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Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools

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TEACHING VALUES, TEACHING STEREOTYPES: SEX EDUCATION AND INDOCTRINATION IN PUBLIC SCHOOLS

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ABSTRACT

Many sex education curricula currently used in public schools indoctrinate students in gender stereotypes. As expressed in the title of one article: "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, *Jennifer L. Greenblatt, 14 Tex. J. on C.L. & C.R. 1 (2008). Other lessons pertain not only to responsibility for sexual activity but to lifelong approaches to family life and individual achievement. One lesson, for example, instructs students that, in marriage, men need sex from their wives and women need financial support from their husbands.*

This Article first describes the ways in which teaching sex stereotypes may affect children, highlighting the need for further empirical research in this area. Second, it critiques the extant feminist legal response to gender-biased sex education curricula, particularly the use of precedent dealing with governmental perpetuation of stereotypes; those precedents cannot be incorporated wholesale into this context. Finally, to correct this analytical gap, this Article connects the sex education issue to the existing scholarly literature on indoctrination of schoolchildren, a literature that has hooks in both equal protection and the First Amendment. The First Amendment principles developed in this literature provide the missing link to explain the constitutional flaw in sex stereotyping at school. The result is an endorsement standard, based on a blending of equal protection and First Amendment doctrine: public school students should not be inculcated in values whose entrenchment by government is contrary to the constitutional commitment to sex equality.

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INTRODUCTION

What did your children learn in school today? If your children take sex education, it may have been this:

> Deep inside every man is a knight in shining armor, ready to rescue a maiden and slay a dragon. When a man feels trusted, he is free to be the strong, protecting man he longs to be.
>
> Imagine a knight traveling through the countryside. He hears a princess in distress and rushes gallantly to slay the dragon. The princess calls out, "I think this noose will work better!" and throws him a rope. As she tells him how to use the noose, the knight obliges her and kills the dragon. Everyone is happy, except the knight, who doesn't feel like a hero. He is depressed and feels unsure of himself. He would have preferred to use his own sword.
>
> The knight goes on another trip. The princess reminds him to take the noose. The knight hears another maiden in distress. He remembers how he used to feel before he met the princess; with a surge of confidence, he slays the dragon with his sword. All the townspeople rejoice, and the knight is a hero. He never returned to the princess. Instead, he lived happily ever after in the village, and eventually married the maiden—but only after making sure she knew nothing about nooses.
>
> Moral of the story: occasional assistance may be all right, but too much will lessen a man's confidence or even turn him away from his princess.[1]

This story is part of a popular sex education curriculum that is federally funded and widely used in public schools.[2] For three decades, the federal government has funded sex education programs that advocate "abstinence-only until marriage," to the exclusion of any instruction on other ways to prevent pregnancy or avoid sexually transmitted diseases (STDs).[3] The class time freed up by that exclusion has, in many schools, been filled with wide-ranging "values" instruction that is riddled with pressure to conform to traditional gender norms.[4]

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1 *Blue Balls for the Red States*, HARPER'S MAG., Feb. 2005, at 22–24.

2 *See Choosing the Best SOUL MATE Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?pageId=922 (last visited Feb. 18, 2011); *see also* CHOOSING THE BEST, www.choosingthebest.com (last visited Feb. 18, 2011) (touting the number of students reached and offering information on obtaining federal grants to underwrite the program).

3 Abstinence programs may discuss such methods only to point out failure rates. *See infra* note 15 (quoting the federal definition of a qualified abstinence-only program). In 2010 the federal government began funding comprehensive programs that include instruction on how to use contraception and avoid STDs, in addition to continuing to fund abstinence-only programs. *See infra* notes 27–31 and accompanying text.

4 *See infra* text accompanying notes 40–69. *See generally* MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., H.R. COMM. ON GOV'T REFORM, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS, 108th Cong. (2004) (prepared for

Sex education classes do not necessarily aim to teach students facts, skills, or analytical methods. Unlike history or literature or math or even shop or home economics, sex education exhorts students about how to live the most intimate parts of their lives. And in many American classrooms, the exhortations are gendered. Boys are taught that they should focus on achievement and that when they marry they should provide their wives with financial support and affection.[5] Girls are taught that they should focus on relationships, assume primary responsibility for controlling boys' lust for premarital sex and, once safely married, fulfill their husbands' needs for admiration and sex.[6] This view is expressed in the title, *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.*[7]

This indoctrination into archaic roles appears to occur primarily in the "abstinence-only" sex education programs that were supported and funded by the Reagan, Bush I, Clinton, and Bush II administrations. In 2009, the Obama administration announced that it would switch the federal preference, so that comprehensive sex education would be funded but abstinence-only programs would not.[8] The new funding for comprehensive programs was included in the health care reform legislation passed in 2010. As the bill passed through Congress, however, abstinence-only funding was reinstated. The final bill allocated $50 million per year for abstinence-only programs and $75 million per year for comprehensive, evidence-based programs known as "personal responsibility education."[9]

Even when it appeared that the federal funding would disappear, a substantial minority of states planned to adhere to abstinence-only

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Rep. Henry A. Waxman), [hereinafter the Waxman Report]; *Why kNOw?? Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=995(last visited Feb. 18, 2011) [hereinafer *Why kNOw??*]; JULIE F. KAY & ASHLEY JACKSON, LEGAL MOMENTUM, SEX, LIES, AND STEREOTYPES: HOW ABSTINENCE-ONLY PROGRAMS HARM WOMEN AND GIRLS (2008), *available at* http://www.legalmomentum.org/assets/pdfs/sexlies_stereotypes2008.pdf.

5 *See infra* text accompanying notes 56–62.

6 *See infra* text accompanying notes 44–55.

7 Jennifer L. Greenblatt, *"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*, 14 TEX. J. C.L. & C.R. 1 (2008).

8 *See* Sarah Kliff, *The Future of Abstinence*, NEWSWEEK (Oct. 27, 2009), http://www.newsweek.com/2009/10/26/the-future-of-abstinence.html.

9 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, § 2954, 124 Stat. 119, 353 (2010) (Restoration of Funding for Abstinence Education, amending 42 U.S.C. § 710); *id.* § 2953 (Personal Responsibility Education, codified at 42 U.S.C. § 713). For the dollar amounts, see 42 U.S.C. §§ 710(d), 713(f) (2006). The funding in each case is authorized for five years.

programs at their own expense.[10] In addition, there is every reason to expect that proponents of abstinence-only programs will strive to incorporate as much of their agenda as possible into the comprehensive curricula. Because abstaining from sex outside marriage is only one piece of the ideology these proponents seek to transmit to students, the sensible strategy for them is to infuse the comprehensive programs with as much of that ideology as possible. Given the seemingly universal acceptance of the "abstinence" banner as at least a large component of all sex education, including comprehensive programs, that should not be difficult.[11]

Feminists who object to rank sexism in public school curricula have begun pondering whether a remedy might lie in the Equal Protection Clause.[12] There are, however, important gaps in the budding feminist analysis of sex education as Sexism 101. The most detailed extant analysis of biased sex education curricula from a legal feminist perspective is an issue brief published by the American Constitution Society (ACS).[13] While well-argued in several respects, the brief is dangerously simplistic in its use of current equal protection doctrine. It uses Supreme Court precedent on gender stereotypes in a way that courts are likely to find (with justification) to be disingenuous and alarming. This Article draws on First Amendment principles and scholarship to provide both theoretical depth and a more precise articulation of the constitutional harm. It proposes that equal protec-

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10 *See* Kliff, *supra* note 8.

11 Opponents of abstinence-only sex education have started describing their preferred alternative as "abstinence plus" rather than "comprehensive" sex education, suggesting that the advocates of abstinence education are winning at least the rhetorical battle. *See, e.g.*, Nicholas D. Kristof, *Bush's Sex Scandal*, N.Y. TIMES, Feb. 16, 2005, at A21. The "personal responsibility education" funded by the health care reform law is required toeducate students about "both abstinence and contraception for the prevention of pregnancy and sexually transmited infections . . . ." 42 U.S.C. § 713(b)(2)(A)(i) (2006).

12 *See, e.g.*, Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1257–61 (2007); Mary Anne Case, *Feminist Fundamentalism and Constitutional Citizenship*, *in* GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 107, 116–17 (Linda C. McClain & Joanna L. Grossman eds., 2009); Michelle Fine & Sara I. McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 EMORY L.J. 993, 1037–38 (2007); Greenblatt, *supra* note 7, at 13–18; Cornelia Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 946–62 (2007); Danielle LeClair, Comment, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overturned*, 21 WIS. WOMEN'S L.J. 291 (2006).

13 Bonnie Scott Jones & Michelle Movahed, *Lesson One: Your Gender Is Your Destiny—The Constitutionality of Teaching Sex Stereotypes in Abstinence-Only Programs*, AM. CONSTITUTION SOC'Y FOR LAW & POLICY (Sept. 2008), http://www.acslaw.org/files/Jones-Movahed Issue Brief.pdf [hereinafter ACS Brief].

tion analysis of biased curricula should be modeled on the endorsement test that is used for identifying violations of the Establishment Clause in the same context: public school instruction.

Part I of this Article discusses the stereotyped content of many sex education curricula and the ways in which promoting those stereotypes in the classroom can harm students. Part II discusses how these harms fit into equal protection doctrine. It concludes that equal protection doctrine as currently constituted does not adequately address the problem of stereotyped sex education because the role of stereotypes in prior sex equality cases is different from their role in an educational environment.

Part III connects the sex education problem to existing scholarship and jurisprudence on the general problem of imposing values on students in public schools. The problem of sex bias in sex education classes provides a good opportunity for courts to grapple with questions about the role of public schools that have been raised in the scholarly literature. At the same time, because the stereotyping in sex education is particularly blatant, it does not present more difficult questions about subtle and unintended bias. First Amendment doctrine indicates that although some degree of value imposition is a necessary consequence of public schooling, a few specific categories of governmental indoctrination of school children are impermissible. Because the entrenchment of traditional sex roles by state action is inconsistent with the Equal Protection Clause, promotion of archaic sex stereotypes should be added to that short list of categories. Courts can borrow from First Amendment principles to restrict the teaching of stereotypes in the same way that they restrict religious indoctrination. Public schools should not be permitted to endorse sex stereotypes and traditional sex roles as normatively desirable.

I. SEX STEREOTYPES IN SEX EDUCATION

Sex education in the United States is a political football with a lot of federal dollars attached. Both sides of the political fight recognize the opportunity to instill in school children the values they consider to be correct on a range of issues implicating sexuality and family life. The explicit effort to manipulate intimate choices, the religious overtones of sexual morality, and the need to address gendered roles and expectations all combine to create a veritable smorgasbord of opportunities to run afoul of the Constitution.

A. *The Content and Funding of Sex Education*

Sex education in the United States is taught in two main forms, known as comprehensive sexuality education and abstinence-only education. Comprehensive sex education typically promotes abstinence for young people, but it also offers students accurate information on contraception and the prevention of STDs.[14] On the other hand, abstinence-only sex education advises students to completely abstain from sex until marriage and excludes any discussion of contraception or prevention of STDs, except to discuss failure rates.[15]

Those who support abstinence-only sex education claim that it fosters a sense of morality among adolescents, works to keep sex within marriage, and helps teens avoid the emotional and physical problems that could come with sex before marriage. They believe that comprehensive courses actually encourage teens to engage in premarital sex and that comprehensive programs are a direct cause of increased levels of STDs and teen pregnancy.[16]

Those who support comprehensive sex education argue that it provides teens with the information they need to make their own de-

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14 According to Sexuality Information and Education Council of the U.S. (SIECUS), a comprehensive program should be structured around four main goals: "to provide accurate information about human sexuality; to provide an opportunity for young people to develop and understand their values, attitudes, and insights about sexuality; to help young people develop relationships and interpersonal skills; and to help young people exercise responsibility regarding sexual relationships, which includes addressing abstinence, pressures to become prematurely involved in sexual intercourse, and the use of contraception and other sexual health measures." *Sexuality Education Q & A*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=521&grandparentID=477&parentID=514 (last visited Feb. 18, 2011).

15 42 U.S.C. § 710(b)(2) (2006) (defining abstinence education according to eight points: a qualified abstinence-only program "(A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity; (B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children; (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; (D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity; (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; (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity").

16 *See, e.g.*, Robert E. Rector, Melissa Pardue & Shannon Martin, *What Do Parents Want Taught in Sex Education Programs?*, THE HERITAGE FOUND. (Jan. 28, 2004), http://www.heritage.org/Research/Reports/2004/01/What-Do-Parents-Want-Taught-in-Sex-Education-Programs (arguing in favor of abstinence education); *see also* Kliff, *supra* note 8 (quoting advocates of abstinence).

cisions about sexual activity while often encouraging them to refrain from sex until they are more mature. Supporters also argue that most existing abstinence-only programs are in fact detrimental to students: they contain factual inaccuracies and misleading information, thereby contributing to public health problems; they unconstitutionally promote religion in public schools; and they inculcate teens with gender stereotypes and negative attitudes about sex.[17]

1. *Funding Streams*

Since 1996, three federal programs have supported and funded abstinence-only sex education programs: the Adolescent Family Life Act;[18] Title V block grants;[19] and direct grants for Community-Based Abstinence Education (CBAE).[20] The Adolescent Family Life Act was enacted in 1981, earmarking a portion of the Health and Human Services budget for abstinence-only education.[21] Title V block grants were put in place by the Clinton administration in 1996, with funding appropriated to abstinence-only programs as part of welfare reform.[22] These block grants were the main source of funding for abstinence-only programs. Additional money was made available in 2000, when CBAE grants were authorized as "Special Projects of Regional and National Significance."[23]

Abstinence-only programs are especially popular in the south, with over half of all funding ($82,267,900) allocated to sixteen southern states in 2008.[24] Twenty-two mostly northern states refused to par-

17 *See generally* COMMUNITY ACTION KIT, http://www.communityactionkit.org (last visited Feb. 18, 2011) (arguing in favor of comprehensive sex education).

18 42 U.S.C. §§ 300z–10 (2006).

19 42 U.S.C. § 710 (2006).

20 42 U.S.C. § 1310 (2006).

21 Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, § 931, 95 Stat. 367, 570 (1981) (amending the Public Health Services Act, 42 U.S.C. 300 et seq.).

22 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, § 912, 110 Stat. 2105, 2354 (1996) (amending Title V of the Social Security Act, 42 U.S.C. § 710).

23 *Fact Sheet: Community-Based Abstinence Education Program*, U.S. DEP'T HEALTH & HUMAN SERVS., ftp://ftp.hrsa.gov/mchb/abstinence/cbofs.pdf; *see also A Brief History of Federal Abstinence-Only-Until-Marriage Funding*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=1263 (last visited).

24 *Sexuality Education and Abstinence-Only-Until-Marriage Programs in the States: An Overview, Fiscal Year 2008*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.siecus.org/_data/global/images/State%20Profiles%20FY%2008/Opening%20Docs%20FY%2008/5%20Overview.pdf (last visited Feb. 18, 2011) [hereinafter *Programs in the States 2008*] (summarizing states' acceptance of and attitudes toward Title V funding). SIECUS also publishes individual state profiles showing acceptance of federal funding and other details about sexuality education in each state. *A Portrait of Sexuality Educa-*

ticipate in the Title V abstinence-only programs that year,[25] and seven states refused to accept any sort of federal support for abstinence-only education.[26] The rejection of federal funds by nearly half the states sent a striking message during a time of severe economic downturn, as many states could have used the money. They were unwilling, however, to take these funds in exchange for teaching abstinence-only curricula.

In 2009, the Obama administration announced that it was eliminating federal funding for abstinence-only programs from the 2010 budget; instead, the administration would favor evidence-based sex education programs.[27] This new funding for comprehensive sex education was surely welcomed by the states that had previously turned down federal money rather than teach abstinence-only sex education. By contrast, the states that supported abstinence-only sex education scrambled to secure private funding to keep those programs afloat.[28] Thus, in this area, it appears that the federal spending power is not sufficient to sway many states' substantive policy decisions in either direction.

The scramble to save abstinence programs abated with the passage of the Patient Protection and Affordable Care Act of 2010.[29] The Act appropriated $75 million per year for five years to support a form of comprehensive sex education referred to in the Act as "personal responsibility education."[30] In addition, however, the Act extended $50 million per year of abstinence-only funding under the Social Security Act for the same period.[31] States can therefore now obtain federal funding for either type of program.

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tion and Abstinence-Only-Until-Marriage Programs in the States, Fiscal Year 2009, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=487 (last visited Feb. 18, 2011).

25 They are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Idaho, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Ohio, Rhode Island, Vermont, Virginia, Wisconsin, and Wyoming. *Programs in the States 2008*, *supra* note 24, at 2.

26 They are Delaware, Idaho, Minnesota, Montana, Rhode Island, Vermont, and Wyoming. *Id.* at 1.

27 Sharon Jayson, *Obama Budget Shifts Money from Abstinence-Only Sex Education*, USA TODAY, May 12, 2009, at 10B, *available at* http://www.usatoday.com/news/health/2009-05-11-abstinence-only_N.htm.

28 Kliff, *supra* note 8 (describing efforts to find alternative funding).

29 Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered sections of 42 U.S.C.).

30 § 2953, 124 Stat. at 347 (amending 42 U.S.C. § 713).

31 § 2954, 124 Stat. at 352 (amending 42 U.S.C. § 710(d)). The amendment reinstating funding for abstinence programs was added by Senator Orrin Hatch (R-Utah) during a committee debate on the bill. Rob Stein, *Health Bill Restores $250 Million in Abstinence-Education Funds*, ST. PAUL PIONEER PRESS, Mar. 27, 2010, at A9.

The Obama administration's unsuccessful attempt to reverse the federal funding policy came in response to increasingly widespread and documented complaints about abstinence-only programs for factual inaccuracy, religious content, and gender stereotypes, as well as several studies finding that they failed to accomplish their goal of influencing students to delay sex until marriage. The most important early critique was a report released by Representative Henry Waxman in 2004, criticizing eleven of the thirteen most popular federally funded programs.[32] The nonprofit group Legal Momentum (formerly NOW Legal Defense Fund) issued a report along similar lines in 2008,[33] and the Sexuality Information and Education Center of the United States (SIECUS) has an ongoing project of reviewing sex education curricula with special attention to these and other flaws.[34] Although these critiques have focused on abstinence-only programs, all of these features would, of course, raise concerns regardless of the type of program in which they appeared.

Most of the factual inaccuracies reported to appear in sex education programs pertain to overstating the dangers of sexual activity and understating the effectiveness and safety of contraception and methods for avoiding and treating STDs.[35] Programs with these sorts of inaccuracies appear to have consciously selected fear and shame, rather than accuracy, as their pedagogical strategy.[36] "Sexual Health Today," for example, claims that touching another person's genitals "can result in pregnancy."[37] Another program purports to inform students of the symptoms of common STDs. The symptoms listed, however, are those of advanced disease, which make STDs frightening, rather than the early symptoms that would enable a person to de-

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32 *See generally* Waxman Report, *supra* note 4.

33 *See generally* KAY, *supra* note 4.

34 *See generally Curricula and Speaker Reviews*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?pageId=922 (last visited Feb. 18, 2011).

35 *See* Waxman Report, *supra* note 4, at 9–10, 12 (summarizing inaccuracies in several programs). *See generally Curricula and Speaker Reviews*, *supra* note 34 (documenting this kind of inaccuracy in many of the programs). Many programs are also palpably hostile to abortion rights. For example, the "Sex Respect" program advocates against abortion and claims that it inclines women to suicide. *See Sex Respect Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=990 (last visited Feb. 18, 2011) (discussing the curriculum's anti-abortion advocacy); *Questions from Students*, SEX RESPECT, http://www.sexrespect.com/StudentQ.html (last visited Feb. 18, 2011) (stating that abortion is "a source of depression, even suicide").

36 *See Curricula and Speaker Reviews*, *supra* note 34 (describing most of the reviewed programs as "fear-based").

37 Waxman Report, *supra* note 4, at 12.

tect and treat an illness.[38] Many programs discuss the failure rate of condoms without disclosing that failure is often a function of user error.[39] One curriculum teaches students that mutual masturbation, French kissing, and receiving a blood transfusion in the United States would all put them "at risk" for contracting HIV and AIDS.[40]

Lessons that associate sex with contamination may do so in gender-specific ways. For example, one lesson instructs the teacher to call a boy to the front of the classroom and hold up a strip of clear packing tape and tells him that it represents his girlfriend. The teacher sticks the tape to the boy's forearm. Unfortunately, the couple breaks up. The teacher tears the girlfriend off the boy's arm and passes her to another boy to repeat the process. As she is passed from one boy to the next, the teacher shows how she is becoming covered with hair, body oil, and other debris. At the end of the exercise, the teacher is told to point out to the class that the girlfriend is not only dirty; she has lost the ability to "stick" to her man.[41]

In another story, a girl tries on her mother's wedding dress and models it for her boyfriend:

> At first, Marcus was overwhelmed at how beautiful Kelly looked. He treated her special, like a person of real honor. Kelly, on the other hand, stopped caring for the dress. She no longer placed it in its protective covering and valued it like a cherished possession. Because of Kelly's new attitude, the dress lost its beauty and charm. The dress began to look different to Marcus. It had lost its appeal and attractiveness. He saw Kelly in it all the time. She wore it rollerblading, biking, bowling and in clubs. The wedding dress had changed its appearance. It was dirty, ripped in some places and simply looked used. The dress now looked like any other dress. After several weeks, Kelly and Marcus broke up.[42]

And for those middle schoolers with good enough instruction in English literature to recognize a flower as a symbol of female sexuality, the teacher is instructed to "hold up a beautiful rose":

> Talk about the petals and how they add color and fragrance to the rose. Hand the rose to a student, telling that student to pull off a petal and pass it on to another student who also pulls off a petal. Continue passing

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38 *See Why kNOw?, supra* note 4.

39 *See HIS (Healthy Image of Sex) Review,* SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=1007 (last visited Feb. 18, 2011) (noting this flaw in several programs).

40 *WAIT Training Review,* SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=992 (last visited Feb. 18, 2011).

41 *Id.*

42 *Reasonable Reasons to Wait Review,* SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=1005 (last visited Feb. 18, 2011).

> the rose around until there are no more petals. At the end, hold up the rose. Ask: *How much value does the rose have now?* Share that the rose represents someone who participates in casual sex. Each time a sexually active person gives that most personal part of himself or herself away, that person can lose a sense of personal value and worth. It all comes down to self-respect.[43]

Associations between sexuality and contamination or poor character may also be racially specific. According to the Legal Momentum Report, one curriculum is available in a "Midwest school version" and an "urban school version." In the urban version, more than half the students portrayed are African American, a quarter are Hispanic, and a quarter white. The young African American women are depicted as sexually aggressive drug users, and young African American men as bound for jail. In the midwestern materials, the students are overwhelmingly white and are depicted as "working to maintain their traditional values."[44]

In many sex education curricula, young women are taught to be sexual gatekeepers and are told that young men their age are unable to control their sexual urges:

- Since females generally become aroused less quickly and less easily, they are better able to make a thoughtful choice of a partner they want to marry. They can also help young men learn to balance in a relationship by keeping physical intimacy from moving forward too quickly.[45]
- [G]uys think so much more about sex because of testosterone.[46]
- Females need to be careful with what they wear, because males are looking! The girl might be thinking fashion, while the boy is thinking sex. For this reason girls have an added responsibility to wear modest clothing that doesn't invite lustful thoughts.[47]
- Because girls are usually more talkative, make eye contact more often than men, and love to dress in eye-catching ways, they may appear to be coming on to a guy when in reality they are just being friendly. To the male, however, he perceives that the girl wants him sexually. Ask-

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43 *Choosing the Best PATH and LIFE Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=Page.ViewPage&PageID=1175&stopRedirect=1&printview=true (last visited Feb. 18, 2011).

44 KAY, *supra* note 4, at 21.

45 *Id.* at 39 (quoting Lorraine Kenny & Julie Sternberg, *Abstinence-Only Education in the Courts*, 31 SIECUS Report 6, at 26, *available at* http://www.aclu.org/FilesPDFs/siecus%20article.pdf).

46 *Id.* at 20 (quoting Bruce Cook, *Choosing the Best Life: Leader Guide* 7 (2003)).

47 *Id.* (quoting Letter from Steven Brown, Exec. Dir., R.I. ACLU, to Peter McWalters, Comm'r, R.I. Dep't of Educ. (Sept. 21, 2005), *available at* http://www.riaclu.org/documents/sex_ed_letter.pdf.

ing herself what signals she is sending could save both sexes a lot of heartache.[48]

- How can girls help boys become virtuous?[49]

Girls in the sixth grade are told that their changing bodies have a huge effect on boys their age, sending signals the girls do not even know they are sending. These signals can cause unspecified "big problems."[50] Whatever these "big problems" might be, it is clear that male responsibility is not part of the equation.

The same attitude appears in the few discussions of sexual assault and date rape that appear in these materials. A unit on preventing date rape, also for sixth graders, discusses the topic only in terms of the victim's behavior and asks, "How do some people say NO with their words, but YES with their actions or clothing?"[51] More crudely, the following passage is part of a lesson designed to be presented only to boys, while girls are separately instructed about behaving modestly: "Generally female dogs allow the male to mount them/get on top of them, do their business, and leave. Some girls appear to act as if they want this."[52]

These lessons not only place responsibility for controlling male sexual behavior on young women but also assume that young women do not have sexual urges of their own. Women are said to require "hours of emotional and mental preparation" for sex.[53] When girls do want sex, it is either dangerous:

> Tina began to pressure Steve for sex. He had been abstinent and was planning to save sex for marriage. One night when they were alone, she told him that if he truly loved her he would prove his love to her by having sex with her. He refused and left the house. Their relationship ended shortly afterward. Two months later Steve learned that Tina was already pregnant on that night when she was trying to get him to have sex with her. Tina became a single mother at age 18.[54]

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48 *Id.* (quoting Kris Frainie, *Why kNOw? Abstinence Education Programs: Curriculum for Sixth Grade Through High School: Teacher's Manual* 122 (2002)).

49 *HIS (Healthy Image of Sex) Review*, *supra* note 39.

50 *Why kNOw?*, *supra* note 4.

51 *Choosing the Best WAY Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=Page.ViewPage&PageID=1180&stopRedirect=1 (last visited Feb. 18, 2011).

52 *HIS (Healthy Image of Sex) Review*, *supra* note 39.

53 *WAIT Training Review*, *supra* note 40.

54 *Game Plan Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=982&printview=true (last visited Feb. 18, 2011); *see also Aspire Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=974&printview=true (last visited Feb. 18, 2011) (utilizing the same story with different names).

or a character flaw, produced by corrupt society:

- [A] young man's *natural desire* for sex is already strong due to testosterone, the powerful male growth hormone. Females are *becoming culturally conditioned* to fantasize about sex as well.[55]
- [I]f Kendra respected herself, would she have *given herself* to Antonio without his commitment to her?[56]

Sex education curricula often reach well beyond the topics of sexual activity and reproductive biology to address lifelong gender roles.[57] Many sex education programs prescribe proper roles for females and males in dating relationships and in marriage:

> The father gives the bride to the groom because he is the one man who has had the responsibility of protecting her throughout her life. He is now giving his daughter to the only other man who will take over this protective role.[58]

Several programs teach about the "five major needs" of women and men in marriage. See if you can guess which are which:

Five Major Needs of Women and Men in Marriage[59]	
Affection	Sexual Fulfillment
Conversation	Recreational Companionship
Honesty and Openness	Physical Attractiveness
Financial Support	Admiration
Family Commitment	Domestic Support

Complementing these differentiated roles in heterosexual relationships are the suggestions for girls' and boys' aspirations for their adult lives:

- Women gauge their happiness and judge their success by their relationships. Men's happiness and success hinge on their accomplishments.[60]
- Generally, guys are able to focus better on one activity at a time and may not connect feelings with actions. Girls access both sides of the

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55 *Sex Respect Review*, *supra* note 35 (emphases added).

56 *Choosing the Best PATH and LIFE Review*, *supra* note 43 (emphasis added).

57 *See* Waxman Report, *supra* note 4, at 16 ("Many abstinence-only curricula begin with a detailed discussion of differences between boys and girls. Some of the differences presented are simply biological. Several of the curricula, however, present stereotypes as scientific fact.").

58 *Id.* at 17.

59 Answer can be found at *WAIT Training Review*, *supra* note 40.

60 Waxman Report, *supra* note 4, at 16.

brain at once, so they often experience feelings and emotions as part of every situation.[61]

- Our guy will do well in "success situations" that give him a chance to plan and achieve his goal; while our girl will excel in situations that allow her to influence and interact with people.[62]

Questions that couples are advised to discuss before getting married include, "Will the wife work after marriage or will the husband be the sole breadwinner?"[63]

A final, pervasive stereotype in many sex education classes is the complete privileging of heterosexual vaginal intercourse as virtually synonymous with "sex" as an activity.[64] This emphasis may seem perverse in light of the purported state interest in avoiding teen pregnancy. Nonetheless, same-sex and any other sexual activity besides penile-vaginal intercourse is, in many curricula, consistently treated as deviant.[65] One curriculum provides a chart showing a spectrum of sexual behavior ranging from hand-holding to sexual intercourse. Everything between French kissing and sexual intercourse is denoted merely as "Other Stuff."[66] Many curricula overwhelmingly emphasize marriage as the only acceptable context for sex without even acknowledging that gay and lesbian students are legally barred from marrying in most states.[67] Same-sex relationships are ignored or, if mentioned, plainly disapproved.[68]

Finally, as an instructional method, some abstinence-only programs require or encourage their students to take virginity pledges, in which they personally promise abstinence until marriage.[69] More

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61 *Id.* at 17.

62 *Choosing the Best SOUL MATE Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=Page.ViewPage&PageID=1184&stopRedirect=1&printview=true (last visited Feb. 18, 2011).

63 *Reasonable Reasons to Wait Review*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., http://www.communityactionkit.org/index.cfm?fuseaction=page.viewpage&pageid=1005&printview=true (last visited Feb. 18, 2011).

64 *See Curricula and Speaker Reviews*, *supra* note 34.

65 *See id.*

66 *See Choosing the Best PATH and LIFE Review*, *supra* note 43.

67 *See, e.g.*, *Choosing the Best SOUL MATE Review*, *supra* note 62; *see also* 42 U.S.C. § 710(b)(2) (2006) (defining the requirements of abstinence-only programs for purposes of federal funding, with a strong emphasis on marriage).

68 *See Choosing the Best SOUL MATE Review*, *supra* note 62 (criticizing the program for ignoring the existence of same-sex relationships); *Sex Respect Review*, *supra* note 35(describing the curriculum's bias against homosexuality); *Why kNOw?*, *supra* note 4 (discussing the refusal of the curriculum to acknowledge same-sex relationships).

69 Research has found that virginity pledges can be effective in delaying intercourse (although not until marriage), but only when a self-selected subgroup of students takes the pledge; if the entire class pledges, the delay effect disappears. In addition, teens who took part in a virginity pledge were found to be one-third less likely to use contraception

generally, a curriculum might require students to prepare "personal behavior contracts" in which they commit to conform their personal lives more closely to the government-sponsored value system in which they have been instructed.[70]

B. Effects of Teaching Stereotypes

The type of programming described above may be affecting teens in ways that are yet to be explored. Most research on the effects of sex education instruction has focused on whether sex education programs accomplish their stated goals of reducing sex, pregnancy, and STDs. Other psychological effects of these programs have yet to be studied. Specifically, these lesson plans may be leading to negative gender stereotypes and negative attitudes toward sex via psychological phenomena known as priming and stereotype threat.

According to the literature on priming, memory consists of a large network of associations.[71] Through everyday experiences, people form associations that later facilitate recall. For example, we often pair items that are commonly presented together such as "cat" and "dog" or "bread" and "butter." If one of these items is presented, it is likely that we will recall the other item. Thus, the first item "primes" the association between the two items. For an everyday example, the game show *Password* relies on the principles of priming.[72]

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when they engaged in sexual activity. *Why kNOw?*, *supra* note 4 (citing Peter Bearman & Hannah Brückner, *Promising the Future: Virginity Pledges and First Intercourse*, 106 AMER. J. SOC. 859, 898–900 (2001)). Perhaps because they are less likely to use condoms, pledgers experience the same rates of STD infection as non-pledgers, even though they delay sex and have fewer partners. *See generally* Hannah Brückner & Peter Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. ADOLESCENT HEALTH 271 (2005).

70 State of Tennessee, Tennessee Health Education Standards 6-8, 4, http://tennessee.gov/education/ci/health_pe/doc/health_6_8.pdf. (last visited February 18, 2011).

71 For discussions of the phenomenon of priming, see E. Tory Higgins, William S. Rholes & Carl R. Jones, *Category Accessibility and Impression Formation*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 141 (1977); John A. Bargh, Mark Chen & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230 (1996); Rob W. Holland, Merel Hendriks & Henk Aarts, *Smells Like Clean Spirit*, 16 PSYCHOL. SCI. 689 (2005).

72 Current research indicates that priming can affect our behaviors, even if we are not consciously aware it is occurring. In one study, researchers told participants that they would be taking part in two unrelated studies. The first study was a priming task in which the participants memorized a list of positive, or a list of negative, words. In the second study, the participants were asked to read a paragraph about a man named Donald, and they were to give their impressions of the man. All participants read the same paragraph describing Donald's attributes in ambiguous terms. Participants' perceptions of Donald were positive or negative depending on which list of words they had memorized. *See* Higgins et al., *supra* note 71.

Sex education curricula like those described above may be priming teens with gender stereotypes and negative attitudes toward sex. By pairing sexual activity with motherhood (and the responsibilities thereof) and paternal financial obligation, this type of education teaches teens to associate sex with traditional gender roles. Additionally, by teaching associations between sex and fear, sex education could be priming teens with negative attitudes toward sex in the future. This in turn could hinder their future relationships and normal sexual functioning as adults, and the length of these effects is unknown.

Children are socialized at a very early age to behave in ways that are considered to be gender appropriate. As a consequence, gender role stereotypes become strong and are easily activated when a person is forming judgments of others.[73] Perceptions of behaviors, traits, and roles of women and men are often influenced by societal expectations for what is considered to be gender appropriate.[74] Through this socialization process, expectations about what constitutes gender-appropriate behaviors become very strong, and those who violate gender-role expectations tend to be disliked.[75]

Since the mid- to late nineteenth century, gender-role norms with regard to sexuality have upheld a double standard in which women

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In another study, participants were asked to form sentences with sets of words provided by the researcher. Half of the participants were primed with words that are stereotypically associated with the elderly (gray, wrinkled, retired, Florida, bingo, etc.), while the remaining participants were exposed to neutral words. After the participants created their sentences, they were dismissed; however, the study was not over. At this point, a second experimenter recorded the time it took the participants to walk from the research room to an elevator. Participants who were primed with stereotypes of the elderly walked to the elevator much more slowly than those who were not primed with the age-related words. *See* Bargh et al., *supra* note 71, at 236–38.

More recently, researchers exposed participants to the scent of an all-purpose cleaner and found that those who were exposed to the cleaner were quicker to identify cleaning-related words, recalled more cleaning-related activities when describing daily activities, and were more likely to keep a desk clean when eating a crumbling cookie. *See* Holland et al., *supra* note 71.

73 *See* Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, 7 PSYCHOL. OF PREJUDICE 55, 55 (1994).

74 *See generally* Kay Deaux & Mary E. Kite, *Thinking About Gender*, *in* ANALYZING GENDER: A HANDBOOK OF SOCIAL SCIENCE RESEARCH 92 (B.B. Hess & M.M. Paludi eds., 1985).

75 *See* Norma Costrich et al., *When Stereotypes Hurt: Three Studies of Penalties for Sex-Role Reversals*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 520, 522–23, 528–29 (1975) (finding that men perceived as passive and dependent and women who acted aggressively and assertively received lower popularity ratings); D.W. Rajecki, Rebecca De Graaf-Kaser & Jeffrey Lee Rasmussen, *New Impressions and More Discrimination: Effects of Individuation on Gender-Label Stereotypes*, 27 SEX ROLES 171, 184 (1992) (reporting that masculine men were likely to be favored over non-feminine women and feminine women were likely to be favored over non-masculine men).

are expected to be chaste and men are given more allowances when it comes to their sexual behavior.[76] This double standard is reflected in the Madonna-Whore dichotomy, in which women are most often categorized as either good and sexually chaste or bad and sexually promiscuous. This dichotomy may lead young women and girls to fear being perceived as sexually promiscuous,[77] as this could be detrimental for their reputations. Instead, these young women might decide to perpetuate gender-role stereotypes and adhere to traditional gender roles in order to maintain their reputations. Additionally, research has found that these double standards influence how men perceive women as potential lifetime mates. Specifically, although promiscuous women are preferred for short-term dating partners, men are less likely to perceive these women as potential lifetime mates or marriage partners.[78] Sex education curricula that link sex with fear and contamination, emphasize female responsibility for sexual gatekeeping, and advocate traditional gender roles in families could play a substantial role in reinforcing stereotypical associations.

Consistent with the literature on priming, teaching sex education in a fear-based manner could also lead to the development of negative attitudes toward sex. Such attitudes are promoted by curricula that are based on the notion that sexual intercourse outside of marriage is dangerous.[79] Premarital sex is often compared to harmful, immoral, and unlawful behavior. It is associated with "poverty, heartache, disease, and even DEATH."[80]

An additional concern with respect to school-based reinforcement of gender stereotypes is the phenomenon of stereotype threat, which is closely related to priming. Stereotype threat occurs when "one faces judgment based on societal stereotypes about one's group."[81] Awareness of the stereotype and the possibility of judgment based on

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76 *See* FLORENCE L. DENMARK ET AL., ENGENDERING PSYCHOLOGY: WOMEN AND GENDER REVISITED 245 (2d ed. 2005).

77 *See* DEBORAH L. TOLMAN, DILEMMAS OF DESIRE: TEENAGE GIRLS TALK ABOUT SEXUALITY 91 (2002).

78 *See* Rebecca E. Fromme & Catherine Emihovich, *Boys Will Be Boys: Young Males' Perceptions of Women, Sexuality, and Prevention*, 30 EDUC. & URB. SOC'Y 172, 174 (1998) ("[W]omen are divided into two categories: good ones who are chaste, marriageable, and socially acceptable partners and bad ones who are sexual and unacceptable for marriage."); Mary Beth Oliver & Constantine Sedikides, *Effects of Sexual Permissiveness on Desirability of Partner as a Function of Low and High Commitment to Relationship*, 55 SOC. PSYCHOL. Q. 321, 326 (1992).

79 *See Why kNOw?*, *supra* note 4.

80 *Id.*

81 Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 5 (1999).

the stereotype can actually *cause* a person to perform consistently with the stereotype. For example, a common stereotype in the U.S. is that women perform poorly in math.[82] Women who are reminded of this stereotype just before taking a math test will generally perform substantially worse than if they had not been "primed" with the stereotype.[83] Men primed with the same stereotype may perform better than they otherwise would have.[84] The same phenomenon has been observed to affect African-Americans taking standardized tests; white men taking math tests when primed with stereotypes about Asian math ability; men performing child care; and white men playing sports.[85] The fact that everyone reading this Article can easily guess the effects of stereotype threat in each context demonstrates the pervasiveness of our cultural stereotypes as frames for understanding and even influencing individual performance.

What happens, then, if sex education is right before math, and the sex education teacher promotes stereotypes about female and male aptitudes for analytical reasoning? The research on stereotype threat suggests that priming students with sex stereotypes about their intellectual abilities could have a measurable effect on their grades.

The literature on priming and stereotype threat suggests that it is highly possible that sex education programs like those described in Part I.A perpetuate gender role stereotypes and instill negative attitudes toward sex. Although this hypothesis is supported with previous research, further empirical research is needed. Most studies of sex education programs focus on whether the programs "work" in the short term—meaning, do they successfully influence teens to delay sexual activity and/or practice safer sex? Additional psychological re-

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82 *See id.* at 6 (citing studies documenting the existence of this stereotype).

83 *Id.* at 10–14; *see also* Toni Schmader, *Gender Identification Moderates Stereotype Threat Effects on Women's Math Performance*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 194 (2002) (finding that the degree of women's gender identification affects their susceptibility to stereotype threat).

84 Spencer et al., *supra* note 81, at 13.

85 *See* Irwin Katz et al., *Effects of Task Difficulty, Race of Administrator, and Instructions on Digit-Symbol Performance of Negroes*, 2 J. PERSONALITY & SOC. PSYCHOL. 53 (1965) (finding effects of the race of the test administrator on performance); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Task Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995) (discussing stereotype threat and the performance of African Americans on intellectual tests); Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCHOL. SCI. 1132 (2009) (discussing stereotype threat and the performance of white men on math tests); Lawrence J. Stricker & Isaac I. Bejar, *Test Difficulty and Stereotype Threat on the GRE General Test*, (Educ. Testing Serv. Research Report 99-19, GRE Board Research Report No. 96-06R, 1999) (discussing stereotype threat and the performance of minority groups on standardized tests).

search could illuminate what effects curricular choices may have on an individual's belief in gender-role stereotypes and the individual's attitudes toward sex in general. Previous research on priming and stereotypes suggests that those who undergo curricula slanted towards sex biases would hold stronger beliefs in gender-role stereotypes and more negative attitudes toward sex, as compared to those who receive accurate, non-stereotyped sex education.

C. Legal Challenges to Biased Sex Education

Additional research would be useful from an educational perspective; it would also help to inform legal analysis of limits on stereotyped instruction in public schools. For example, Part II.A, below, argues that classroom stereotyping in sex education constitutes a sex classification of the students for purposes of equal protection analysis. This argument stands on its own terms, but it deals with an unusual set of circumstances, since equal protection doctrine typically deals with more overt distribution of rights and benefits. Empirical confirmation that express differentiation in instruction also has a differentiated impact would demonstrate that the argument has more than formal significance.

However, the legal status of biased sex education programming does not, for the most part, depend on empirical psychological evidence. Under the Establishment Clause, the government may not promote a particular religious belief, and it is no defense to argue that its promotional efforts were unsuccessful. As we argue below, the same principle should apply to the promotion of sex stereotypes.[86]

Lawyers and scholars have argued that the kinds of biases and misinformation described above violate the Constitution in several ways. Many of the same curricula that promote gender stereotypes may also unconstitutionally promote particular religious beliefs. For example, the *Sex Respect* abstinence-only program received federal funds despite its religious foundation. This program instructs students to abstain from sex until marriage and advises them to consult with their pastors and to pray for guidance as they work through this trying time.[87] The *Why kNOw?* program also uses religious language and biblical verses and stories in its abstinence-only curriculum.[88] *Why kNOw?* also refers students to outside religious organizations which they may join and in which they may take a virginity pledge. Within the virgini-

86 *See infra* Part III.B.

87 *See Sex Respect Review*, *supra* note 35.

88 *See Why kNOw?*, *supra* note 4.

ty pledge, students are asked to commit to God, to themselves, to their family and friends, to their future mate, and to their future children that they will retain their virginity until the day in which they enter a "biblical marriage."[89] Unsurprisingly, the Establishment Clause has been a frequent basis for legal challenges to programs receiving federal funds earmarked for abstinence-only education.[90]

In addition to Establishment Clause problems, some programs may be so dangerously inaccurate and misleading from a scientific perspective that they violate substantive due process, or they may violate substantive due process merely by seeking to intervene so deeply in students' intimate choices.[91] A few lawsuits have challenged abstinence-only programs under state laws requiring sex education to be accurate and/or neutral.[92]

The First Amendment and due process problems with biased curricula are overlapping and intertwined with issues of gender stereotyping. The commitment to rigid gender roles, for example, is likely due in large part to the religious beliefs that motivate many of the curricula. The due process and religious aspects of the problem, however, have already been examined.[93] The equal protection issue has received only passing commentary in legal scholarship.[94] Therefore, this Article carves out the issue of sex stereotypes and equal pro-

89 *See Why kNOw?, supra* note 4.

90 *See* KAY, *supra* note 4, at 38–39.

91 *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (holding that informed consent requirements for abortion were consistent with the right to privacy, even when the government openly intends to influence the choice between abortion and childbirth, but suggesting that this holding was contingent on the accuracy of the information presented). *See generally* Sarah Smith Kuehnel, Note, *Abstinence-Only Education Fails African American Youth*, 86 WASH. U. L. REV. 1241 (2009); Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 WOMEN'S RTS. L. REP. 27 (2002).

92 *See* KAY, *supra* note 4, at 38–39.

93 *See generally* 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 (2002) (arguing that section 510 of Title 5 of the Social Security Act violates the Establishment Clause); Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495 (2008) (arguing that abstinence-only education is unconstitutional because of the inherently religious nature of the message); 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 (2000) (considering the implications of the First Amendment's Religion Clauses on both comprehensive and abstinence-only sex education).

94 *See* sources cited *supra* note 12.

tection, treating that issue without regard to the religious overtones of the gender roles being promoted.[95]

Sex bias in school curricula has been on feminist radar screens for many years.[96] As a form of sex discrimination in education, it arguably should have been addressed by Title IX of the Civil Rights Act.[97] However, when the Department of Health, Education, and Welfare promulgated regulations to implement Title IX in 1975, it created a loophole. Over the objections of feminist organizations, the Department declared that "[T]itle IX does not reach the use of textbooks and curricular materials on the basis of their portrayals of individuals in a stereotypic manner or on the basis that they otherwise project discrimination against persons on account of their sex."[98] The kind of curricular material described in Part I.A is thus exempt from the legal regime that is supposed to prevent sex discrimination in the schools.

The explicit sex stereotyping in sex education classes first received widespread attention as a result of the Waxman Report.[99] The report highlighted gender bias as a pervasive feature of many abstinence-only programs. As noted above, similar reports have been issued by Legal Momentum and SIECUS.[100] In 2007, Cornelia Pillard brought this issue to the attention of the legal academy in a symposium at

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95 In addition, the scope of this Article is limited to school districts' curricular choices at the policy level. Not addressed are students' rights to engage in dissenting speech (see *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), and *Morse v. Frederick*, 51 U.S. 393 (2007)). For a discussion on teachers' intellectual and free speech rights, see generally Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647–53 (1980) (reviewing the issue of values inculcation in public schools primarily through the lens of identifying the appropriate degree of academic freedom to accord to teachers), and on censorship in school libraries, see generally *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

96 *See* Beverly J. Hodgson, *Sex, Texts, and the First Amendment*, 5 J.L. & EDUC. 173, 175–79 (1976) (surveying the literature on gender bias in curricular materials); Carol Amyx, Comment, *Sex Discrimination: The Textbook Case*, 62 CALIF. L. REV. 1312, 1312–14 (1974) (documenting the extent of sex-role stereotyping in public school textbooks); Tanya Neiman, Note, *Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles*, 24 HASTINGS L.J. 1191, 1207 (1973) (discussing the manner through which sex roles are imposed during the educational process).

97 20 U.S.C. § 1681 (2006).

98 40 Fed. Reg. 24,135 (June 4, 1975). The Department claimed that this exception to Title IX was motivated by unspecified First Amendment concerns. *Cf.* Monteiro v. Tempe Union High Sch. Dist., 138 F.3d 1022, 1029 (9th Cir. 1998) (stating that students have a First Amendment right of access to materials that have been deemed educationally valuable by school authorities). *But see* Hodgson, *supra* note 96 (refuting the First Amendment justification for the regulation).

99 Waxman Report, *supra* note 4.

100 KAY, *supra* note 4; *Curricula and Speaker Reviews*, *supra* note 34.

Emory Law School.[101] In addition to pointing to the possibility of a legal challenge to stereotyped programs, Pillard described the aims and strategies that ought to shape an egalitarian sex education curriculum.[102] Susan Appleton has also recently described a vision of a feminist approach to sex education.[103] These visions represent what a school system would do if it took seriously its own independent constitutional obligation to provide the equal protection of the laws.

It seems unlikely that many schools are currently teaching sex education in the way either Pillard or Appleton describes, or that a court would require them to do so. Courts can, however, set outer limits on permissible instruction that implicates constitutional values. Pillard also suggested what this Article argues is the correct direction for developing doctrine in this area: an analogy to the Establishment Clause, which forbids public schools to promote particular normative positions about religion.[104]

Pillard's article prompted a few efforts to elaborate the doctrinal basis for challenging sex stereotypes in sex education, most prominently in an issue brief published by the American Constitution Society (ACS).[105] These efforts overlooked Pillard's suggestion of a connection to Establishment Clause cases, relying on a pure Fourteenth Amendment approach.[106] Their arguments thus lack the benefits of the insights developed from First Amendment case law and scholarly examination of the imposition of values on students in public schools. Instead, they attempt a doctrinal shortcut that likely would—and should—prove fatal in court.[107] Part II of this Article discusses the strengths and weaknesses of the equal protection approach, and Part III turns to the insights that can be gleaned from First Amendment theory.

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101 *See* Pillard, *supra* note 12.

102 *Id.* at 959.

103 Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267 (2008).

104 *See* Pillard, *supra* note 12, at 961 ("Teaching about sex-based discrimination, identifying historical patterns, and observing general trends is [sic] not the same thing as endorsing them. For equal protection purposes, as under the religion clauses, the constitutional line should be drawn between descriptive teaching, and prescriptive or normative advocacy of sexual double standards.").

105 ACS Brief, *supra* note 13; *see also* Greenblatt, *supra* note 7 (discussing legal challenges to federally-funded sex education programs); LeClair, *supra* note 12 (focusing on Title IX challenges to abstinence-only sex education but overlooking the regulatory loophole described above).

106 *See* ACS Brief, *supra* note 13, at 7–17; Greenblatt, *supra* note 7, at 13–19.

107 *See* ACS Brief, *supra* note 13, at 11–13, discussed *infra* Part II.C.2.

II. THE EQUAL PROTECTION ARGUMENT

The ACS Brief attacks the sex stereotypes found in sex education curricula with the usual doctrinal tools for challenging sex classifications based on stereotypes.[108] The brief, however, does not grapple with an important limitation on the logic of existing doctrine: the usual doctrinal moves for condemning stereotypes, even if they have a basis in fact, do not work in the curricular context.[109] This limitation motivates the effort in Part III to deepen the equal protection analysis by drawing on First Amendment precedents that deal with governmental efforts to promote particular ideologies.

A. Sex Classifications, Sex Stereotypes, and Gender Scripts

For purposes of equal protection analysis, the first question is whether the state has adopted a sex classification at all. Most sex education courses do not segregate children on the basis of sex, and children of both sexes are taught according to the same curriculum. The teacher could conduct most of the lessons without even inquiring into the sex of any particular student. There is, therefore, a colorable argument that there is no facial sex classification.

This argument may be correct with respect to certain kinds of biased curricula. For example, a history curriculum that neglected the achievements of women might have different effects on female and male students but not, in all fairness, be considered a classification of the students themselves on the basis of sex.[110] Such a curriculum would be facially neutral as to the students themselves, so it would violate the Equal Protection Clause only if it was adopted for the purpose of discriminating against female students under the rigorous definition of purpose adopted in *Personnel Administrator of Massachusetts v. Feeney*.[111]

In the case of the sex education lessons described above, however, the better argument is that they classify students by sex with respect to what the students are instructed about themselves and their aspira-

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108 *See* ACS Brief, *supra* note 13, at 7–17.

109 *See infra* Part III.C.2.

110 Even the fairest possible curriculum would likely have different impacts on girls and boys, the blame for which lies much more with history than with any teacher's presentation of it.

111 442 U.S. 256, 279 (1979) (holding that a facially neutral statute that has a differential impact on the basis of sex violates the Equal Protection Clause only if it is adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

tions. Sex education courses are expressly intended to instruct students about how to live their own lives. As Pillard argued, "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."[112] Unlike standard academic subjects, which are meant to teach students about various aspects of the world, sex education openly aims to influence students' aspirations and intimate choices about sexual activity and family relationships. Moreover, most other subjects are, at least in theory, subject to the intellectual standards of a particular academic discipline. While a sex education curriculum may include some biology, the stereotypes with which we are concerned appear largely in curricular components whose sole aim is the transmission of particular values to govern students' intimate life choices.[113] When a school elects to promote one set of values and aspirations for girls and a different set for boys, the fact that each group is present for the other's lessons does not change the fact that the school has classified its students on the basis of sex. As the ACS Brief points out, "such teaching indoctrinates female and male students with different messages about who they are."[114]

A collection of stereotypes that prescribes a particular life path or pattern of conduct on the basis of gender is called a *gender script.*[115] Common gender scripts in American culture maintain the sexual double standard and the gendered division of labor.[116] Gender scripts

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112 Pillard, *supra* note 12, at 958.

113 *See* ACS Brief, *supra* note 13, at 13. To be sure, schools aim to promote values such as self-discipline and responsibility through all their instruction. The differences between inculcating those sorts of values and inculcating sex stereotypes is discussed *infra* Part III.A.1.

114 ACS Brief, *supra* note 13, at 13. The ACS Brief also argues that such teachings constitute sex classifications in a larger sense "comparable . . . to Congress passing a resolution" endorsing gender stereotypes. *Id.* I am less certain that the latter type of governmental action constitutes a sex classification for equal protection purposes. *Cf.* NAACP v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990) (holding that Alabama's display of the confederate flag did not violate the Equal Protection Clause in part because "there is no unequal application of the state policy; all citizens are exposed to the flag"). For a discussion on the differences between government expression of racist ideas and government endorsement of sex stereotypes, see also *infra* Part II.D.

115 Holning Lau, *Identity Scripts and Democratic Deliberation*, 94 MINN. L. REV. 897, 902–03 (2010) (defining "identity scripts" as the products of aggregating stereotypes).

116 *See* Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 28 (2010) (arguing that gender scripts maintain the traditional division of labor within marriage); Linda C. McClain, *Some ABCs of Feminist Sex Education (In Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 68–69 (2006) (discussing cultural scripts about sexuality and the sexual double standard).

also define what behavior is seen as masculine or feminine.[117] For example, in *Price Waterhouse v. Hopkins*, the Supreme Court found sex discrimination when an employer failed to promote a female stockbroker because she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[118] The Court recognized that the employer's expectations placed the employee in a catch-22, since the qualities demanded of her because of gender clashed with the qualities expected in her traditionally male job. This sort of sex discrimination claim under Title VII is known as a sex-stereotyping claim.

Discrimination law under both Title VII and the Equal Protection Clause usually refers to "stereotypes" rather than "scripts." The concept of gender scripts is useful, however, because it highlights the connections among individual stereotypes that together form a hierarchal, gendered system.

A stereotype may be merely a generalization, and it may be based on an empirical reality. For example, when a state assumes that a married man supports his family financially but a married woman does not, this assumption is a stereotype even if it is based on an accurate statistical observation.[119] This understanding of stereotypes as generalizations runs throughout the Supreme Court's jurisprudence of sex classifications, and it persists today. For example, in a recent oral argument, Justice Scalia asked, "What separates a stereotype from a reality?"[120] Justice Ginsburg responded, "[I]t is true in general, but there are people who don't fit the mold. So a stereotype is true for maybe the majority of cases. It just means that you say: This is the way women are, this is the way men are."[121] Justice Ginsburg's comment is a classic statement of the "unfair generalizations" definition of a stereotype.

The unfairness of expecting outliers to conform to a statistical norm, however, is not the only problem with sex stereotypes. Catharine MacKinnon has suggested a more nuanced taxonomy of stereotypes:

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117 Cameron Cloar, *Through the* Price Waterhouse*-Looking Glass: Dominance and Oppression Revealed*, 43 U.S.F. L. REV. 703, 709–10 (2009) (noting a discrimination plaintiff's challenge to a "classic gender script" of femininity).

118 Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

119 *See, e.g.*, Frontiero v. Richardson, 461 U.S. 677, 690–91 (1973) (plurality opinion) (holding that a classification on this basis violated the Due Process Clause even if the statutory presumption was statistically accurate).

120 Transcript of Oral Argument at 4, Flores-Villar v. United States, 130 S. Ct. 1878 (2010) (No. 09-5801).

121 *Id.*

> As an account of the injury of discrimination, this notion of misrepresentation by generalization is certainly partial, limited, can be trivializing and even perverse. What if the stereotype—such as women enjoy rape—is not really true of anyone? What if, to the extent a stereotype is accurate, it is a product of abuse, like passivity, or a survival strategy, like manipulativeness? What if, to the degree it is real, it signals an imposed reality, like a woman's place is in the home? What if the stereotype is ideo-ideologically injurious but materially helpful, like maternal preference in child custody cases? What if a stereotype is injurious as a basis for policy whether or not accurate, such as the view that women are not interested in jobs with higher salaries? Further, why is it an injury to be considered a member of a group of which one is, in fact, a member? Is the injury perhaps more how that group is actually treated?[122]

The concept of a gender script captures the prescriptive quality found in sex education curricula. The curricula do not merely report a statistical reality or even assume that students' lives will correspond to the statistics; instead, the curricula teach that students *ought* to conform to particular gender scripts.

The classification of students by sex and their assignment to different, prescribed gender scripts puts the sex education curricula in a different category from previously litigated cases of curricular bias. In *Monteiro v. Tempe Union High School District*,[123] for example, parents lost their case objecting to the assignment of *Huckleberry Finn*, despite evidence that race-based, student-to-student harassment had substantially increased during and after the assignment. The court viewed the assignment as a legitimate effort to teach literature, as well as an opportunity to teach *about* racism; it saw no reason to conclude that the school intended to promote the racist values expressed in the book.[124] While cases such as *Monteiro* raise serious concerns about educational equality, the harm inflicted was likely unintentional—brought about either by indifference to disproportionate racial impact or by failed implementation of a legitimate pedagogical goal—rather than an intentional and explicit endorsement of stereotypes. Doctrinally, the intentional differentiation in the lessons conveyed to girls and boys is subject to a more rigorous standard than the unintentional differential effect in *Monteiro*.[125] The blatant sex stereotyp-

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122 Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1293 (1991).

123 158 F.3d 1022, 1029 (9th Cir. 1998).

124 On the question of whether *Huckleberry Finn*, taken as a whole, supports the ideology of white supremacy, see Sharon E. Rush, *Emotional Segregation:* Huckleberry Finn *in the Modern Classroom*, 36 U. MICH. J.L. REFORM 305, 366 (2003).

125 *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278–81 (1979) (upholding a state's preference for hiring veterans despite legislative indifference to its effect on female applicants).

ing in many sex education curricula therefore offers a better starting point for judicial exploration of the problem of biased curricula than the more difficult project of interpreting the messages implicit in a work of literature.

B. Intermediate Scrutiny and Real Differences

Once it is established that students are being classified and treated differently on the basis of sex, the question becomes whether that classification is justified. Sex classifications are subject to intermediate scrutiny under the Equal Protection Clause: a sex classification must serve an "important" state interest, and that interest must be "substantially related" to the sex classification.[126] Typically, the Supreme Court has concluded that a sex classification satisfies intermediate scrutiny when the classification is used in a way relevant to "real differences" between women and men.[127] It has struck down sex classifications that it finds to be based not on real differences but on "archaic stereotypes."[128] Any equal protection challenge to biased

126 Craig v. Boren, 429 U.S. 190, 197–98 (1976) (applying intermediate scrutiny to a gender-based classification). When the Court is feeling particularly hostile to a sex classification, it requires that the government's justification for the classification be "exceedingly persuasive." United States v. Virginia (The VMI Case), 518 U.S. 515, 524 (1996) (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). *But see* Nguyen v. INS, 533 U.S. 53, 74, 79–80 (2001) (O'Connor, J., dissenting) (complaining that the majority had abandoned the "exceedingly persuasive" requirement).

127 The "real differences" line of cases was first identified as such in Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 962 (1984), and Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 931 (1983). Freedman and Law identified the following as "real differences" cases: *Michael M. v. Super. Ct.*, 450 U.S. 464 (1981) (upholding a statute defining statutory rape as a crime only when committed by a male against a female); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (concluding that male-only registration for the draft is constitutional); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (permitting the exclusion of women from contact jobs in prisons); *Gen. Elec. v. Gilbert*, 429 U.S. 125 (1976) (finding that the exclusion of pregnancy-related disabilities from disability benefits policy offered by private employer does not violate Title VII); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (supporting the separate rules for male and female officers under navy's up-or-out policy); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that the exclusion of pregnancy from disability benefits policy offered by public employer is constitutional); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down mandatory pregnancy leave rules as arbitrary and irrational).

128 Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); Michael M. v. Super. Ct., 450 U.S. 464, 472 n.7 (1981); *see, e.g.*, United States v. Virginia, 518 U.S. 515, 549–50 (1996) (rejecting arguments that gender differences in learning styles justified excluding women from quasi-military academy); *see also* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) ("To determine whether there is unconstitutional sex discrimination, one need generally ask only two questions: 1) Is the rule or practice at issue sex-

curricula would therefore hinge on the court's assessment of whether the gendered instruction in sex education classes fairly reflects real sex differences or improperly reflects or reinforces sex stereotypes.

The categories "real differences" and "archaic stereotypes" are not mutually exclusive. *Reed v. Reed*,[129] the first Supreme Court case holding that a sex classification was unconstitutional, involved a classification that was both archaic and, in a sense, real. The state had adopted a presumption that male relatives of a decedent should be preferred as administrators of the estate. The state probably could have shown that this classification was based on a "real difference" in that men typically had more experience than women with certain kinds of financial affairs. The difference may have been "real" in the sense of being statistically accurate. The Court nonetheless struck down the presumption as an impermissible generalization. Since *Reed*, the Court has consistently rejected statistical arguments as justifications for sex classifications. The "real differences" that the Court has accepted are those the Court perceives to be immutably related to reproductive biology.[130]

A state could identify several important interests served by its sex education curriculum, having to do with students' education and welfare. Since the course revolves around sex and reproduction, biological differences between females and males are directly implicated. The state would thus try to justify its gendered instruction by reference to the "real differences" line of cases.

Of the "real differences" cases, the most obvious one for a state to rely on in support of gendered sex education instruction is *Michael M. v. Superior Court*.[131] *Michael M.* upheld California's statutory rape law, which made it a crime for an under-aged boy to have sex with an un-

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respecting, that is to say, does it distinguish on its face between males and females? and 2) Does the sex-respecting rule rely on a stereotype?" (internal citation omitted)).

129 404 U.S. 71 (1971).

130 *See* Freedman, *supra* note 119; Law, *supra* note 119; *see also Michael M.*, 450 U.S. at 469 ("[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."). The Court has also treated certain matters involving military service as if the exclusion of women from combat service was a real difference rather than a legally created one. This treatment is probably an artifact of the cases, which never directly challenged the combat exclusion but dealt with its consequences. In addition, many of the Justices likely believed that the exclusion was itself justified by real differences. *See* Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After* Ricci *and* PICS, 16 MICH. J. GENDER & L. 397, 436–37 (2010) (discussing the treatment of the military cases as "real differences" cases).

131 450 U.S. 464, 476 (1981) (permitting a statutory rape statute that treated men and women differently).

der-aged girl, but not vice versa. The Supreme Court accepted California's argument that the purpose of the classification was to facilitate enforcement of the law which would, in turn, prevent teen pregnancy.[132] Girls, the Court reasoned, suffer "natural sanctions" for sex by the risk of pregnancy.[133] That risk is a "real difference," so the state was entitled to treat girls and boys differently and thereby "roughly 'equalize' the deterrents on the sexes."[134]

Pregnancy prevention is typically one of the goals of sex education courses, and it is likely that courts would reach for *Michael M.* if asked to assess the validity of sex differentiation in sex education. For example, a state could argue that emphasizing girls' responsibility as sexual gatekeepers was for their own benefit because they would disproportionately suffer the negative consequences of sexual activity. The statute upheld in *Michael M.* itself reflected stereotypes about who benefits and who is victimized by sex, which are similar to some of the stereotypes found in sex education curricula. Nonetheless, once the *Michael M.* Court identified a link between the sex classification and the state interest in pregnancy prevention, it showed little interest in the rest of the intermediate scrutiny analysis. The Court was unswayed either by evidence that the classification served that state interest rather poorly or by claims that impermissible stereotypes were the true basis for the law.[135]

In recent years, however, the center of gravity in the Court's analysis seems to have shifted further toward anti-stereotyping principles. As Cary Franklin has explained, "[i]n the past, 'real' differences served as a check on the reach of anti-stereotyping doctrine."[136] Thus, once the *Michael M.* Court had identified real differences, it no longer interrogated the law for stereotyping. Under more recent cases, perhaps, "anti-stereotyping doctrine serves as a check on the state's regulation of 'real' differences."[137] For example, in *Nguyen v. INS*,[138] the majority concluded that a statute distinguishing between mothers and fathers in the transmission of citizenship was based on real differences but also appeared to concede that the law would nonethe-

132 *Id.* at 469–70.

133 *Id.* at 473.

134 *Id.*

135 *Id.* at 472, n.7 (stating that possible invidious motives for the statute were irrelevant); *id.* at 474 n.9 (dismissing arguments that a gender-neutral statute would not hinder prosecutions).

136 Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 145 (2010).

137 *Id.* at 145–46.

138 Nguyen v. INS, 533 U.S. 53, 73 (2001).

less be invalid if it were based on stereotypes about those differences. Thus, even if a state can point to real differences like in *Michael M.*, the current Supreme Court may nonetheless require that those differences be addressed without perpetuating archaic stereotypes.

Moreover, of all the objectionable sex stereotypes found in sex education curricula, only a small portion fall under the logic of *Michael M.* While the *Michael M.* decision is flawed in several ways, its concept of real differences is, at least, limited to situations involving a plausible connection to reproductive biology. Later cases have confirmed that "real differences" do not include purported sex differences in mental ability, learning style, or career ambitions.[139] Moreover, the sex biases behind the statutory rape law were implicit and subtle, not like the explicit and blatant endorsement of traditional gender roles found in sex education curricula.

Instructing students that wives give sex and husbands give money has no plausible connection to reproductive biology. Telling girls that it is their responsibility to put the brakes on male lust by dressing modestly may resonate with some of the same stereotypes that were at play in *Michael M.*, but it is much more readily recognized as such. The sex differences in sexual desire, intellectual ability, and life expectations that appear in sex education curricula are the sorts of characterizations of the sexes that the Court can be expected to deem not "real differences" but "archaic stereotypes."

While the Court has at times shown itself unable to distinguish between "biology [and] the social consequences of biology,"[140] its understanding of which differences are "real" has narrowed over time. Once broad enough to include the capacity to be a lawyer as an inherently male trait,[141] it is now limited to those differences that the Court believes have more direct links to reproductive organs. Moreover, even the presence of real differences no longer necessarily diverts the Court from inquiring into whether the state has engaged in impermissible stereotyping. The real differences argument would therefore not get the state very far in a challenge to gender-biased sex education. On the other hand, however, for the reasons discussed in the next section, neither would the usual arguments about "stereotypes" seal the case against the state's curriculum.

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139 *See* United States v. Virginia (*The VMI Case*), 518 U.S. 515 (1996) (rejecting a classification based on purported sex differences in learning styles).

140 Law, *supra* note 127, at 1001.

141 *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 142 (1872) (upholding the exclusion of women from the practice of law).

C. *Stereotypes Based on Fact*

Assuming that a court correctly identifies the stereotyped gender scripts being promoted in sex education, a state is likely to defend the teaching of some stereotypes on the grounds that they reflect empirical reality. The argument would be that the state can legitimately instruct students about observed sex and gender differences, even if it cannot coercively impose those differences on individuals. For example, women and men perform differently on various tasks, may prefer different modes of reasoning, and express different priorities for their lives when it comes to sex, relationships, and careers.[142] A state is likely to claim that its instruction about, say, women and men's "five major needs in marriage" simply reflects this empirical reality.

Just as culture provides gender scripts that represent appropriate, expected behavior for women and men, legal culture provides doctrinal scripts for particular areas of law. A doctrinal script consists of a familiar, expected pattern of arguments with which lawyers and judges feel comfortable. In law school, we teach students to frame their arguments within these scripts, using the established categories and vocabulary. The structure of this Part so far follows the doctrinal script for equal protection: First, is there a classification?; and second, what is the level of scrutiny?; and so forth. At this point in the script, we have identified the state's use of sex stereotypes, and the state has, we assume, responded by asserting a factual basis for the stereotypes in its curriculum.

The equal protection script now calls for the plaintiff to cite cases like *Reed v. Reed*[143] and *United States v. Virginia (The VMI Case)*[144] for the proposition that the factual basis—the truth or falsity—of a stereotype is constitutionally irrelevant. That is what the ACS Brief does,[145] and that is where its argument goes off the rails. By making this argument, the brief implicitly concedes that the Equal Protection Clause could be used to prohibit a school from conveying truthful information because that information was inconsistent with a particular theory of sex equality. While the authors of the brief clearly do not intend such a result, the implication follows from their mechanical

142 *See generally* Doreen Kimura, *Sex Differences in the Brain*, 267 SCI. AM.188 (1992).

143 404 U.S. 71 (1971) (striking down a preference for men as administrators of estates).

144 518 U.S. 515 (1996) (the *VMI* case) (striking down the male-only admissions policy of a state-sponsored quasi-military college).

145 ACS Brief, *supra* note 13, at 11–13 ("The Constitutional Irrelevance of Evidence of a Stereotype's 'Accuracy'").

application of the precedents on stereotyping. The brief errs by implying that the issue to be addressed is whether sex education curricula teach the truth about sex differences as a matter of objective reality rather than whether they are normatively promoting a gender ideology that is inconsistent with the Equal Protection Clause.

To be clear, we are not arguing that the stereotypes described in Part I are fundamentally "true," only that states are likely to argue that many of the generalizations have a statistical and perhaps biological basis. Confronting that argument, the ACS Brief attempts a doctrinal shortcut based on holdings in other contexts. This shortcut is not appropriate in a challenge to curricular content.

1. *Existing Doctrine on Entrenchment of Sex Stereotypes*

As discussed above in connection with real differences, the Supreme Court has frequently cited "archaic stereotypes" as the hallmark of unconstitutional sex classifications.[146] For example, in *Frontiero v. Richardson*,[147] the Court struck down a military policy of paying a dependency allowance to all married servicemen, while married servicewomen received the allowance only on a showing that their husbands were in fact dependent. The classification corresponded to a statistical reality: husbands were more likely than wives to have their own incomes.[148] That statistical fact, however, is a far cry from the "real differences" in cases like *Michael M.*, and the Court held it was an impermissible basis for determining individual entitlements. Although legislatures are entitled to take into account the basic facts of reproductive biology, they may not entrench gender roles pertaining to other characteristics, even when their classifications mirror existing statistical differences.[149]

146 *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."); Michael M. v. Super. Ct., 450 U.S. 464, 472 n.7 (1981).

147 461 U.S. 677 (1973) (plurality opinion). *Frontiero* was decided before the Supreme Court formally adopted "intermediate scrutiny" for sex classifications, but the plurality's reasoning is consistent with the Court's subsequent treatment of stereotypes with a basis in fact.

148 *Id.* at 688–89. It was unclear whether the cost of identifying the exceptional cases would outweigh the costs of giving the benefit to men automatically. *Id.* at 689–90.

149 *See also* Craig v. Boren, 429 U.S. 190, 204 (1976) (stating that statistical differences in traffic accidents could not justify a sex classification with respect to purchasing alcohol); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (holding that the state could not assign the power to administer estates by assuming that men have more experience managing money than women do).

This principle has been especially important in the Supreme Court's cases on single-sex education.[150] Those cases may be particularly relevant to sex education, since our premise is that girls and boys are receiving distinct educations, albeit in the same classrooms. In *The VMI Case*, the Court was confronted with claims about sex differences very similar to some of the claims made in sex education curricula; for example, girls and women value relationships, while boys and men value competitive achievement.[151] These differences were offered to justify a male-only quasi-military academy based on an adversative pedagogical model and a female-only leadership institute based on cooperation and reinforcement of self-esteem.[152] As it has done since the 1970s, the Court rejected the sex classification because of its "overbroad generalization" and resonance with "stereotypes," even though the "stereotypes" have a statistical correlation with reality.[153]

2. *A Tempting Misapplication*

The ACS issue brief seizes on this line of precedent as a rejoinder to any argument that the stereotypes in sex education curricula are permissible because they have a basis in fact.[154] This rejoinder seeks to use cases like *The VMI Case* to rule out any defense of curricular material on the basis of truth, statistical accuracy, or empirical basis. Lessons that perpetuate gender stereotypes are impermissible even if the stereotype is, in fact, true. This argument is understandably tempting, but it also has serious problems.

The argument is tempting, first and foremost, because it is part of the doctrinal script of equal protection. Deviating from a prescribed script requires extra work to explain and justify the deviation.[155] In this instance, we can identify what that work would be by noting the alternative arguments for responding to a claim that curricular stereotypes have a factual basis. One alternative response would be to

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150 *See* United States v. Virginia (*The VMI Case*), 518 U.S. 515, 541, 558 (1996); *Miss. Univ. for Women*, 458 U.S. at 729, 733 (holding that Mississippi University for Women could not exclude men from its nursing school even though women were more likely than men to pursue nursing degrees).

151 *The VMI Case*, 518 U.S. at 541 (noting that Virginia had concluded that men were more likely to thrive in an adversarial environment, while women would do better in a more cooperative setting); Waxman Report, *supra* note 4, at 16.

152 *The VMI Case*, 518 U.S. at 541.

153 *Id.* at 533.

154 ACS Brief, *supra* note 13, at 13–15.

155 *Cf.* Lau, *supra* note 115, at 904–06 (describing the work involved in rejecting an ascribed identity script).

refute the factual claim. That would require an evidentiary trial as well as a definition of truth when it comes to gender differences.[156]

Another alternative would be to distinguish between factual statements, which can coherently be described as true or false, and the normative prescriptions contained in archaic gender scripts. Questions of truth, falsity, and normativity are discussed further below. At the outset, however, it is important to see that both alternative responses involve relatively novel arguments in the equal protection context. They therefore require extra work, and in litigation, they would entail extra risk. That is why it is tempting to stick to the doctrinal script and dismiss the question of factual accuracy as irrelevant. For two reasons, however, this move is a mistake.

First, the use of this argument—the fact that feminists arguing against the teaching of sex stereotypes find it necessary to make this argument—implies that the goal is to use equal protection doctrine to suppress the teaching of material that is factually true. This should be disturbing. It would certainly be disturbing to a federal court. There is a difference between, on the one hand, adopting laws that force individuals to conform to general statistics about group characteristics and, on the other hand, describing those group characteristics in the classroom. Justice Ginsburg wrote in *The VMI Case* that differences between the sexes "remain cause for celebration" so long as they are not used "to create or perpetuate the legal, social, and economic inferiority of women."[157] More recently, as quoted above, she has stated that her definition of a stereotype is that it is "true in general, but there are people who don't fit the mold."[158] Rather than accepting the premise that the objectionable material is fact-based and responding in those terms, the appropriate response is that the state is not teaching facts. It is prescribing sex roles to students by inculcating them with stereotyped gender scripts. The short-cut of arguing that it does not matter if it is "true" is tempting, but wrong.

Second, feminists must confront a conflict that was submerged in *The VMI Case*. When the State of Virginia sought to justify its stereo-

156 Is a statement about a sex difference "true" only if it is shown to have a biological basis?

157 *The VMI Case*, 518 U.S. at 533–34. The scope of the presumed "inherent differences" is unclear. The context suggests that the phrase could refer only to gross anatomy. On the other hand, Justice Ginsburg's use of scare quotes around the phrase suggests that it may include widely observed statistical differences whether or not they are "real" in the sense of being aspects of reproductive biology. Moreover, it seems unlikely that one would celebrate the mere fact of sexual reproduction and associated dimorphisms, impressive as they may be as evolutionary strategies.

158 Transcript of Oral Argument at 4, Flores-Villar v. United States, 130 S. Ct. 1878 (2010) (No. 09-5801).

typed treatment of women and men, it relied on reputable expert testimony to do so.[159] Much of the literature on sex differences in learning comes from the feminist movement, especially the "cultural" or "relational" branch of feminism. Feminists have produced a vast amount of research about a range of sex differences, many of which correlate to the segregated education programs in *The VMI Case* and to some of the stereotypes promulgated in sex education curricula.[160] While some curricula have been mocked for promoting a *Men Are From Mars, Women Are From Venus*[161] vision of sex differences, that vision is in some ways merely a less sophisticated version of psychological theories accepted by many researchers, including feminist ones. While perhaps rejected by the majority of legal scholars, they are well within the range of reasonable disagreement.[162]

The Supreme Court has rejected the use of most stereotypes as a basis for social policy. For example, it is a fact in the United States that boys score better than girls on measures of mathematical ability. The state may not use that fact to restrict opportunities for girls, as a class, to study math. But suppose that in a psychology class, students are instructed to the effect that "boys tend to do better than girls at math." That is a stereotype. It is also true.[163] We may prefer that it not be presented to students as a bare fact, and that it be contextualized with the weighty evidence that the gap in math scores is the product of culture rather than inherent sex differences.[164] A good teacher would feel compelled to present that context, as a matter of

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159 United States v. Virginia, 766 F. Supp. 1407, 1434–35 (W.D. Va. 1991) ("Given these developmental differences females and males characteristically learn differently. Males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor. Females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students.").

160 *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (6th ed. 1993) (proposing a theory of differential moral development on the basis of gender); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990) (describing sex-based differences in communication styles).

161 *See WAIT Training Review, supra* note 40 (noting that the program draws directly from JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS: THE CLASSIC GUIDE TO UNDERSTANDING THE OPPOSITE SEX (2004)).

162 For a critique of relational feminist psychology from a feminist legal perspective, see Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858 (1993).

163 Brian A. Nosek et al., *National Differences in Gender-Science Stereotypes Predict National Sex Differences in Science and Math Achievement*, 106 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. 10,593 (June 30, 2009), *available at* http://www.pnas.org/content/106/26/10593.full?sid=959d961d-9d9e-4ebf-ab1e-add72a84d6d7.

164 *Id.*

both her intellectual integrity and her obligations under the Equal Protection Clause (in that order).

A similar analysis applies to stereotypes about women being better at connecting to others and expressing their feelings. Most feminists attribute the statistical gap with respect to this ability to socialization, but some attribute it to social experiences that are closely intertwined with female biology: childbirth, breastfeeding, penetration, and even menstruation.[165] The latter analysis suggests that this particular sex difference is innate in female physiology. Again, a good teacher would, at a minimum, present alternative viewpoints, but it does not follow that a school system should be found in violation of the Fourteenth Amendment for informing its students of a statistical finding, or of reputable psychological theory that attributes that finding to inherent sex differences.

The point here is not that we should be content to let public schools promulgate stereotypes because they are arguably true anyway. It is that to the extent that a school conveys a fact to students, that fact's correspondence to an objectionable stereotype does not constitute an equal protection violation. The attempt in the ACS issue brief to use existing precedent to argue that it does is severely flawed. It wrenches the Supreme Court's statements about sex stereotypes out of context. The argument that federal courts should suppress information "even if it's true" because it is inconsistent with a particular theory of gender—even a theory of gender that is currently enshrined in constitutional doctrine—is a lightening rod of which federal courts would rightly steer clear.

Most importantly, the argument is also flawed because it is beside the point. The feminist objection to the stereotypes in sex education is *not* a matter of wanting to deny true facts, as invocation of the "even if it's true" argument unfortunately suggests. The objection is to the inculcation of sexist *values* by indoctrinating students with stereotyped gender scripts. A dispute over factual accuracy or inaccuracy would be a red herring; the relevant dispute is not factual but normative. The "even if it's true" argument is a tempting short-cut but is both untenable and inapplicable.

The fact that the dispute concerns not facts but normative preferences is part of why First Amendment, Establishment Clause concepts are useful here. Equal protection doctrine is structured around several assumptions regarding stereotypes. It accepts that stereotypes are often true for most people. It assumes that the problem is when

165 *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2–3 (1988).

unfair generalizations are applied to unusual individuals who do not conform to type. Implicit in this framework is the assumption that the individual is fully formed before the government's classification is brought to bear. In contrast, in First Amendment cases, courts recognize that the individual is still being formed and that the government's efforts to shape preferences are suspect, at least in constitutionally sensitive territory. Establishment Clause jurisprudence focuses on whether the government is imposing an impermissible normative script rather than on whether it is making an unfair generalization. While the inclusion of false statements of fact might be further evidence that a particular normative agenda is being pursued,[166] it is the agenda, not the supporting facts, that is in question.

Equal protection doctrine also fails to provide a clear answer to the question of why the state ought not to be allowed to disagree with the Supreme Court. More precisely, I would submit that state actors *are* free to disagree with the Supreme Court about the meaning of the Equal Protection Clause, and First Amendment concepts are better suited to explaining why that disagreement should not be allowed to extend to classroom instruction. The government may believe that the world would be a better place if more people adhered to the "traditional" sexual division of labor with regard to work and family. Government can further that vision in a variety ways, such as, say, failing to enact the Family and Medical Leave Act[167] or issuing press releases that endorse traditional marriages.[168] Government cannot further its vision by coercing individuals, such as by forbidding paid employment by mothers. Somewhere between these two extremes, the government furthers its vision by instructing school children that they will be happier and the world will be a better place if they adopt the government's vision as their own. What is at issue is not whether particular observations about the sexes are "true" or "stereotypes" or both. The fight is over whether they are desirable normative aspirations. The child here is presumed to be an empty or, at most, a partially written-on page. The adults are competing to write the story,

166 False statements of fact may also support a claim for violation of the Due Process Clause. *See supra* note 91 and accompanying text.

167 29 U.S.C. §§ 2601–54 (2006).

168 Mary Anne Case, however, would argue that the press release is a violation. *See* Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 391 (arguing that a local government resolution endorsing "traditional family structure" could be understood to endorse traditional gender roles in marriage and that the implicit message "'Welcome to Cobb County, Where a Woman's Place Is in the Home' would be a combination welcome mat and no trespassing sign with . . . serious constitutional problems").

and compulsory schooling is a very big pen. It is that normative struggle, not the truth or falsity of particular underlying facts, that is at issue in sex education stereotyping. The argument against a stereotype "even if it's true" would be a detrimental distraction in any litigation over the sex stereotypes in sex education curricula.

D. Stereotypes and Brown v. Board of Education

A final alternative to relying on the cases rejecting sex stereotypes would be to analogize to race cases, especially *Brown v. Board of Education*[169] and *Loving v. Virginia*.[170] This argument is an improvement over "even if it's true." However, sex classifications are different from race classifications in important, relevant ways that make this argument incomplete as well.

The opinions in both *Brown* and *Loving* emphasized the government's policy of white supremacy as a hallmark of unconstitutionality.[171] In *Brown*, the resulting stigmatic harm was part of what rendered separate school systems inherently unequal.[172] In *Loving*, the Court deployed the state's supremacist ideology to counter the "equal application" argument that a ban on interracial marriage should be reviewed deferentially as long as it was applied to all races.[173] Under the antisubordination theory of the Equal Protection Clause, an underlying ideology of white supremacy, rather than the bare fact of a racial classification, should be the touchstone of equal protection analysis.[174]

Sex stereotypes generally play the same role as white supremacy in the Supreme Court's equal protection analysis. As Mary Anne Case has observed, the results of most sex cases turn not on the "fit" of the sex classification but on whether the Court perceives the state action as based on stereotypes.[175] She points out that the outcomes of sex cases can be explained by asking whether the law in question in each case relies on a stereotype: if it does, the law will be struck down.[176]

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169 347 U.S. 483 (1954).

170 388 U.S. 1 (1967).

171 *Brown*, 347 U.S. at 494–95 (describing the stigmatic harm of segregated schooling); *see also Loving*, 388 U.S. 1, 11–12 (1967) (finding unconstitutional Virginia miscegenation laws found to have been designed to maintain White Supremacy).

172 *Brown*, 347 U.S. at 494–95.

173 *Loving*, 388 U.S. at 7–8.

174 *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (setting out the now-classic distinction between the anti-classification and anti-subordination interpretations of the Equal Protection Clause).

175 *See* Case, *supra* note 128, at 1449.

176 *See id.*

Because courts have suggested that curricular promotion of white supremacy would be unconstitutional,[177] and because stereotypes play the role in sex discrimination analysis that white supremacy plays in race discrimination analysis, it is again tempting to conclude that promotion of sex stereotypes in schools is similarly unconstitutional.

In the Supreme Court's eyes, however, there remains a key difference between race-based and sex-based laws: white supremacy is a constitutional evil; sex differences are an impermissible basis for limiting individual opportunities but can otherwise be "cause for celebration."[178] After all, sex differences are "true in general" and become problematic only when they are imposed on individuals "who don't fit the mold."[179] The sex cases downplay the relationship between stereotypes and hierarchy.[180] In the absence of complete condemnation of sex stereotypes comparable to the condemnation of white supremacy, a school board can more plausibly argue that it is entitled to disagree with the Supreme Court's vision of a good society with regard to gender roles. A First Amendment approach, however, can provide the missing link to explain why that disagreement may not extend into the classroom.

III. A FIRST AMENDMENT OVERLAY

This Part turns to the First Amendment, where concerns about governmental imposition of values are more deeply theorized and more elaborated in doctrine than under the Fourteenth Amendment. Part III.A reviews the scholarly literature on the values-inculcating function of public schools. It traces a progression from the most ambitious theoretical challenges to public schools as vehicles of indoctrination to the Supreme Court's much narrower approach. Part III.B identifies the problem of stereotypes in sex education as an appropriate next step in the Supreme Court's cautious program of limiting the imposition of values. This step would also

177 *See* Monteiro v. Temple Union High Sch. Dist., 158 F.3d 1022, 1027–32 (9th Cir. 1998) (rejecting a challenge to the assignment of *Huckleberry Finn* but distinguishing that challenge from the possibility of allegations "that the curriculum was itself racist or that the manner in which the assigned books, or any other books, were taught caused injury to African-American students").

178 *The VMI Case*, 518 U.S. 515, 533 (1996).

179 Transcript of Oral Argument at 4, Flores-Villar v. United States, 130 S.Ct. 1878 (2010) (No. 09-5801).

180 This does not mean they ignore it entirely. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 133 (1994) (noting that archaic stereotypes associated with "'romantic paternalism' . . . put women, not on a pedestal, but in a cage") (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion)).

bring the Court one step closer to grappling with the larger questions raised by the scholarly literature.

A. *Scholarly Literature on Inculcating Values*

The Supreme Court's Establishment Clause jurisprudence limits one small aspect of public school efforts to instill selected values in children. Since the 1960s, legal scholars have questioned and proposed further limits on the use of public schools as vehicles for the government to mold citizens' most basic values.

1. *The Inevitability of Imposing Values on Students*

The first important observation of this literature is that the inculcation of values is inherent in schooling. Cornelia Pillard's article on sex education pointed out the inevitability of addressing gender stereotypes, one way or the other, once a school decides to teach sex education.[181] A similar point can be made more broadly about the enterprise of education itself:

> Even when a school bends over backwards (as it almost never does) to provide all points of view about ideas and issues in the classroom, it barely scratches the surface of its system of value inculcation. A school must still confront its *hidden curriculum*—the role models teachers provide, the structure of classrooms and of teacher-student relationships, the way in which the school is governed, the ways in which the child's time is parceled out, learning subdivided and fragmented, attitudes and behaviors rewarded and punished.[182]

Just as the child is "the Achilles heel of liberal ideology,"[183] public schooling presents the paradox that "[s]ociety must indoctrinate children so they may be capable of autonomy."[184] Even to strive for

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181 *See* Pillard, *supra* note 12, at 952.

182 Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 316–17 (1980) (emphasis added); *see also* Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986) ("Socialization to values through a uniform educational experience necessarily conflicts with freedom of choice and the diversity of a pluralistic society."); Martin H. Redish & Kevin Finnerty, *What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 69 (2002) ("It would be both practically and theoretically impossible to completely prevent the governmental values inculcation that occurs in the educational process; in certain instances, values inculcation is an inherent by-product of the educational process, and it would be absurd to hypothesize a vibrant democratic society absent such a process.").

183 Shiffrin, *supra* note 95, at 647.

184 Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 19 (1987).

value-neutrality in the schools may represent a bias in favor of a "liberal scientific viewpoint" that values exposure to a wide variety of perspectives.[185]

> The child is inevitably coerced, placed in an environment which is manipulated by those around him and which is bound to affect his attitudes as an adult. The question is simply who (or more accurately, what combination of actors) should decide what values will be inculcated and how they should be instilled.[186]

Because public school instruction necessarily contains a hidden curriculum based on the school's values, students whose own values clash with the school's values may struggle with the educational experience.[187] The only currently available remedy for a clash between individual and school values is to opt out of public schooling, a remedy which requires the individual to have substantial resources for obtaining private or home-based instruction.[188] A child also needs a parent's cooperation to pursue these alternatives.

2. *General Attempts to Limit the Imposition of Values on Public School Students*

Scholars vary in the degree to which they are troubled by the inevitability of values inculcation in public schools. Arons and Lawrence argue that governmental regulation of belief formation renders freedom of expression illusory, since "fewer people can conceive dissenting ideas."[189] They conclude that freedom of personal conscience requires that the individual control her own education, or that her parents do so if she is too young.[190] To attack the problem of the "hidden curriculum," they propose greater parental choice, decentralized control of schools, abolition of standardized testing, and teacher training programs about the dangers of imposing values on students. Other scholars, however, point out that parental control presents its own problems. Parents who home-school their children have far more ability than a school does to control the child's entire environment and thereby indoctrinate a narrow, often sexist, ideology. Several scholars have proposed placing limits on the prerogatives of

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185 *See id.* at 28 ("[V]alue neutrality itself has a value bias favoring the liberal philosophy that the scientific method of inquiry embodies.").

186 Malcolm Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 25 (1989).

187 *See* Arons & Lawrence, *supra* note 182, at 322 (arguing that the student who struggles in this manner will likely receive less educational benefit than others).

188 *See id.* at 324.

189 *Id.* at 312 .

190 *See id.* at 313.

tives of home and private schools in order to protect constitutional values.[191] Martha Fineman has suggested that protection of the child's interests may require mandatory public schooling.[192] The question, again, is what balance to strike among the competing claims of the parents, the state, and others to influence the child's development.

Most scholars take the basic structure of public schooling as given and concede, at least implicitly, the inevitability of values imposition through the hidden curriculum. They turn, then, to seeking limits on more explicit advocacy of values, especially values that are controversial. Their approaches fall into four overlapping categories: (1) relying on structural features of the schools to create an adequate marketplace of ideas within the classroom; (2) requiring "fairness" in the presentation of controversial topics to students; (3) defining specific values that *may* be promoted in public schools; and (4) defining specific values that *may not* be promoted in public schools. The first three are described below. The fourth, which is the approach taken in Supreme Court decisions, is discussed separately in the next Subsection.

As an initial matter, the free speech rights of students and teachers constitute a structural check on values imposition: the normative assertions of the school itself can to some extent be challenged in classroom discussion.[193] Many scholars, however, conclude that this check is insufficient and seek more substantive limits. They question whether values inculcation is ever a proper *goal* of public schools at all.[194] While recognizing the futility of eliminating values from the

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191 *See, e.g.*, Kimberly Yuracko, *Education Off the Grid: Constitutional Constraints on Home-Schooling*, 96 CALIF. L. REV. 123 (2008).

192 Martha Albertson Fineman, *Taking Children's Interests Seriously*, *in* WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 237 (Martha Albertson Fineman & Karen Worthington eds., 2009). *But see* DAVID L. KIRP, MARK G. YUDOF, & MARLENE STRONG FRANKS, GENDER JUSTICE 122–23 (1986) (summarizing the Supreme Court's holdings regarding parents' control over education thus: "Even though a pluralist order in which individuals determine their life plans only after exposure to alternative conceptions might be theoretically preferable to a world replete with private indoctrination, the Court has been unwilling to insist upon such exposure").

193 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (explaining that public schools lack complete authority over students' classroom expressions due to students' fundamental rights). *But see* Morse v. Frederick, 551 U.S. 393 (2007) (explaining that students are subject to reduced First Amendment protections in the public school setting, as schools can restrict student expressions reasonably regarded as promoting illegal drug use).

194 Frederick F. Schauer, *School Books, Lesson Plans, and the Constitution*, 78 W. VA. L. REV. 287, 300–01 (1976) (collecting articles taking various positions on whether inculcation is a legitimate goal).

hidden curriculum, they seek to keep values imposition to a minimum by requiring the school to give "equal time" to competing viewpoints on explicit questions of values. Several of these scholars have proposed a "fairness doctrine" for public schools, sometimes expressly analogizing to the fairness doctrine that used to govern broadcast media.[195]

The fairness approach has several limitations. Courts would need to develop a method for identifying "controversial" issues and evaluating fairness, although presumably much of this work has been done in the broadcast context.[196] The fairness approach may optimistically assume too much about young children's capacity to participate as sophisticated "buyers" in the marketplace of ideas, especially when methods of instruction play to their emotions rather than their intellects.[197]

In the hands of at least some scholars, the fairness approach may also result in excessive leniency with respect to the hidden curriculum or else an overly narrow conception of the mission of a public school. Fairness rules only apply to explicit discussions of controversial topics, not to transmission of values that is inherent in the educational process. For example, Martin Redish and Kevin Finnerty seek to "separate inherent values education from naked values inculcation."[198] To do so, they propose a high level of deference to values imposition that occurs incident to substantive instruction.[199] They reserve their skepticism for extra-curricular activities or programs about "normative issue[s] of concern primarily beyond the four walls of the schoolhouse."[200] In the latter category they place issues of "racial or gender equality, ethnic tolerance, [and] patriotism."[201] They object especially to events such as school assemblies promoting diversity,

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195 *See* Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (1987); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983).

196 *See generally* Sheldon H. Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1509–14 (1972) (discussing the difficulties of a balance requirement).

197 *See* Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 43 GA. L. REV. 447, 449–51 (2009).

198 *See* Redish & Finnerty, *supra* note 182, at 94 (emphasis removed).

199 For example, they argue, "[I]f the school teaches a course in the Holocaust, the anti-indoctrination model would not preclude the direct or indirect transmission of the value of religious tolerance. The same would be true of a course in the history of race relations." *Id.* at 107.

200 *See id.* at 70.

201 *See id.*

which they deem extra-curricular, but would give wide latitude to a school that inculcated the same values in the context of a history class on the Holocaust or the civil rights movement.[202]

The example of sex education illustrates some of the shortcomings of this approach. The characterization of race and sex equality as issues that are "primarily" relevant outside of the school suggests a perspective that is quite removed from that of the child. For the child, school is likely the main contact with the larger world, and her education may be strongly affected by issues of racial and gender equality, both within the school itself and from without. Similarly, the dichotomy between values incident to the educational process and "extra-curricular" promotion of values rests on an assumption that curricular materials constitute instruction in particular academic disciplines. Sex education, as taught in public schools, is not a distinct field of intellectual inquiry; it is primarily about shaping students' values. This kind of instruction frustrates the attempt to "separate inherent values education from naked values inculcation."[203]

Perhaps, then, the entire endeavor of values-shaping sex education is illegitimate, regardless of which particular values inform it. That is certainly a tenable position, but it leads to a final problem with the fairness approach, at least as a practical solution to the problem of values imposition. That problem is that both the American public and the Supreme Court appear to be committed to values instruction not just as a permissible but as a core function of public schools. The Court has endorsed values inculcation through schools not just with regard to values like hard work and responsibility, which might be deemed part of the (legitimate) hidden curriculum, but also with regard to more political values such as patriotism and racial equality.[204] As a society, we want the schools to teach, for example, that *Brown* was right, and we do not want white supremacists to feel particularly welcome. As a result, the scholarly critiques about the

202 *See id.*

203 *Id.* at 94 (emphasis omitted).

204 *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 76–80 (1979) (quoting, *inter alia*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."); *id.* at 840 (Breyer, J., dissenting) ("[T]here is a democratic element: an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation." (internal citation omitted)).

inherent perniciousness of values imposition have made virtually no headway in legal doctrine or either popular or judicial sentiment.

Other scholars, however, embrace the task of identifying a set of "core" or "fundamental" values that schools may properly strive to inculcate in their students. As justification, Steven Shiffrin has suggested,

> Arguably, the system can be explained in terms of community rights. Although parents raise their children in the home, the community has a stake in the kind of person who will be a part of it, and that stake transcends its interest in discouraging the production of Charlie Mansons, David Berkowitzs and Lee Harvey Oswalds. For example, our society has constitutionalized some basic conceptions of equality, freedom, and political democracy. It has a stake in seeing that its citizens are at least exposed to its point of view.[205]

The rub, of course, lies in identifying the community's shared values. Shiffrin proposes "equality, freedom, and political democracy."[206] Other scholars, however, have different lists. Joel Moskowitz argues that schools should teach "'such universally accepted values as justice, property rights, respect for law and authority, and brotherhood,'"[207] while Susan Bitensky nominates environmentalism and abhorrence of genocide as the basic "ideational perquisites" for the continuance of our civilization.[208] Brian Freeman concludes that schools should be free to promote a particular value system with respect to such purportedly non-controversial matters as "personal honesty and integrity, family life and responsibilities, sexual standards, and the harmful effects of drug and alcohol abuse."[209] These examples demonstrate the difficulties of selecting a discrete set of values as constitutionally approved for inculcation in public schools.

3. *Identifying Proscribed Values*

In contrast to the scholarly efforts to reconcile any *inclusion* of values in public school curricula with freedom of conscience, the Supreme Court's approach has been one of case-by-case *exclusion.* That is, the Court has permitted—at times, enthusiastically endorsed—a

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205 Shiffrin, *supra* note 95, at 651–52.

206 *Id.*

207 Joel S. Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education,* 6 PEPP. L. REV. 105, 136 (1978) (quoting J. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 MINN. L. REV. 329 (1963)).

208 Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools,* 70 NOTRE DAME L. REV. 769, 835–36 (1995).

209 Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis,* 12 HASTINGS CONST. L.Q. 1, 56 (1984).

wide range of values training in public schools, subject only to a few specific exceptions for religious indoctrination, partisan advocacy, and the promotion of white supremacy.

If the Court is ever to confront the more fundamental questions about values imposition that are raised in the scholarly literature, it will have to work its way up to doing so through a larger collection of specific examples. The Court is unlikely to adopt the initial stance recommended by much of the scholarly literature—skepticism about all values imposition—and build from there through a theory of inclusion. If, however, it is able to proceed step by step, first identifying the most pernicious types of values imposition, it may eventually be in a position to grapple with the larger questions. This Subsection describes the pernicious types that the Court has identified so far; Part III.B argues that dealing with sex stereotypes in sex education curricula would be a good next step.

The most obvious category of values that public schools are prohibited from inculcating is the category of religious values. This proscription has an independent basis in the Establishment Clause, so the Court has not had to rely solely on more abstract First Amendment principles of freedom of thought and conscience. The Court has repeatedly held that religious values cannot be forced upon—or even suggested to—students in government-operated schools.[210]

The Supreme Court has also hinted at a narrow proscription of partisan political advocacy under the First Amendment. In *Board of Education v. Pico*,[211] for example, even the dissenters agreed that a school board could not remove all books by Democrats or all books by Republicans from the school library.[212] Presumably a similar principle would apply to curricular engagement with partisan politics, along the lines of the fairness doctrine proposed by scholars. It seems, unlikely, however, that the Court will have to do much work in this area. The political structure and close community supervision of schools should usually be sufficient to keep schools neutral on mat-

210 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (invalidating a policy regarding prayer at high school football games); Lee v. Weisman, 505 U.S. 577, 585–86 (1992) (holding that prayers at graduation ceremony impermissibly established religion); Wallace v. Jaffree, 472 U.S. 38, 41–42, 48 (1985) (striking down a statute calling for the public school day to include a period of silence for "meditation or voluntary prayer").

211 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

212 *Id.* at 870–71 ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students . . . ."); *id.* at 907 (Rehnquist, J., dissenting) ("I can cheerfully concede all of this.").

ters that are live political disputes.[213] First Amendment protection is much more likely to be needed to protect outliers and to articulate limits on imposing values that have broad community support.

A few lower courts and several scholars have also suggested an intersection of First and Fourteenth Amendment values that would proscribe public school endorsement of racism. The scholarly critiques have been aimed at both the hidden curriculum and any explicit endorsement of racist values, while courts so far have limited themselves to remedying the latter.

For example, David Burcham has proposed a First Amendment strategy for attacking racial bias in the hidden curriculum while avoiding the intent requirement of the Fourteenth Amendment.[214] He argues that school children have a First Amendment right not to be inculcated with racist values, even unintentionally.[215] De facto segregation, therefore, may not be remediable under the Fourteenth Amendment, but the racial message it conveys unconstitutionally inculcates children with racist values, and is thus subject to judicial remediation.[216]

Moving to the explicit curriculum, several scholars have argued that active promotion of white supremacy in the schools would be unconstitutional. Arons and Lawrence, for example, have suggested that a prohibition on racist advocacy flows from the Fourteenth Amendment itself, as interpreted in *Brown*.[217] *Brown*'s concern about the stigmatic harm of segregation would apply equally to racist advocacy in the classroom; in addition, such advocacy would impede desegregation since it would deter black children from attending the school.[218] Consistent with this theory, courts implementing *Brown* regularly considered curricular content as a gauge of whether a school had eliminated the vestiges of de jure segregation.[219] Other scholars have suggested that the proscription of racist values would arise from general First Amendment restrictions on inculcating values, arguing that schools may inculcate only a core of important, con-

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213 Admittedly, this statement may be overly optimistic, particularly in light of how many sex education programs treat controversial issues like abortion. *See supra* note 35.

214 David W. Burcham, *School Desegregation and the First Amendment*, 59 ALA. L. REV. 213 (1995).

215 *See id.* at 240.

216 *See id.* at 243–57.

217 *See* Arons & Lawrence, *supra* note 182, at 349–50.

218 *See generally* Arons & Lawrence, *supra* note 182; text accompanying notes 125–127.

219 *See* Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUST. 315, 327 (1999).

stitutionally sanctioned values, including the constitutional value of racial equality.[220]

Outside the context of remedial desegregation, however, direct claims of racially biased curricula have met with little success. In most cases, their failure is due to courts' distinction between teaching racism and teaching about racism. Under Fourteenth Amendment doctrine, the school's benign intent to do the latter—which courts presume—trumps any evidence regarding actual effects.[221] Contrary to Burcham's argument,[222] courts have generally assumed that free speech principles weigh *against* judicial restrictions on curricular material. Only rarely has a court found evidence of discriminatory intent sufficient to invalidate a curricular choice on Fourteenth Amendment grounds.[223] Even where they do, the reasoning may not translate well to sex education cases, for the reasons discussed previously.[224] First Amendment principles can help bridge this gap.

B. The First Amendment Frame

While some scholars have insisted that any imposition of values by the government threatens First Amendment principles, the Supreme Court's restrictions on values-imposition do not go nearly so far. The Court has indicated that inculcation of specific values may go much further than the minimum that is inherent in the existence of public schools. In *Ambach v. Norwick*, the Court explicitly endorsed the transmission of patriotic values as a legitimate function of public schools.[225] More recently, the Court has endorsed anti-drug proselytizing as part of the core mission of a public school.[226] In short, the Court has consistently suggested that schools *should* inculcate students with favorable opinions of democracy, American forms of governance, and some of our basic constitutional values—including,

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220 *See* Norman B. Lichtenstein, *Children, the Schools, and the Right to Know: Some Thoughts at the Schoolhouse Gate*, 19 U.S.F. L. REV. 91, 135–36 (1985) (using the First Amendment concept of group defamation to argue that schools should not be allowed to adopt curricular materials that defame racial, ethnic, or religious groups).

221 *See, e.g.*, Monteiro v. Temple Union High Sch. Dist., 158 F.3d 1022 (9th Cir. 1998); Shorter v. St. Cloud State Univ., No. Civ. 00-1314RHK/RLE, 2001 WL 912367 (D. Minn. Aug. 14, 2001); Grimes v. Sobol, 832 F. Supp. 704 (S.D.N.Y. 1993).

222 *See supra* text accompanying notes 214-216.

223 *See, e.g.*, Loewen v. Turnipseed, 488 F. Supp. 1138, 1154 (N.D. Miss. 1980) (finding intentional race discrimination in a school board's rejection of a particular textbook).

224 *See supra* Part II.D.

225 Ambach v. Norwick, 441 U.S. 68, 76–80 (1979).

226 Morse v. Frederick, 127 S. Ct. 2618, 2628 (2007).

importantly, Fourteenth Amendment values favoring racial equality.[227] It has also suggested that schools *may* endorse a wide range of other values, such as the value of not using drugs. Schools do so both through express instruction and through ritual and other appeals to students' emotions.[228] Thus, in contrast to the broad theories questioning the legitimacy of any government-sponsored inculcation of values, the current doctrinal landscape is best understood not as scrupulously avoiding all unnecessary indoctrination but as permitting indoctrination of values chosen by the state except in a few special cases. The scholarship discussed above raises a serious challenge to this complacency about the degree of indoctrination that is allowed in public schools. However, any effort to convince the Court to engage that challenge must offer the Court relatively modest first steps.

The sex stereotypes in sex education provide such a first step because traditional gender roles, like religious values, may not be entrenched by state action. The promotion of sex stereotypes can thus be judicially proscribed under the same approach developed for the Establishment Clause, known as the endorsement test.[229]

Scholars seeking to limit values inculcation in the public schools have frequently turned to the Establishment Clause as a model for a judicial standard.[230] Other scholars have also noted the conceptual similarity between the constitutional principles that govern sex and religion. In both realms, we celebrate diversity while seeking equality: "[T]he central aspiration of the law in each instance may be stated in broadly similar language: to protect free exercise, whether of religion or life choices; and to proscribe governmental imposition of conventions, establishments of religion or sex-role stereotypes."[231] David Cruz has elaborated on this similarity and argued that the anti-stereotyping principles of the Equal Protection Clause requires both that gender be "disestablished" and that individuals have a right to

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227 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 823 (Breyer, J., dissenting).

228 On ritual and other emotional persuasion, see White, *supra* note 197.

229 *See* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (blending the endorsement test with the *Lemon* test); Van Orden v. Perry, 545 U.S. 677, 682–83 (2005) (using the endorsement test).

230 *See, e.g.*, Redish & Finnerty, *supra* note 182, at 106 ("In determining which activities inherently cross the constitutional line, we may draw a rough analogy to the Establishment Clause jurisprudence. As the Supreme Court has interpreted that Clause, schools may discuss religious issues; they are, however, prohibited from promoting either particular religions or the idea of religion.").

231 KIRP, YUDOF & FRANKS, *supra* note 192, at 120–21.

"free exercise" of gender.[232] The problem of stereotyping in sex education, which sits at the intersection of sex equality and freedom of conscience, is thus highly amenable to analysis through Establishment Clause principles.

Establishment Clause jurisprudence has been forged largely in the educational context, so courts are practiced in assessing claims of curricular bias.[233] Using the Establishment Clause as a model, courts should hold that public schools may not endorse adherence to stereotypical gender roles, just as they may not endorse adherence to a particular religious belief or practice.

The Establishment Clause is ideal for bridging the gap between the Supreme Court's condemnation of white supremacy and its more tepid proscriptions on sex stereotypes. Religious values are not contrary to the Constitution as is white supremacy; it is the entrenchment of religion by state action that is contrary to the Constitution. An Establishment Clause approach thus sits more comfortably with the Court's simultaneous "celebration" of sex difference and prohibition on using the power of the state to entrench current statistical differences.[234] Endorsing sex stereotypes in sex education entrenches them through the mechanisms described in Part I.B. The Equal Protection Clause clearly prohibits state entrenchment of sex stereotypes, and the red herring of truth or falsity drops out of the equation.[235] To the

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232 David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002).

233 Only the issue of Christmas decorations rivals education as an object of attention under the Establishment Clause.

234 *See The VMI Case*, 518 U.S. 515, 533 (1996).

235 Resort to the Establishment Clause's endorsement test in the sex education context does not constitute an end-run around the intent requirement of the Equal Protection Clause. For comparison, in the context of racial segregation, David Burcham has proposed a First Amendment approach to address the racist effects of facially neutral state action. Burcham used the *Lemon* test rather than the endorsement test; at the time he wrote, the endorsement test had not yet reached the prominence it enjoys today. The *Lemon* test expressly goes beyond the intent requirement of equal protection by prohibiting state action with the purpose *or primary effect* of promoting religious doctrine. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Burcham, however, erroneously argues that the *Lemon* test is met because de facto segregation is *primarily caused* by state action. Burcham, *supra* note 214, at 243. The fact that Y is primarily caused by X does not establish that Y is the primary effect of X. (Y is de facto segregation; X is the state's facially race-neutral action that produces de facto segregation.) For the reasons discussed in the text, the endorsement test better serves Burcham's purpose. Moreover, under equal protection doctrine the intent requirement attaches to the classification, not to its invidiousness. The legislature in *Craig v. Boren*, 429 U.S. 190 (1976) (striking down a sex classification with respect to the purchase of low-alcohol beer), did not need to intend invidious discrimination to trigger intermediate scrutiny: it only needed to intend to classify on the basis of sex. The intent to classify on the basis of sex is proven each time a sex education curriculum makes separate recommendations to girls and boys. *See supra* Part II.A.

extent that an Establishment Clause-based analysis highlighted the prescriptive quality of gender scripts, rather than stereotypes as overgeneralizations, it might also push the jurisprudence of sex classifications toward a greater focus on hierarchy and subordination, rather than fair treatment of statistical outliers.

The endorsement test offers several advantages in this context, as compared to the usual doctrinal script of equal protection. The test asks whether a reasonable observer would construe the state's action as an endorsement of religion.[236] It thereby elides baseline problems and limits the scope of judicial review. The test inherently incorporates context, such as the difference between discussing sex differences in Psychology class and advocating sex-differentiated roles in sex education. It also quite cleverly circumvents post-modern objections to attributing an inherent meaning to a text. Instead, the endorsement test asks how a reasonable observer in the relevant speech community would understand the text. While there would be some doctrinal work to be done to adapt the endorsement test to the evaluation of sex stereotypes, the basic theory of the test is well-suited to the task.

Some of that doctrinal work involves defining the scope of the prohibition, which should be relatively narrow. That is, a public school is prohibited from endorsing archaic gender scripts that contain the same stereotypes that government is forbidden to entrench in other contexts. The school is not, however, forbidden from taking positions on matters pertaining to sex roles or, especially, from endorsing the constitutional value of sex equality. The approach suggested here thus differs from David Cruz's theory of disestablishing gender. Cruz suggests that full disestablishment would require government neutrality between traditional sex roles and other ideologies of gender.[237] Cruz's approach may be preferable in contexts where the state acts coercively or distributes rights and benefits. In the educational context, however, it would be anomalous to require the state to be neutral on the question of equality, a matter on which the Constitution itself is not neutral.[238] The constitutional principles against

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236 *See* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (blending the endorsement test with the *Lemon* test); Van Orden v. Perry, 545 U.S. 677 (2005) (using the endorsement test).

237 Cruz, *supra* note 232, at 1009.

238 There are already suggestions floating around that say the existence of women's studies programs and Afrocentric curricula are discriminatory. *See* Corey Kilgannon, *Lawyer Files Antifeminist Suit Against Columbia*, N.Y. TIMES CITY ROOM (Aug. 18, 2008, 3:16 PM), http://cityroom.blogs.nytimes.com/2008/08/18/lawyer-files-antifeminist-suit-against-columbia/ (reporting the filing of a lawsuit charging Columbia University with sex discrimination for having a women's studies program); *see also* Steven Siegel, *Ethnocentric*

endorsing or condemning a particular religious belief do not prevent public schools from teaching evolution just because it is inconsistent with some religious beliefs. Similarly, the constitutional principle against entrenching archaic gender scripts does not prevent governments from fulfilling their Fourteenth Amendment obligation to seek equality for all citizens. The means for doing so may include promoting the ideal of equality through instruction in public schools.

Finally, the analogy to the Establishment Clause also makes an important point regarding the appropriate scope of judicial relief in a challenge to stereotyping in sex education. It might seem an appropriate remedy to give students the right to opt out of sex education courses that promote sex stereotypes, as the Supreme Court did with the Pledge of Allegiance in *West Virginia State Board of Education v. Barnette*.[239] This accommodation might seem especially appropriate in sex education because there is an existing custom of opt outs: most states allow parents to opt their children out of comprehensive sex education classes that include information about contraception and certain other subjects. Parents are generally notified in advance of the content that is deemed controversial and can follow a procedure to remove their children from the class. By contrast, we have been unable to find any example of a school giving parents the right to opt out of "abstinence-only" classes, where sex stereotypes appear to be the most widespread. There would be an appealing parity in allowing parents who object to opt out of the stereotypes, just as other parents are allowed to opt out of comprehensive classes. A right to opt out could be useful in raising awareness of the problem and leading to change through democratic processes.

An opt-out right, however, would not be an appropriate remedy for the endorsement of sex stereotypes in the classroom. The opt-out approach would lend inappropriate credence to the view that public school curricula are a menu from which parents can pick and choose. It would also suggest that opposition to sex stereotypes is an idiosyn-

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Public School Curriculum in a Multicultural Nation: Proposed Standards for Judicial Review, 40 N.Y.L. SCH. L. REV. 311, 351–56 (1996) (arguing that Afrocentric programs are unconstitutional because they promote segregation). Siegel's argument is based on several dubious assumptions, including: that the desire to meet the needs of African American students is equivalent to intent to segregate, for purposes of the rigorous intent requirement of the Equal Protection Clause; that such segregation causes the same kind of intangible harm that was denounced in *Brown v. Board of Education*, 347 U.S. 483 (1954); and that an Afrocentric curriculum is deviant and racially biased, while a Eurocentric curriculum is neutral.

239 319 U.S. 624, 642 (1943).

cratic personal belief rather than a constitutional value.[240] Finally, an opt-out right would inappropriately locate the right in the parent rather than the child. While as a practical matter a child would need a parent's assistance to challenge improper endorsement of sex stereotypes, the resulting court decision would accrue to the benefit of all children in the class. Parents cannot consent to have the government promote anti-constitutional values in their children, whether those values be sex stereotypes or religious beliefs.

Notably, the Supreme Court has never suggested that a right to opt out would cure Establishment Clause problems in public school classrooms.[241] In *Barnette*, an opt out was appropriate because the value the school sought to instill was itself permissible, but the student was nonetheless entitled not to personally affirm it.[242] The case against sex stereotypes in sex education rests primarily on the Fourteenth Amendment prohibition on entrenchment of sex stereotypes. The First Amendment's endorsement test is useful as a model, developed in the main context in which the Court deals with government entrenchment of impermissible values. Opt outs would not be an appropriate solution to government endorsement of values contrary to the Constitution.

CONCLUSION

The problematic stereotypes in sex education curricula consist primarily of normative endorsement of traditional gender roles. These endorsements are likely to have real and pernicious effects on the students who are exposed to them. Such entrenchment of tradi-

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240 For these reasons, there is not generally a right to opt out of educational activities that conflict with personal beliefs. See Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1062, 1070 (6th Cir. 1987) (rejecting a free exercise challenge to public school curricular materials to which the plaintiffs objected because, among other things, the materials asked children to make moral judgments and described women who had been recognized for achievements outside the home). Before *Employment Division v. Smith*, 494 U.S. 872 (1990), there appeared to be an exception to this rule, allowing some opt outs under the Free Exercise Clause, but *Smith* calls that practice into question. While courts have been appropriately skeptical of free exercise claims to selectively opt out of the general curriculum, the values—and conduct—shaping aims of sex education probably warrant the greater consideration of parental values that many schools provide.

241 The optional nature of the activity has sometimes been a factor in analyzing religious activity at extra-curricular activities that take place separately from the regular school day, such as football games and graduation ceremonies. Even in those contexts, the Court has been highly skeptical of arguments that rely on the optional nature of the activity to relax the requirements of the Establishment Clause.

242 *Barnette*, 319 U.S. 624 at 631 (stating that the state may seek to inspire patriotism through education but may not compel a student to declare a belief).

tional gender roles by the state is contrary to the Fourteenth Amendment. Any legal challenge, however, should propose a judicial standard modeled on the First Amendment's endorsement test, rather than rely solely on existing Fourteenth Amendment case law in a way that would incorrectly imply that the challengers sought to suppress factually true information for the sake of ideology.