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

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TEACHING VALUES, TEACHING STEREOTYPES: SEX ED 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 Ed 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 Ed 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 constitutional principles.

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INTRODUCTION

What did your children learn in school today? If your child takes Sex Ed, 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.
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> 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.[3]

This story is part of a popular Sex Ed curriculum that is widely used in public schools and was federally funded for many years.[4] For three decades, the federal government has funded Sex Ed programs that advocate "abstinence-only until marriage," to the exclusion of any

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[3] *Blue Balls for the Red States*, HARPER'S MAGAZINE, at 22 (Feb. 2005).

[4] *See* Sexuality Information and Education Council of the United States, *Community Action Toolkit: Curriculum and Speaker Reviews*, available at www.communityactionkit.org (hereinafter "SIECUS Reviews"), "Choosing the Best SOULMATE"; see also www.choosingthebest.com (touting the number of students reached and offering information on obtaining federal grants to underwrite the program). As of 2010, the federal government is no longer funding this kind of program. *See infra*, notes 22-32 and accompanying text.

instruction on other ways to prevent pregnancy or avoid sexually transmitted diseases (STDs).[5] 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.[6]

Sex Ed classes aim to do much more than teach students facts, skills, or analytical methods. Unlike History or Literature or Math or even Shop or Home Economics, Sex Ed 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.[7] 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.[8] 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*.[9]

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.[10] While the effect of this policy reversal is not yet clear, most likely a substantial minority of states will adhere to abstinence-only

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[5] Federally funded programs may discuss such methods only to point out failure rates. *See infra*, note 19 (quoting the federal definition of a qualified abstinence only program).

[6] *See infra*, text accompanying notes 42-71. *See generally* SIECUS Reviews, *supra* note _; Julie F. Kay, *Sex, Lies, and Stereotypes: How Abstinence-Only Programs Harm Women and Girls* (2008) (monograph published by NOW Legal Momentum); *The Content of Federally Funded Abstinence-Only Education Programs*, Minority Staff Report, U.S. House of Reps. Committee on Government reform (prepared for Rep. Henry A. Waxman (hereinafter the Waxman Report).

[7] *See infra*, text accompanying notes 58-64.

[8] *See infra*, text accompanying notes 46-57.

[9] Jennifer L. Greenblatt, *Note: "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. ON C.L. & C.R. 1 (2008))

[10] *See* Sarah Kliff, *The Future of Abstinence*, NEWSWEEK (Oct. 27. 2009).

programs at their own expense.[11] In addition, however, 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 at this juncture is to infuse the comprehensive programs that will be receiving federal funds with as much as that ideology as possible. Given the seemingly universal acceptance of the "abstinence" banner as at least a large component of all Sex Ed, including comprehensive programs, that should not be difficult.[12]

Feminists who object to rank sexism in public school curricula have begun pondering whether a remedy might lie in the equal protection clause.[13] There are, however, important gaps in the budding feminist analysis of Sex Ed as Sexism 101. The most detailed extant analysis of biased Sex Ed curricula from a legal feminist perspective is an issue brief published by the American Constitution Society (ACS).[14] While well-argued in several respects, the brief is dangerously over-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. In addition, this over-reaching overlooks the great lesson of equal protection jurisprudence since the civil rights movement: anything you argue can and will be used

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[11] *See* Kliff, *supra* note 10.

[12] Opponents of abstinence-only Sex Ed have started describing their preferred alternative as "abstinence plus" rather than "comprehensive" Sex Ed. *See, e.g.,* Nicholas D. Krostoff, *Bush's Sex Scandal*, N.Y. TIMES at A21 (2/16/05).

[13] *See, e.g.* Cornelia Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 946-62 (2007); Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1257-61 (2007); Greenblatt, *supra* note 9; Danielle LeClair, *Comment: Let's Talk About Sex Honestly: Why Federal Abstinence-Only Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overturned*, 21 WIS. WOMEN'S L.J. 291 (2006); Michelle Fine and Sara I. McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 EMORY L.J. 993 (2007); Mary Anne Case, *Feminist Fundamentalism and Constitutional Citizenship*, *in* GENDER EQUALITY: DIMENSIONS OF WOMEN'S CITIZENSHIP 107, 116-17 (Linda C. McClain & Joanna L. Grossman, eds. 2009).

[14] Bonnie Scott Jones & Michelle Movahed, *Lesson One: Your Gender Is Your Destiny—The Constitutionality of Teaching Sex Stereotypes in Abstinence-Only Programs* (2008) (hereinafter ACS Brief).

against you. That is, equal protection doctrine is symmetric: mention colorblindness in *Brown*,[15] and you get *Parents Involved*.[16] There are already suggestions floating around that, say, the existence of women's studies programs and Afrocentric curricula are discriminatory.[17] This landscape calls for precision and depth of argument. 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 protection 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 Ed 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 describe the problem of stereotyped sex education, for two reasons: First, the role of stereotypes in prior sex equality cases is very different from their role in an educational environment. Second, there are legitimate concerns about institutional competence in assessing the normative viewpoints espoused in public schools. These concerns are not insurmountable, but they counsel caution for courts venturing into this area.

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[15] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregated schools were unconstitutional).

[16] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (holding that school attendance plans that classified students on the basis of race in order to ensure integration were unconstitutionality).

[17] *See* Corey Kilgannon, *Lawyer Files Antifeminist Suit Against Columbia*, N.Y. TIMES CITY ROOM, Aug. 18, 2008, 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); Steven Siegel, *Ethnocentric Public School Curriculum in a Multicultural Nation: Proposed Standards for Judicial Review*, 40 N.Y.L. Sch. L. Rev. 311 (1996). Siegel argues that Afrocentric programs are unconstitutional because they promote segregation. Siegel, *supra*, at 351-56. This 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.

Part III connects the Sex Ed 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 Ed 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 Ed is particularly blatant, it does not present more difficult questions about subtle and unintended bias. Courts can borrow from first amendment principles to assess the teaching of stereotypes in a manner that is within their current institutional competence. 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, archaic sex stereotypes should be added to that short list of categories. Public schools should not be permitted to endorse sex stereotypes and traditional sex roles as normatively desirable.

I. SEX STEREOTYPES IN SEX ED

Sex Ed 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 ED

Sex education in the United States is taught in two main forms, known as comprehensive sex education and abstinence-only sex education. Comprehensive Sex Ed typically promotes abstinence as a positive choice, but it also offers students accurate information on contraception and the prevention of STDs.[18] On the other hand,

[18] According to 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

abstinence-only Sex Ed advises students to completely abstain from sex until marriage and excludes any discussion of contraception or prevention of STDs, except to discuss failure rates.[19]

Those who support abstinence-only Sex Ed claim that it fosters a sense of morality among adolescents, works to keep sex within marriage, and assists teens in avoiding 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.[20]

Those who support comprehensive Sex Ed argue that it provides teens with all of the information they need to make their own educated decisions about sexual activity. They 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

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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." SIECUS, *What Are the Goals of School-Based Sexuality Education?*, available at www.siecus.org.

[19] Federal law defines 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." 42 U.S.C. § 710(b)(2).

[20] *See, e.g.,* Robert E. Rector, Melissa G. Pardue, and Shannon Martin, *What Do Parents Want Taught in Sex Education Programs* (Jan. 28, 2004), available at www.heritage.org/research/abstinence (arguing in favor of abstinence education); *see also* Kliff, *supra* note 10 (quoting advocates of abstinence).

inculcate teens with gender stereotypes and negative attitudes about sex.[21]

Until 2010, three federal programs supported and funded abstinence-only Sex Ed programs: the Adolescent Family Life Act[22]; Title V block grants[23]; and direct grants for Community Based Abstinence Education (CBAE).[24] The Adolescent Family Life Act was enacted in 1981, earmarking a portion of the Health and Human Services budget for abstinence-only education.[25] 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.[26] 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 Programs of Regional and National Significance."[27]

The majority of schools that sought funding for abstinence-only programs were in the south, with over half of all funding ($82,267,900) allocated to sixteen states.[28] Twenty-two mostly northern states refused to participate in the Title V abstinence-only programs,[29] and seven states refused to accept any sort of federal support for abstinence-only education.[30] The continued rejection of these funds by nearly half the states sent a striking message during a time of severe economic downturn, as many states could have used

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[21] *See generally* SIECUS Community Action Kit, www.communityactionkit.org (arguing in favor of comprehensive Sex Ed).
[22] 42 U.S.C. §§ 300z-z-10.
[23] 42 U.S.C. § 710.
[24] 42 U.S.C. § 1310.
[25] Public Health Services Act, Pub. L. 97-35 (1981).
[26] Personal Responsibility and Work Opportunity Reconciliation Act, § 912, Pub. L. 104-193, 110 Stat. 2354 (1996) (amending Title V of the Social Security Act, 42 U.S.C. § 710).
[27] U.S. Dep't Health & Human Servs., *Fact Sheet: Community-Based Abstinence Education Program*, available at www.acf.hhs.gov/programs/fysb/content/abstinence/community.htm.
[28] *See* Kay, *supra* note 6, at 37.
[29] 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. Kay, *supra* note 6, at 37.
[30] They are Delaware, Idaho, Minnesota, Montana, Rhode Island, Vermont, and Wyoming. Kay, *supra* note 6, at 37.

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 Ed programs.[31] Any new funding for comprehensive Sex Ed will surely be welcomed by the states that previously turned down federal money rather than teach abstinence-only. By contrast, the states that supported abstinence-only are currently scrambling to secure private funding to keep those programs afloat.[32] 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 reversal of federal funding policy comes in response to increasingly widespread complaints about abstinence-only programs for factual inaccuracy, religious content, and gender stereotypes. 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.[33] The National Organization for Women (NOW) issued a report along similar lines in 2008,[34] and the Sexuality Information and Education Center of the United States (SIECUS) has an ongoing project of reviewing Sex Ed curricula with special attention to these and other flaws.[35] 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 Ed programs pertain to overstating the dangers of sexual activity and understating the effectiveness and safety of contraception and methods for avoiding and treating STDs.[36] Programs with these sorts

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[31] Sharon Jayson, *Obama Budget Cuts Funds for Abstinence-Only Sex Education*, www.usatoday.com/news/health/2009-05-11-abstinence-only.N.htm (5/11/09).
[32] Kliff, *supra* note 10 (describing efforts to find alternative funding).
[33] Waxman Report, *supra* note 6.
[34] Kay, *supra* note 6.
[35] SIECUS Reviews, *supra* note 4.
[36] *See* Waxman Report, *supra* note 6, at 9-10, 12 (summarizing inaccuracies in several programs); SIECUS Reviews, *supra* note 4 (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 says nothing about abortion except that it inclines women to suicide. SIECUS Reviews, *supra* note _, "Sex Respect."

of inaccuracies appear to have consciously selected fear and shame, rather than accuracy, as their pedagogical strategy.[37] "Sexual Health Today," for example, claims that touching another person's genitals "can result in pregnancy."[38] Another program purports to inform students of the symptoms of common STDs. The symptoms listed, however, are those of advanced disease, which makes STDs frightening, rather than the early symptoms that would enable a person to detect and treat an illness.[39] Many programs discuss the failure rate of condoms without disclosing that failure is often a function of user error.[40] One curriculum teaches students that mutual masturbation, french kissing, and receiving a blood transfusion in the United States would put them "at risk" for contracting HIV and AIDS.[41]

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. "This," says the teacher, "is your 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.[42] 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

[37] *See* SIECUS Reviews, *supra* note 4 (describing most of the reviewed programs as "fear-based").
[38] Waxman Report, *supra* note 6, at 12.
[39] *See* SIECUS Reviews, *supra* note 4, "Why kNOw?"
[40] *See* SIECUS Reviews, *supra* note 4 (noting this flaw in several programs).
[41] SIECUS Reviews, *supra* note 4, "WAIT (Why Am I Tempted?)."
[42] SIECUS Reviews, *supra* note 4, "WAIT (Why Am I Tempted?)."

> 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.[43]

And for those middle schoolers with a good enough English teacher 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 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.[44]

Associations between sexuality and contamination or poor character may also be racially specific. According to the NOW 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 African American women are depicted as sexually aggressive drug users, and 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.[45]

In many Sex Ed 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

[43] SIECUS Reviews, *supra* note 4, "Reasonable Reasons to Wait."
[44] SIECUS Reviews, *supra* note 4, "Choosing the Best PATH."
[45] Kay, *supra* note 6, at 21.

> men learn to balance in a relationship by keeping physical intimacy from moving forward too quickly.[46]
>
> [G]uys think so much more about sex because of testosterone.[47]
>
> 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.[48]
>
> 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. Asking herself what signals she is sending could save both sexes a lot of heartache.[49]
>
> How can girls help boys become virtuous?[50]

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."[51] Whatever these "big problems" might be, it is clear that male responsibility is not part of the equation.

Shockingly, 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?"[52] Or, 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:

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[46] Kay, *supra* note 6, at 39.
[47] Kay, *supra* note 6, at 20.
[48] Kay, *supra* note 6, at 20.
[49] Kay, *supra* note 6, at 20.
[50] SIECUS Reviews, *supra* note 4, "HIS (Healthy Image of Sex)."
[51] SIECUS Reviews, *supra* note 4, "Why kNOw?"
[52] SIECUS Reviews, *supra* note 4, "Choosing the Best WAY."

> 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.[53]

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."[54] 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.[55]

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.[56]

> if Kendra respected herself, would she have *given herself* to Antonio without his commitment to her?[57]

Sex Ed curricula often reach well beyond the topics of sexual activity and reproductive biology to address lifelong gender roles.[58] Many Sex Ed programs prescribe proper roles for females in males in dating relationships and in marriage:

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[53] SIECUS Reviews, *supra* note 4, "HIS (Healthy Image of Sex)."
[54] SIECUS Reviews, *supra* note 4, "WAIT (Why Am I Tempted?)."
[55] SIECUS Reviews, *supra* note 4, "Game Plan"; see also SIECUS Reviews, *supra* note 4, "ASPIRE" (same story but with Tammy and Shane).
[56] SIECUS Reviews, *supra* note 4, "Sex Respect" (emphases added).
[57] SIECUS Reviews, *supra* note 4, "Choosing the Best LIFE" (emphasis added).
[58] *See* Waxman Report, *supra* note 6, 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.").

> 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.[59]

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

Five Major Needs of Women and Men in Marriage

Affection	Sexual Fulfillment
Conversation	Recreational Companionship
Honesty and Openness	Physical Attractiveness
Financial Support	Admiration
Family Commitment	Domestic Support[60]

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.[61]

> 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 brain at once, so they often experience feelings and emotions as part of every situation.[62]

> 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.[63]

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?"[64]

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[59] Waxman Report, *supra* note 6, at 17.
[60] Answer can be found at SIECUS Reviews, *supra* note 4, "WAIT (Why Am I Tempted?)."
[61] Waxman Report, *supra* note 6, at 16.
[62] Waxman Report, *supra* note 6, at 17.
[63] SIECUS Reviews, *supra* note 4, "Choosing the Best SOULMATE."
[64] SIECUS Reviews, *supra* note 4, "Reasonable Reasons to Wait."

A final, pervasive stereotype in many Sex Ed classes is the complete privileging of heterosexual vaginal intercourse as virtually synonymous with "sex" as an activity.[65] 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.[66] 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 described merely as "Other Stuff."[67] Many curricula overwhelmingly emphasize marriage as the only acceptable context for sex without even acknowledging that gay and lesbian students will be legally barred from marrying in most states.[68] Same-sex relationships are ignored or, if mentioned, plainly disapproved.[69]

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.[70] More generally, a curriculum might require students to prepare "personal behavior contracts" describing how they will conform their personal lives more closely to the government-sponsored value system in which they have been instructed.[71]

B. FACTUAL HARM

The type of programming described above may be affecting teens in ways that are yet to be explored. The psychological effects

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[65] *See* SIECUS Reviews, *supra* note 4, all reviews.
[66] *See* SIECUS Reviews, *supra* note 4, all reviews.
[67] *See* SIECUS Reviews, *supra* note 4, "Choosing the Best LIFE."
[68] *See* SIECUS Reviews, *supra* note 4, all reviews; *see also* 42 U.S.C. § 710(b)(2) (defining the requirements of abstinence-only programs for purposes of federal funding, with a strong emphasis on marriage).
[69] *See* SIECUS Reviews, *supra* note 4, all reviews.
[70] Research has found that these pledges are highly ineffective and that they lead to unprotected sex. Teens who took part in a virginity pledge were found to be one-third less likely to use contraception when they engaged in sexual activity. *See* SIECUS Reviews, *supra* note 4, "Why kNOw?" Rates of sexually transmitted disease have been found to be higher in communities where over twenty percent of the population had taken part in virginity pledges. P. Bearman & H. Brückner, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. OF ADOLESCENT HEALTH 271 (2005).
[71] State of Tennessee, Curriculum Standards for Wellness Education (on file with author).

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.[72] 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.[73]

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[72] For discussions of the phenomenon of priming, see generally T. E. Higgins, W.S. Rholes, & C.R. Jones, *Category Accessibility and Impression Formation*, 13 J. EXPERIMENTAL SOCIAL PSYCH., 141-154 (1977); J. A. Bargh, M. Chen, & L. Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOCIAL PSYCH., 230-244 (1996); R. W. Holland, M. Hendriks, & H. Aarts, *Smells Like Clean Spirit*, 16 PSYCH. SCI., 689-693 (2005).

[73] 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 would be 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 72.

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 72.

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, to recall 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 72.

Sex Ed 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 Ed 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 forming judgments of others.[74] Perceptions of behaviors, traits, and roles of women and men are often influenced by societal expectations for what is considered to be gender appropriate.[75] 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.[76]

Since the mid- to late nineteenth century, gender role norms with regard to sexuality have upheld a double standard in which women are expected to be chaste and men are given more allowances when it comes to their sexual behavior.[77] This double standard is reflected in the Madonna-Whore dichotomy, in which women are most often categorized as good and sexually chaste, or bad and sexually promiscuous. This dichotomy may lead young women and girls to fear being perceived as sexually promiscuous,[78] as this could

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[74] *See* M.R. Banaji & A.G. Greenwald, IMPLICIT STEREOTYPING AND PREJUDICE, IN THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM vol. 7, 55-76 (eds. M. P. Zanna & J. M. Olson 1994).

[75] *See* K. Deaux and M.E. Kite, *Thinking About Gender, in* ANALYZING GENDER: A HANDBOOK OF SOCIAL SCIENCE RESEARCH 92-117 (eds. B.B. Hess and M.M. Paludi 1985).

[76] *See* N. Costrich, L. Feinstein, L. Kiddler, J. Marecek, & L. Pascale, L., *When Stereotypes Hurt: Three Studies of Penalties for Sex-Role Reversals*, 11 J. OF EXPERIMENTAL SOCIAL PSYCH., 520 (1975); D.W. Rajecke, R. De Graaf-Kaser, & J.L. Rasmussen, *New Impressions and More Discrimination: Effects of Individuation on Gender-Label Stereotypes*, 27 SEX ROLES 171 (1992).

[77] *See* F.L. DENMARK, V.C. RABINOWITZ, & J.A. SECHZER, ENGENDERING PSYCHOLOGY: WOMEN AND GENDER REVISITED (2nd ed. 2005).

[78] See D.L. TOLMAN, DILEMMAS OF DESIRE (2002).

be detrimental for their reputations. Instead, these young women might decide to perpetuate gender role stereotypes and adhere to traditional gender roles in order maintain their reputations. Additionally, previous 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.[79] Sex Ed 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 Ed 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.[80] Premarital sex is often compared to harmful, immoral, and unlawful behavior. It is associated with "poverty, heartache, disease, and even DEATH."[81]

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."[82] Awareness of the stereotype and the possibility of judgment based on 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.[83] Women who are reminded of this stereotype just before taking a math test will generally perform substantially worse than if they had

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[79] R.E. Fromme & C. Emihovich, *Boys Will Be Boys: Young Males' Perceptions of Women, Sexuality and Prevention*, 30 EDUC. & URBAN SOCIETY 172 (1998); M.B. Oliver & C. Sedikides, *Effects of Sexual Permissiveness on Desirability of Partner as a Function of Low and High Commitment to Relationship*, 55 SOCIAL PSYCH. Q. 321 (1992).
[80] *See* SIECUS Reviews, *supra* note 4, "Why kNOw?"
[81] SIECUS Reviews, *supra* note 4, "Why kNOw?"
[82] Steven J. Spencer, Claude M. Steele, and Diane M. Quinn, *Stereotype Threat and Women's Math Performance*, 34 J. EXPERIMENTAL SOCIAL PSYCH. 4, 5 (1999).
[83] *See* Spencer et al., *supra* note 82, at 6 (citing studies documenting the existence of this stereotype).

not been "primed" with the stereotype.[84] Men primed with the same stereotype may perform better than they otherwise would have.[85] 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.[86] 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 Ed is right before Math, and the Sex Ed teacher promotes stereotypes about female and male aptitudes for mathematical 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 Ed 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 Ed 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 research could illuminate what effects curricular choices may have on an individual's belief in gender role stereotypes and the individual's

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[84] Spencer et al., *supra* note 82, at 10-14; see also Toni Schmader, *Gender Identification Moderates Stereotype Threat Effects on Women's Math Performance*, 38 J. EXPERIMENTAL SOCIAL PSYCH. 194 (2002) (finding that the degree of women's gender identification affects their susceptibility to stereotype threat).

[85] Spencer et al., *supra* note 82, at 13.

[86] *See* Gregory M. Walton and Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCH. SCIENCE 1132 (2009); Lawrence J. Stricker and Isaac I. Bejar, *Test Difficulty and Stereotype Threat on the GRE General Test*, GRE Board Research Report No. 96-06R (Educational Testing Service 1999); Claude M. Steele and Joshua Aronson, *Stereotype Threat and the Intellectual Task Performance of African Americans*, 69 J. PERSONALITY & SOCIAL PSYCH. 797 (1995); Irwin Katz, S. Oliver Roberts, and James M. Robinson, *Effects of Task Difficulty, Race of Administrator, and Instructions on Digit-Symbol Performance of Negroes*, 2 J. PERSONALITY & SOCIAL PSYCH. 53 (1965) (finding effects of the race of the test administrator on performance).

attitudes toward sex in general. It is predicted that those who undergo curricula slanted towards sex biases would hold greater beliefs in gender role stereotypes and more negative attitudes toward sex, as compared to those who receive accurate, non-stereotyped Sex Ed.

C. LEGAL HARM

The additional research advocated above 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 Ed constitutes a sex classification of the students for purposes of equal protection analysis. This argument stands on its own terms, but it is admittedly somewhat novel among equal protection cases, which typically deal 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 Ed programming does not, for the most part, depend on empirical psychological evidence. The government may not promote a particular religious belief even if its promotional efforts are unsuccessful. As we shall see, this establishment clause analogy is an apt one, and the same principle should apply to the promotion of sex stereotypes.[87]

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.[88] The "Why kNOw" program also uses religious language and biblical verses and stories in its abstinence-only curriculum.[89] "Why kNOw?" also refers students to outside religious organizations which they may join and in which they may take a virginity pledge. Within the virginity pledge, students are asked to commit to God, to themselves, to their family and friends, to

[87] *See* infra, Part III.B.
[88] SIECUS Reviews, *supra* note 4, "Sex Respect."
[89] SIECUS Reviews, *supra* note 4, "Why kNOw?"

their future mate, and to their future children that they will retain their virginity until the day in which they enter a "biblical marriage."[90] Unsurprisingly, the establishment clause has been the most frequent basis for legal challenges to programs receiving federal funds earmarked for abstinence-only education.[91]

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.[92] A few lawsuits have challenged abstinence-only programs under state laws requiring Sex Ed to be accurate and/or neutral.[93]

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.[94] The equal protection issue has received only passing commentary in legal scholarship.[95] Therefore, this Article carves out the issue of sex stereotypes and

[90] SIECUS Reviews, *supra* note 4, "Why kNOw?"
[91] *See* Kay, *supra* note 6, at 38-39.
[92] *See generally* Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 WOMEN'S RTS. L. REP. 27 (2002); Sarah Smith Kuehnel, *Abstinence-Only Education Fails African American Youth*, 86 WASH. U. L. REV. 1241 (2009); cf. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 882 (1992) (1992) (holding that informed consent requirements for abortion were consistent with the right to privacy, but suggesting that this holding was contingent on the accuracy of the information presented).
[93] *See* Kay, *supra* note 6, at 38-39.
[94] *See generally, e.g.,* Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J. LAW & FEMINISM 495 (2002); Gary J. Simson & Erika Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 31 S. CAL. REV. L. & WOMEN'S STUD. 265 (2000); 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).
[95] *See* sources cited *supra*, note 13.

equal protection, treating that issue without regard to the religious overtones of the gender roles being promoted.[96]

Sex bias in school curricula has been on feminist radar screens for many years.[97] As a form of sex discrimination in education, it arguably should have been addressed by Title IX of the Civil Rights Act.[98] However, when the Department of Health, Education, and Welfare promulgated regulations to implement Title IX, it created a loophole. Over the objections of feminist organizations, the Department declared that "title IX does not reach the use of textbooks and curricular materials on the basis of their portrayals of individual in a stereotypic manner or on the basis that they otherwise project discrimination against persons on account of their sex."[99] The kind of instruction 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 Ed classes first received widespread attention as a result of the Waxman Report.[100] The report highlighted gender bias as a pervasive feature of many abstinence-only programs. As noted above, similar reports have been issued by NOW and SIECUS.[101] In 2007, Cornelia Pillard brought this issue to the attention of the legal academy in a symposium at

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[96] 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. Community Sch. Dist., 393 U.S. 503 (1969), and Morse v. Frederick, 127 S. Ct. 2618 (2007)); teachers' intellectual and free speech rights (see generally Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 652 647-53 (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)); or censorship in school libraries (see Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982)).

[97] *See* Beverly J. Hodgson, *Sex, Texts, and the First Amendment*, 5 J. Law-Educ. 173, 175-79 (1976) (surveying the literature on gender bias in curricular materials); Carol Amyx, *Comment, Sex Discrimination: The Textbook Case*, 62 CAL. L. REV. 1312, 1312-13 (1974); 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).

[98] 42 U.S.C. § 1681.

[99] 40 Fed. Reg. 24135 (1975).

[100] Waxman Report, *supra* note 6.

[101] Kay, *supra* note 6 (NOW); SIECUS Reviews, *supra* note 4.

Emory Law School.[102] 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 Ed curriculum.[103] Susan Appleton has also recently described a vision of a feminist approach to sex education.[104] 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 Ed in the way either Pillard or Appleton describes, and no 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 endorsement test used in establishment clause cases.[105]

Pillard's article prompted a few efforts to elaborate the doctrinal basis for challenging sex stereotypes in Sex Ed, most prominently in an Issue Brief published by the American Constitution Society (ACS).[106] These efforts overlooked Pillard's suggestion of a connection to establishment clause cases, relying on a pure fourteenth amendment approach.[107] 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.[108] 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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[102] Pillard, *supra* note 13, at _.
[103] Pillard, *supra* note 13, at _.
[104] Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUSTICE 267 (2008).
[105] *See* Pillard, *supra* note 13, at 961.
[106] ACS Brief, *supra* note 14; see also Greenblatt, *supra* note 9; LeClair, *supra* note 13 (focusing on Title IX, apparently overlooking the regulatory loophole described above).
[107] *See* ACS Brief, *supra* note 14, at 7-17; see also Greenblatt, *supra* note 9, at 13-19.
[108] *See* ACS Brief, *supra* note 14, at 11-13, discussed *infra*, Part II.C.2.

II. THE EQUAL PROTECTION ARGUMENT

The ACS brief attacks the sex stereotypes found in Sex Ed curricula with the usual doctrinal tools for challenging sex classifications based on stereotypes.[109] 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.[110] The Supreme Court has not condemned sex-based generalizations per se; it has only prohibited "unfair" reliance on those generalizations to determine individual rights and privileges.[111] This limit 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. IS THERE A SEX CLASSIFICATION?

For purposes of equal protection analysis, the first question is whether the state has adopted a sex classification at all. Most Sex Ed 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.[112] 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 v. Feeney*.[113]

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[109] ACS Brief, *supra* note 14, at 7-17.
[110] *See infra*, Part III.C.2.
[111] *See infra*, Part III.C.2.
[112] 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.
[113] 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

In the case of the Sex Ed 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 aspirations. Sex Ed courses are expressly intended to instruct students about *how to live their own lives*. As Cornelia 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."[114] Unlike standard academic subjects, meant to teach students *about* various aspects of the world, sex education openly aspires 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 Ed 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.[115] When a school elects to promote one set of values for girls and a different set of values 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."[116]

This fact of classification puts the Sex Ed curricula in a different category from previously litigated cases of curricular bias. In *Monteiro v. Temple Union High School District*,[117] for example,

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is adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

[114] Pillard, *supra* note 13, at 958.

[115] ACS Brief, *supra* note 14, 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 II.A.1.

[116] The ACS brief also argues that such teachings constitute sex classifications in a larger sense "comparable … to Congress passing a resolution" endorsing gender stereotypes. ACS Brief, *supra* note 14, at 13. 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 155 (11th Cir. 1990) (upholding a state law that required display of the confederate flag); but see *infra*, Part II.D (discussing differences between government expression of racist ideas and government endorsement of sex stereotypes).

[117] 138 F.3d 1022 (9th Cir. 1998).

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.[118] While cases such as *Monteiro* raise serious concerns about educational equality, they are likely to involve errors of omission—indifference to or neglect of disproportionate racial impact, or failed implementation of a legitimate pedagogical goal—rather than errors of commission—the intentional and explicit endorsement of sex stereotypes. Doctrinally, errors of commission are subject to a more rigorous standard than facially neutral errors of omission.[119] The blatant sex stereotyping in many Sex Ed 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.[120] Typically, the Supreme Court has concluded that a sex classification satisfies intermediate scrutiny when the classification is used in a

[118] 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 (2003).
[119] *See* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (upholding a veteran's preference in state hiring despite legislative indifference to its effect on female applicants).
[120] Craig v. Boren, 429 U.S. 190, 197-98 (1976) (intermediate scrutiny); U.S. v. Virginia, 518 U.S. 515, 524 (1996). When the Court is feeling particularly hostile to a sex classification, it requires that the government's justification for the classification be "exceedingly persuasive." U.S. v. Virginia, 518 U.S. at 524; but see Nguyen v. INS, 533 U.S. 53 (2001) (O'Connor, J., dissenting) (complaining that the majority had abandoned the "exceedingly persuasive" requirement).

way relevant to "real differences" between women and men.[121] It has struck down sex classifications that it finds to be based not on real differences but on "archaic stereotypes."[122] Any equal protection challenge to biased curricula would therefore hinge on the court's assessment of whether the gendered instruction in Sex Ed classes reflects stereotypes or real sex differences.

A state could easily identify several important interests served by its Sex Ed curriculum, having to do with students' education and welfare. Moreover, 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 sex discrimination cases. In those cases, the Supreme Court has allowed states more leeway in using sex classifications when the Court perceives the state's interest as pertaining directly to reproductive biology.[123]

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[121] The "real differences" line of cases were first identified as such in Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 962 (1984), and Ann E. Freedman, *Sex Equality, Sex Difference, and the Supreme Court*, 92 YALE L.J. 913 (1983). Freedman and Law identified the following as real differences cases: Michael M. v. Superior Ct., 450 U.S. 464 (1981) (statutory rape a crime only when committed by male against female); Rostker v. Goldberg, 453 U.S. 57 (1981) (male-only registration for draft); Dothard v. Rawlinson, 433 U.S. 321 (1977) (exclusion of women from contact jobs in prisons); Gen. Elec. v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnancy from disability benefits policy offered by private employer); Schlesinger v. Ballard, 419 U.S. 498 (1975) (separate rules for male and female officers under navy's up-or-out policy); Geduldig v. Aiello, 417 U.S. 48 (1974) (exclusion of pregnancy from disability benefits policy offered by public employer); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory pregnancy leave).

[122] Michael M. v. Superior Court, 450 U.S. 464, 472 n.7 (1981); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982). *See e.g.,* U.S. v. Virginia, 518 U.S. 515 (rejecting arguments that gender differences in learning styles justified excluding women form quasi-military academy). *See also* Mary Ann 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-respecting, that is to say, does it distinguish on its face between males and females? [FN12] and 2) Does the sex-respecting rule rely on a stereotype?").

[123] *See* Law, *supra* note 121; Freedman, *supra* note 121; Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) ("[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.").

Of the real difference cases, the most obvious one for a state to rely on in support of gendered Sex Ed instruction is *Michael M. v. Superior Court.*[124] *Michael M.* upheld California's statutory rape law, which made it a crime for an under-aged boy to have sex with an under-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.[125] Girls, the Court reasoned, suffer "natural sanctions" for sex by the risk of pregnancy.[126] That risk is a "real difference," so that the state was entitled to treat girls and boys differently and thereby "roughly 'equalize' the deterrents on the sexes."[127]

Pregnancy prevention is typically one of the goals of Sex Ed courses, and it is likely that courts would reach for *Michael M.* if asked to assess the validity of sex differentiation in Sex Ed. The statute upheld in *Michael M.* itself reflects stereotypes about who benefits and who is victimized by sex, which are similar to some of the stereotypes found in Sex Ed curricula. Moreover, 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.[128]

Of all the objectionable sex stereotypes found in Sex Ed curricula, however, 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.[129] Moreover, the sex biases behind the statutory rape law were implicit

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[124] 450 U.S. 454 (1981).
[125] Michael M. v. Superior Court, 450 U.S. 454, 469-70 (1981).
[126] Michael M. v. Superior Court, 450 U.S. 454, 473 (1981).
[127] Michael M. v. Superior Court, 450 U.S. 454, 473 (1981).
[128] Michael M. v. Superior Court, 450 U.S. 454, 472, n.7 (1981) (stating that possible invidious motives for the statute were irrelevant); *id*. at 474 n.9 (dismissing the arguments by dissenting justices that the statute was *ineffective*).
[129] *See* U.S. v. Virginia, 518 U.S. 515 (1996) (rejecting a classification based on purported sex differences in learning styles).

and subtle, not like the explicit and blatant endorsement of traditional gender roles found in Sex Ed curricula.

While the Court has at times shown itself unable to distinguish between "biology and the social consequences of biology,"[130] it has established a plausible line between reproductive biology and more amorphous sex differences. Many of the objectionable stereotypes in Sex Ed curricula fall on the wrong side of that line. 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 Supreme Court's 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,[131] it is now limited to those differences that the Court believes have more direct links to reproductive organs. The sex differences in sexual desire, intellectual ability, and life expectations that appear in Sex Ed curricula are the sorts of characterizations of the sexes that the Court generally deems not "real differences" but "archaic stereotypes." The real differences argument would therefore not get the state very far. 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.

C. STEREOTYPES BASED ON FACT

In addition to its claimed interest in shaping teen sexuality, a state is likely to defend the teaching of some sex stereotypes on the grounds that they are factually true. 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. Responding to this anticipated argument is where the ACS brief starts to go off the rails. The brief argues that reliance on stereotypes is fatal to state action.[132] In particular, it argues that schools may not teach sex stereotypes as if they are

[130] Law, *supra* note 121, at 1001.
[131] *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (upholding the exclusion of women from the practice of law.
[132] *See* ACS Brief, *supra* note 14, at 9-10.

facts.[133] Yet simultaneously, the brief argues that the teaching of a stereotype is impermissible even when the stereotype has some basis in fact.[134] The implication is that a public school may not teach a "stereotype" as if it were a fact, *even if it is*. This argument is a tempting, but ultimately misguided, application of the Supreme Court's precedents on stereotyping that has a basis in fact.

1. Existing Doctrine on Entrenchment of Sex Stereotypes

The Supreme Court has frequently cited "archaic stereotypes" as the hallmark of unconstitutional sex classifications.[135] For example, in *Frontiero v. Richardson*,[136] 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.[137] 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.[138]

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[133] ACS Brief, *supra* note 14, at 2.
[134] ACs Brief, *supra* note 14, at 11-13 ("The Constitutional Irrelevance of Evidence of a Stereotype's 'Accuracy'").
[135] *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. Superior Court, 450 U.s. 464, 472 n.7 (1981).
[136] 461 U.S. 677 (1973). *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.
[137] Frontiero v. Richardson, 461 U.S. 677, 688-89 (1973). 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.
[138] *See also* Craig v. Boren, 429 U.S. 190 (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 (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.[139] Those cases may be particularly relevant to Sex Ed, 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 Ed curricula; for example, girls and women value relationship, while boys and men value competitive achievement.[140] 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.[141] 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.[142]

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.[143] This rejoinder seeks to use cases like *VMI* to rule out any defense of curricular material on the basis of truth. Lessons that communicate that a gender stereotype is true are impermissible even if the stereotype is, in fact, true. There are two serious problems with this use of precedent.

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 *VMI* that

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[139] *See* U.S. v. Virginia, 518 U.S. 515 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).
[140] U.S. v. Virginia, 518 U.S. 515, 541 (1996); Waxman Report, *supra* note 6, at 16.
[141] U.S. v. Virginia, 518 U.S. 515, 541 (1996).
[142] U.S. v. Virginia, 518 U.S. 515, 533 (1996).
[143] ACS Brief, *supra* note 14, at 13-15.

differences between the sexes "remain cause for celebration" so long as they are not used "to create or perpetuate the legal, social, or economic inferiority of women."[144] Could the *VMI* opinion not be assigned as reading in a public school classroom?

Second, feminists must confront a conflict that was submerged in *VMI*. When the State of Virginia sought to justify its stereotyped treatment of women and men, it relied on reputable expert testimony to do so.[145] 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 *VMI* and to some of the stereotypes promulgated in Sex Education curricula.[146] While some curricula have been mocked for promoting a *Men Are From Mars, Women Are From Venus*[147] 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.[148]

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[144] U.S. v. Virginia, 518 U.S. 515, 533 (1996). The scope of the presumed "inherent differences" is unclear. The context suggests that the phrase may 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.

[145] U.S. v. Virginia, 766 F.Supp. 1407, 1434-35 (W.D. Va.) ("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.").

[146] *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 (2001) (describing sex-based differences in communication styles).

[147] *See* SIECUS, *supra* note 4, "WAIT (Why Am I Tempted?) (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)).

[148] For a critique of relational feminist psychology from a feminist legal perspective, see Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice:*

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.[149] 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.[150] A good teacher would feel compelled to present that context, as a matter of both academic legitimacy 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.[151] 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 fact.

The point here is not that we should be content to let public schools promulgate stereotypes because they are all true anyway. My point 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 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

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Relational Feminism, Abortion Rights, and the Feminist Legal Agenda, 87 NW. U. L. REV. 858 (1993).

[149] Brain A. Nosek et al., *National Differences in Gender-Science Stereotypes Predict National Sex Differences in Science and Math Achievement*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE U.S. (2009).

[150] Nosek, *supra* note 149.

[151] *See, e.g.,* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2-3 (1988).

information "even if it's true" because it is inconsistent with a particular theory of gender is a lightening rod of which federal courts would rightly steer clear.

The argument is also flawed because it is beside the point. The feminist objection to the stereotypes in Sex Ed 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*. 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. While the inclusion of false statements of fact might be further evidence that a particular normative agenda is being pursued,[152] it is the agenda, not the supporting facts, that is in question. As discussed in Part III, the first amendment provides a more richly elaborated and theorized approach to government efforts to impose normative values on citizens.

In addition to the non-transferability of equal protection doctrine about the irrelevance of statistical truth, equal protection doctrine fails to provide a clear answer to the question why the state ought 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[153] or by issuing press releases about it. Government cannot further its vision by coercing individuals, such as by forbidding paid employment by mothers. Somewhere in between these two extremes is the government furthering its vision by instructing school children that they will be happier and the world

[152] False statements of fact may also support a claim for violation of the due process clause. See *supra*, note 192.
[153] 29 U.S.C. § 2601-54.

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 least an only partially written-on page. The adults are competing to write the story, 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 Ed 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 Ed curricula.

D. STEREOTYPES AND *BROWN*

An alternative to relying on the cases rejecting sex stereotypes would be to analogize to race cases, especially *Brown*[154] and *Loving*.[155] 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.[156] In *Brown*, the resulting stigmatic harm was part of what rendered separate school systems inherently unequal.[157] 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.[158] 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.[159]

Sex stereotypes generally play the same role as white supremacy in the Supreme Court's equal protection analysis. As Mary Ann Case

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[154] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[155] Loving v. Va., 388 U.S. 1 (1967).
[156] Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954) (describing the stigmatic harm of segregated schooling).
[157] Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).
[158] Loving v. Va., 388 U.S. 1, 7-8 (1967).
[159] *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).

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.[160] 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.[161] Because courts have admitted that curricular promotion of white supremacy would be unconstitutional,[162] 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. Generalizations based on sex, on the other hand, are an impermissible basis for limiting individual opportunities, but can otherwise be "celebrated."[163] 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 Ed as an appropriate next step in the Supreme Court's cautious program of

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[160] *See* Mary Ann Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L. Rev. 1447, 1449 (2000).
[161] *See* Case, *supra* note 160, at 1449.
[162] *See* Monteiro v. Temple Union High Sch. Dist., 138 F.3d 1022 (9th Cir. 1998).
[163] U.S. v. Virginia, 518 U.S. 515, 533 (1996).

limiting the imposition of values. This step would also 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 Ed pointed out the inevitability of addressing gender stereotypes, one way or the other, once a school decides to teach Sex Ed.[164] 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.[165]

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[164] *See* Pillard, *supra* note 13, at 952.

[165] Stephen Arons and 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 Martin H. Redish and 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."); 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

Just as the child is "the Achilles heal of liberal ideology,"[166] public schooling presents the paradox that "society must indoctrinate children so they may be capable of autonomy."[167] Even to strive for 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.[168] "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."[169]

Because public school instruction necessarily contains a hidden curriculum based on the school's values, students whose own values clash with the school's will likely struggle with and obtain less benefit from the educational experience.[170] Moreover, 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.[171] 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."[172] 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.[173] To attack the problem of the "hidden curriculum," they propose greater

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necessarily conflicts with freedom of choice and the diversity of a pluralistic society.").

[166] Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980).

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

[168] *See* Ingber, *supra* note 167, at 28.

[169] Malcom M. Stewart, *The First Amendment, The Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 25 (1989).

[170] *See* Arons and Lawrence, *supra* note 165, at 322, 324.

[171] See Arons and Lawrence, *supra* note 165, at 322, 324.

[172] Arons and Lawrence, *supra* note 165, at 313.

[173] *See* Arons and Lawrence, *supra* note 165, at 313.

parental choice, decentralized control of schools, abolition of standardized testing, and teacher training programs about the dangers of imposing values on students.

Most scholars, however, 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 general, 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 sub-section.

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.[174] 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.[175] While recognizing the futility of eliminating values from the 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 for broadcast media.[176]

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[174] *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); *but see* Morse v. Frederick, 127 S. Ct. 2618 (2007).

[175] 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)

[176] *See* Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); 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); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983).

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.[177] 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.[178]

In the hands of at least some scholars, the fairness approach may also result in excessive leniency with respect to the hidden curriculum. 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."[179] To do so, they propose a high level of deference to values imposition that occurs incident to substantive instruction.[180] They reserve their greatest skepticism for extra-curricular activities or programs about "normative issue of concern primarily beyond the four walls of the schoolhouse."[181] In the latter category they place issues of "racial or gender equality, ethnic tolerance, [and] patriotism."[182] They object especially to events such as school assemblies promoting diversity, 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.[183]

The example of Sex Ed illustrates some of the shortcomings of this approach. The characterization of race and sex equality as issues

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[177] *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 difficulties of balance requirement).
[178] *See* Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 42 GA. L. REV. 1 (2009).
[179] *See* Redish, *supra* note 165, at 94.
[180] 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." Redish, *supra* note 165, at 107.
[181] *See* Redish, *supra* note 165, at 70.
[182] *See* Redish, *supra* note 165, at 70.
[183] *See* Redish, *supra* note 165, at 70.

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 Ed, 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."[184]

Perhaps, then, the entire endeavor of values-shaping Sex Ed is illegitimate, regardless of which particular values that 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.[185] 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. The scholarly critiques about the inherent perniciousness of values imposition have made virtually no headway in legal doctrine.

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

[184] Redish, *supra* note 165, at 94.
[185] *See, e.g.,* Ambach v. Norwick, 441 U.S. 68, 76-80 (1979); Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Kennedy, J., concurring in part and concurring in the judgment); id. (Breyer, J., dissenting).

> 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.[186]

The rub, of course, lies in identifying the community's shared values. Shiffrin proposes "equality, freedom, and political democracy."[187] 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,"[188] while Susan Bitensky nominates environmentalism and abhorrence of genocide as the basic "ideational perquisites" for the continuance of our civilization.[189] 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. Competing viewpoints need not receive equal time."[190] 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 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.

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[186] Shiffrin, *supra* note 166, at 651.
[187] Shiffrin, *supra* note 166, at 651.
[188] Joel S. Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education,* 6 PEPPERDINE L. REV. 105, 134-36 (1978).
[189] Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause With Curricular Values Inculcation in Public Schools*, 70 NOTRE DAME L. REV. 769 (1995).
[190] 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).

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 the sex stereotypes found in Sex Ed programs represent 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 did not have 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.[191]

The Supreme Court has also hinted at a narrow proscription of partisan political advocacy under the first amendment. In *Pico*,[192] 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.[193] 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

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

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

[193] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870-71 (1982) ("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.").

structure and close community supervision of schools should usually be sufficient to keep schools neutral on matters that are live political disputes.[194] First amendment protection is much more likely to be needed to protect outliers and to articulate any 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.

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.[195] He argues that school children have a first amendment right not to be inculcated with racist values, even unintentionally.[196] 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.[197]

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*.[198] *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.[199] Consistent with this theory, courts implementing *Brown* regularly considered curricular content as a gauge of whether a

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[194] Admittedly, this statement may be overly optimistic, particularly in light of how many Sex Ed programs treat controversial issues like abortion. *See supra* note _.
[195] David W. Burcham, *School Desegregation and the First Amendment*, 59 ALB. L. REV. 213 (1995).
[196] *See* Burcham, *supra* note 195, at 240.
[197] *See* Burcham, *supra* note 195, at 243-57.
[198] *See* Arons & Lawrence, *supra* note 165, at 349.
[199] *See* Arons and Lawrence, *supra* note 165; text accompanying notes 124-26.

school had eliminated the vestiges of de jure segregation.[200] 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, constitutionally sanctioned values, including the constitutional value of racial equality.[201]

Outside the context of remedial desegregation, however, direct claims of racially biased curricular 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.[202] Contrary to Burcham's argument,[203] 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.[204] Even where they do, the reasoning may not translate well to sex cases, for the reasons discussed previously.[205] First amendment principles can help bridge this gap.

B. THE FIRST AMENDMENT FRAME

While some scholars have insisted that any imposition of values by 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

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[200] *See* Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. Gender, Race & Justice 315, 327 (1990).

[201] *See also* 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).

[202] *See, e.g.,* Montiero v. Temple Union High Sch. Dist., 138 F.3d 1022 (9th Cir. 1998); Grimes v. Sobol, 832 F.Supp. 704 (S.D.N.Y. 1993); Shorter v. St. Cloud Univ., 2001 WL 912367 (D.Minn. 2001).

[203] *See supra*, text accompanying notes 195-97.

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

[205] *See supra*, Part II.D.

schools. In *Ambach v. Norwick*, the Court explicitly endorsed the transmission of patriotic values as a legitimate function of public schools.[206] More recently, the Court has endorsed anti-drug proselytizing as part of the core mission of a public school.[207] 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, importantly, anti-racist values.[208] 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.[209] 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 Ed 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.[210]

Scholars seeking to limit values inculcation in the public schools have frequently turned to the establishment clause as a model for a judicial standard.[211] Establishment clause jurisprudence has been

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[206] 441 U.S. 68, 76-80 (1979).
[207] Morse v. Frederick, 127 S. Ct. 2618 (2007).
[208] *See* Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Kennedy, J., concurring in part and concurring in the judgment); id. (Breyer, J., dissenting).
[209] On ritual and other emotional persuasion, see White, *supra* note 178.
[210] *See* Van Orden v. Perry, 125 S.Ct. 2843 (2005) (using the endorsement test); McCreary County v. ACLU, 545 U.S. 844 (2005) (blending the endorsement test with the *Lemon* test).
[211] *See, e.g.,* Redish, *supra* note _, 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

forged primarily in the educational context, so courts are practiced in assessing claims of curricular bias.[212] 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 also 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.[213] Teaching sex stereotypes in Sex Ed endorses these stereotypes and thereby 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.

Resort to the establishment clause's endorsement test could be seen as an end-run around the intent requirement of the equal protection clause. Indeed, in the context of racial segregation, David Burcham has proposed a first amendment approach to address the racist effects of facially neutral state action.[214] Under equal protection doctrine, however, the intent requirement attaches to the classification, not to its invidiousness. The legislature in *Craig .v*

Clause, schools may discuss religious issues; they are, however, prohibited from promoting either particular religions or the idea of religion.").

[212] Only the issue of Christmas decorations rivals education as an object of attention under the establishment clause.

[213] U.S. v. Virginia, 518 U.S. 515, 533 (1996).

[214] Burcham uses 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 (1971). Burcham, however, erroneously argues that the *Lemon* test is met because de facto segregation is *primarily caused* by state action. Burcham, *supra* note 195, 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.

Boren[215] 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 Ed curriculum makes separate recommendations to females and males.[216]

The endorsement test offers several advantages in this context, as compared to the usual "fit" analysis of equal protection. The test asks whether a reasonable observer would construe the state's action as an endorsement of religion.[217] 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 Ed. 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.

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 Ed. It might seem an appropriate remedy give students the right to opt out of Sex Ed courses that promote sex stereotypes, as the Supreme Court did with the Pledge of Allegiance in *West Virginia Board of Education v. Barnette*.[218] This remedy might seem especially appropriate in Sex Ed because there is an existing custom of providing opt outs for Sex Ed: Most states allow parents to opt their children out of comprehensive Sex Ed classes that include information about contraception and certain other subjects. Parents are generally notified of the content that is deemed controversial in advance and can follow a procedure to remove their children from the class. By contrast, we have been unable to find any indication of a school giving parents the right to opt out of

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[215] 429 U.S. 190 (1976) (striking down a sex classification with respect to the purchase of low-alcohol beer).
[216] *See supra*, Part II.A.
[217] *See* Van Orden v. Perry, 125 S.Ct. 2843 (2005) (using the endorsement test); McCreary County v. ACLU, 545 U.S. 844 (2005) (blending the endorsement test with the *Lemon* test).
[218] 319 U.S. 624 (1943).

"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 idiosyncratic personal belief rather than a constitutional value.[219] 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.[220] 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. The case against sex stereotypes in Sex Ed rests primarily on the fourteenth

[219] 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. Educ., 827 F.2d 1058 (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 appropriate skeptical of free exercise claims to selectively opt out of the general curriculum the values- and conduct-shaping aims of Sex Ed probably warrant the greater consideration of parental values that many schools provide.

[220] 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 option nature of the activity to relax the requirements of the Establishment Clause.

amendment prohibition on entrenchment of sex stereotypes. The first amendment's endorsement clause 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 Ed 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 traditional 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.