

“The Talk” and the Tenth Amendment: Sex Education in a Constitutional Lens

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“I flip ahead in the textbook. There's an interesting chapter about acid rain. Nothing about sex.”

- *Speak* by Laurie Halse Anderson¹

Critical lessons on how to make healthy decisions in the real world start in sex or health education classes.² However, many students also absorb these concepts from a variety of sources outside of the classroom.³ Students use diverse resources to learn about healthy sexuality, not out of creativity or entertainment, but rather out of necessity due to incomprehensive sexual health education, when offered at all.⁴ Some states treat sexual

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¹ LAURIE HALSE ANDERSON, *SPEAK* 146 (1st ed. 1999). This book is frequently included in Most Banned Books lists for its depiction of adolescent peer-inflicted sexual violence and subsequent mental health struggles for surviving said sexual violence. *See generally, Banned and Challenged Young Adult Books 2000-2009*, American Library Association (2013), <http://www.ala.org/advocacy/bbooks/top-100-bannedchallenged-books-2000-2009> (last visited Feb. 17, 2020).

² *See* U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. (UNESCO), INT’L TECHNICAL GUIDANCE ON SEXUALITY EDUC., 12 (2018) (stating the classroom environment is ideal for teaching sexuality education concepts). “Sexuality education – in or out of schools – does not increase sexual activity, sexual risk-taking behavior or STI/HIV infection rates.” *Id.*; *see also* Joerg Drewke, *Promiscuity Propaganda: Access to Information and Services Does Not Lead to Increases in Sexual Activity*, 22 *Guttmacher Pol. Rev.* 29, 31 (2019).

³ *See* Enid Gruber & Joel W. Grube, *Adolescent Sexuality and the Media*, 172 *W. J. MED.* 210, 211-12 (2000) (discussing teen viewers watch over 140 “incidents of sexual behavior” a week through television alone). *See also* Mansi Kanuga & Walther Rosenfeld, *Adolescent Sexuality and the Media: The Good, the Bad and the UGL*, 17 *J. PEDIATRIC ADOLESCENT GYNECOLOGY* 117, 118 (2004) (citing 75%-83% teens having internet access at home to pursue efficient search for information); *see also* Theresa Chmara, *Minors’ First Amendment Rights: Children’s Internet Protection Act & School Libraries*, *AM. LIBR. ASS’N* (2010), http://www.ala.org/aasl/sites/ala.org/aasl/files/content/aalissues/bwad/KNOW_39_1_MinorsFirst_16-21.pdf.

⁴ *See* Alaina Demopoulos, *Sex Education Is So Bad These Teens Are Doing It On TikTok*, *THE DAILY BEAST* (Nov. 15, 2019, 4:22 AM), <https://www.thedailybeast.com/sex-education-is-so-bad-these-teens-are-doing-it-on-tiktok?ref=home> (last visited March 15, 2020).

Young women like Meador have taken to the video-sharing app to discuss their birth control, a hashtag that has over 13.8 million views on the app. Creators of these posts aim to be what their younger selves needed—a friendly, non-corny

education as a nuanced subject with explorations of consent, healthy intimate relationships, and proactive sexual behaviors for LGBTQ persons.⁵ Reverence to the topic is not uniform, with many states still maintaining abstinence-only and queer-shaming concepts under the guise of “state’s rights, despite data disproving their effectiveness.”⁶ When data clearly shows the benefits of comprehensive sex education for young adults while in their secondary school careers, the need for comprehensive sexual education is no longer in question.⁷ In light of the current social climate addressing history of gender harassment, sexual consent, psychological abuse and the health and safety of young people seeking out sexual health resources, the greater inquiry lies in how states prioritize their right to curricular development and their citizen’s health.⁸

voice of reason, there to answer questions or address concerns about the pill or implants.

Id.; see also Sarah Shapiro & Catherine Brown, *Sex Education Standards Across The States*. CTR. FOR AM. PROGRESS. May 9th, 2018 at 1(2018), <https://www.americanprogress.org/issues/education-k-12/reports/2018/05/09/450158/sex-education-standards-across-states/> (last visited March 15, 2020).

... as the sources of sex education become even more diverse and are presented in ways that may be inconsistent, confusing, or misleading, educators must leverage these sources and align messaging to help young people determine how best to engage in positive, healthy relationships. State sex education standards in public schools vary widely. According to a study from the National Institutes of Health, only about half of adolescents receive school instruction about contraception before they first have sex.

Id.

⁵ *Id.* Only seven states – California, Hawaii, New Jersey, North Carolina, Oregon, Vermont and West Virginia – and the District of Columbia include consent in their mandated sexual health curricula. *Id.*

⁶ See *Sex and HIV Educ.*, GUTTMACHER INST. OF LAWS AND POLICY (2019), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> (last visited March 15, 2020). “39 states and DC require provision of information on abstinence. 29 states require that abstinence be stressed. 10 states and DC require that abstinence be covered.” *Id.*; see also Planned Parenthood Action Fund, *SEX EDUCATION LAWS AND STATE ATTACKS*, <https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks> (last visited January 18, 2020). “Decisions about sex education are made at the state and local level — no federal laws dictate what sex education should look like or how it should be taught in schools.” *Id.*; see also Factsheet, *Sexuality Education*, Advocates for Youth (2014). “While there is as yet no law that supports comprehensive sexual health education, there is pending legislation.” *Id.*

⁷ See generally *2017 National School Climate Survey The*, GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, <https://www.glsen.org/research/2017-national-school-climate-survey-0> (stating that independent recommendation of overhauling gay and straight sexual health education is overwhelming).

⁸ *Id.*

I. THE HISTORY OF SEX EDUCATION IN THE UNITED STATES

The constitutional freedom of free speech has been a critical element of the jurisprudence now more commonly known as educational law.⁹ In *Board of Education v. Pico*, a district school board attempted to remove young adult books from the school library that featured taboo, “objectionable” topics such as communism, drug use and addiction, racial discrimination, and suicide.¹⁰ The plaintiff in that case was the leader of a student movement to prevent the district from removing the books as an offense against student freedoms of speech.¹¹ In siding with the district court, Justice Brennan stated that the school’s book removal was outside of the 1st Amendment limitations on district discretion and held the school board’s actions unconstitutional.¹² This case has since been a foundation of the Banned Books Movement, where local libraries advocate for books facing institutional or parent-led bans for highlighting topics of premarital sex, same-sex relationships, sexual assault, teen pregnancy, masturbation, and intimate partner violence.¹³ In using Justice Brennan’s reasoning in *Pico*, students can logically expand this argument to affirm a student’s right to access different types of media in schools that address topics that can also be found in a comprehensive sexual health education curriculum.¹⁴

⁹ See *Tinker v. Des Moines Indp. Cmty. Sch. District*, 393 U.S. 503 (1969) (maintaining that student free speech was not a disruption within established First Amendment freedoms); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 857 (1982). When asked about his motivation to take his hometown school board to the Supreme Court, plaintiff Stephen Pico said, “I didn’t wish to become a First Amendment Junkie. I wanted to get those books back on the shelves so public-school students and teachers might choose to read and discuss them.” See Debra Lau Whelan, *NCAC Talks to the Man Behind Pico v. Board of Ed.*, NAT. COAL. AGAINST CENSORSHIP BLOG (July 9, 2013), <https://ncac.org/news/blog/ncac-talks-to-the-man-behind-pico-v-board-of-ed>.

¹⁰ See *Pico*, 457 U.S. at 856.

¹¹ *Id.* at 857.

¹² See Demoupoulos, *supra*, note 4.

¹³ *Banned Books Week 2019*, AM. LIBR. ASS’N: BANNED & CHALLENGED BOOKS, <http://www.ala.org/advocacy/bbooks/banned> (last visited March 15, 2020). The ALA directly credits the *Pico* decision for the celebration of literary freedom in school libraries that cannot be thwarted by school boards. *Id.* This list also features a number of repeatedly banned books over the decades. See Judy Blume, *DEENIE* (1973) (for referencing masturbation); Judy Blume, *FOREVER...* (1975) (for featuring premarital adolescent sex); Laurie Halse Anderson, *SPEAK* (1999) (for referencing sexual violence); Marilyn Reynolds, *DETOUR FOR EMMY* (1993) (for referencing teen pregnancy); William Faulkner, *AS I LAY DYING* (1930) (for referencing abortion); and Sherman Alexie, *THE ABSOLUTELY TRUE DIARY OF A PART-TIME INDIAN* (2007) (for referencing intimate partner violence and alcoholism).

¹⁴ See *Pico*, 457 U.S. at 867.

In keeping with this principle, we have held that in a variety of contexts “the Constitution protects the right to receive information and ideas.” This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender’s First Amendment right to send them: “The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to

In addition, the 1st Amendment has been fundamental in determining whether choosing to teach creationism, the idea of evolution through divine creation, offends the constitutional freedoms that students already maintain.¹⁵ Issues like these are decided using the Lemon Test, born when the Supreme Court held in *Lemon v. Kurtzman* that the city of Philadelphia could not supplement private Catholic schoolteacher salaries with government funds.¹⁶ This test uses a three prong approach to ensure that a state law does not have a (1) purpose, (2) effect, or (3) statutory entanglement with any particular religion.¹⁷ The Lemon Test was a critical part of *Edwards v. Aguillard*, a case that challenged the constitutionality of creationism and other creation-focused concepts traditionally included in Louisiana public schools science curriculum.¹⁸ In *Edwards*, the Supreme Court determined that the school board requiring a creationist curriculum was motivated by a religious purpose which interfered with the constitutional freedoms of students.¹⁹ This lawsuit was one of many in recent decades challenging the power that public schools supposedly wielded as state actors under the 10th Amendment.²⁰

receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers. More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.

Id.; see also Jesse R. Merriam, *Why Don't More Public Schools Teach Sex Education? A Constitutional Explanation and Critique*, 13 WM. & MARY J. OF WOMEN & L. 539, 544 (2007).

¹⁵ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

Forbidding the teaching of evolution when creation science is not also taught undermines the provision of a comprehensive scientific education. Moreover, requiring the teaching of creation science with evolution does not give schoolteachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life.

Id.

¹⁶ See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971). “The Supreme Court agreed and established the so-called Lemon Test for evaluating the constitutionality of laws alleged to violate the Establishment and Free Exercise Clauses of the 1st Amendment.” *Lemon v. Kurtzman*, COLUM. U. GLOBAL FREEDOM OF EXPRESSION (2020), <https://globalfreedomofexpression.columbia.edu/cases/lemon-v-kurtzman/> (last visited March 15, 2020).

¹⁷ See *id.* Any encroachment against any prongs of the Lemon Test automatically violates both of the clauses, which ensure and affirm the “wall of separation of church and state” within the Bill of Rights. See Letter from Thomas Jefferson to the Danbury, Conn. Baptists (1802) (on file with the Library of Congress), <https://www.loc.gov/loc/lcib/9806/danpre.html> (last visited March 22, 2020).

¹⁸ *Lemon*, *supra* note 16. “The Act impermissibly endorses religion by advancing the religious belief that a supernatural being created humankind. The legislative history demonstrates that the term ‘creation science,’ as contemplated by the state legislature, embraces this religious teaching.” *Id.* at 589

¹⁹ *Id.* at 596. “The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety.” *Id.*

²⁰ *Id.*

From a federalism lens, where the powers of the federal government must supersede those of the states, the 10th Amendment power reserving any non-articulated federal powers to the states is a key component in understanding how a state determines its statewide curricula.²¹ However, as federal administrations have rotated, some states resistant to expanding their sexual health education curricula have been emboldened by federal funding to promote abstinence-only programming that has been proven to be ineffective.²² Recent studies have shown that states who choose to spend school funds on abstinence-only education have a higher prevalence of adolescent births, thus suggesting that students are not equally protected by their school's sexual health curriculum alone.²³

The 13th, 14th, and 15th Amendments were created post-Civil War as a legal and social embrace of civil and due process rights for those who had been recently freed from slavery.²⁴ The 14th Amendment ensured states uphold Due Process and Equal Protection rights for their citizens, while the federal government was already obligated to do this under the 5th Amendment.²⁵ Of the five sections of the 14th Amendment, the Due

Similarly, the Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught.

Id. at 593.

²¹ U.S. Const. Amend. X; *see also* Lawrence Gerston, AM. FED.: A CONCISE INTRODUCTION 5-6 (2007). “Representative governments award, deprive, and rearrange our lives with our consent, even though we may not always agree with what they do or how things turn out. Federalism, then, is the organizational mechanism through which governments manage power.” *Id.* at 5.

²² Anthony Paik et al., *Broken Promises: Abstinence Pledging and Sexual and Reproductive Health*, 78 J. MARRIAGE & FAM. 546, 562 (2016). “Abstinence pledge breakers subject to abstinence-only programs have higher prevalence of unintended pregnancies and human papilloma virus [HPV].” *See also* Megan Donovan, *The Looming Threat to Sex Education: A Resurgence of Federal Funding for Abstinence-Only Programs?*, GUTTMACHER INSTITUTE (2017), <https://www.guttmacher.org/gpr/2017/03/looming-threat-sex-education-resurgence-federal-funding-abstinence-only-programs> (last visited March 16, 2020). “The bulk of this money—\$75 million—is allocated for the Title V abstinence education program, a grant program for states that contains an eight-point statutory definition of an eligible ‘abstinence education’ program.” *Id.* “Among its points are teaching that ‘sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects’ and that ‘a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity.’” *Id.*

²³ A. M. Fox et al., *Funding for Abstinence-Only Education and Adolescent Pregnancy Prevention: Does State Ideology Affect Outcomes*, 109 AM. J. PUB. HEALTH 497 (2019). “Federal abstinence-only funding had no effect on adolescent birthrates overall but displayed a perverse effect, increasing adolescent pregnancy-prevention and sexuality education funding eclipsed this effect, reducing adolescent birthrates in those states.” *Id.* This number does not reflect the number of pregnancies that did not result in births. *Id.*

²⁴ William E. Nelson, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 110 (1988). These three amendments were ratified “in order to secure the fruits of the North’s labor” in the Civil War. *Id.* at 111.

²⁵ A U.S. Const. Amend. XIV § 1; *see also* Amanda Bellows, *150 Cheers for the 14th Amendment*, THE NEW YORK TIMES (July 8, 2018), www.nytimes.com/2018/07/08/opinion/14th-amendment-

Process and Equal Protection clauses of Section 1 are the most referenced parts of the Amendment in civil rights cases at the Supreme Court level.²⁶ The first section of the Amendment has yet to be revised by Congress since its ratification.²⁷

The issues of sex education equality are indelible from the equality issues surrounding public education, namely that of school segregation overturned in *Brown v. Board of Education of Topeka*.²⁸ In *Brown*, over a dozen black parents sued the school district on behalf of their children after being turned away by all-white schools closer to their homes due to their race.²⁹ Here, the Supreme Court interpreted that schools separated by race were in violation of the 14th amendment's Equal Protection clause.³⁰ In applying this amendment to the racially segregated school system in *Brown*, the Supreme Court began a decades long precedent of using the 14th amendment to address inequitable disparity in public education.³¹

african-americans-citizenship.html?login=smartlock&auth=login-smartlock (last visited January 9, 2020). The 14th Amendment was a necessary addition after the 13th Amendment freed thousands of black men and women but did not concurrently grant them citizenship with this freedom. *Id.*

²⁶ See Victor Li, *The 14th: A Civil War-era amendment has become a mini Constitution for modern times*, AM. BAR ASSOC. J. (May 1, 2017, 12:10 AM), www.abajournal.com/magazine/article/14th_amendment_constitution_important_today. “The longest amendment in the U.S. Constitution, the 14th is also the most complex, resulting in a raft of litigation over its meaning and reach that continues to this day.” *Id.*

²⁷ See *id.*; see also Web Guide, *Primary Documents in American History: The 14th Amendment to the U.S. Constitution*, LIBRARY OF CONGRESS, www.loc.gov/rr//program/bib/ourdocs/14thamendment.html (last visited January 9, 2020). “By directly mentioning the role of the states, the 14th Amendment greatly expanded the protection of civil rights to all Americans and is cited in more litigation than any other amendment.” *Id.*

²⁸ 347 U.S. 483 (1954).

²⁹ *Id.* at 488; see also Sarah Prutt, *Brown v. Board of Education: The First Step in the Desegregation of America's Schools*, HISTORY (Aug. 31, 2018) <https://www.history.com/news/brown-v-board-of-education-the-first-step-in-the-desegregation-of-americas-schools>. Oliver Brown, the named plaintiff, strategically tried to enroll his daughter Linda in a school for white children knowing that it was closer to their home and had better funded resources for students. *Id.* While Linda's all-black school was comparatively well-resourced in staff and materials, fellow plaintiffs in the case were required to attend schools that were dilapidated and lacking in nurse's offices, gymnasiums, cafeterias, and adequate restrooms. *Id.*

³⁰ *Brown*, 347 U.S. at 495. *Brown*, *supra* note 29.

In a 1955 case known as *Brown v. Board II*, the Court gave much of the responsibility for the implementation of desegregation to local school authorities and lower courts, urging that the process proceed “with all deliberate speed.” The problem? Many lower court judges in the South, who had been appointed by segregationist politicians, were emboldened to resist desegregation by the Court's lackluster enforcement of the *Brown* decision.

Id.

³¹ See generally Erin Miller, *The Global Impact of Brown v. Board of Education*, SCOTUSBLOG (Feb. 18, 2010 12:42 PM), <https://www.scotusblog.com/2010/02/the-global-impact-of-brown-v-board-of-education/>.

The logic of *Brown* was applied in later cases where states did not agree or comply with federal equal protection interventions.³² An example of this is *U.S. v. Virginia*, in which the state of Virginia justified excluding women from the Virginia Military Institute based solely on their gender.³³ The Supreme Court held that the state's offer to create an equitable military program for women at a different college was an identical situation to the racially segregated schools in *Brown*, and therefore inherently unequal.³⁴ In her opinion, Justice Ginsburg found a critical part of the 14th amendment to include protections of those "omitted or excluded" from opportunities.³⁵ Here, denying women who could meet the physical and academic standards of the Virginia Military Institute was a blatant denial of equal protection under the law and thus unconstitutional.³⁶

Virginia was not the last gender issue facing federal courts, and in the subsequent years the jurisprudence on gender intersected with LGBTQ freedoms in sexuality protections.³⁷ In 1989, the Supreme Court decided in *Price Waterhouse v. Hopkins* that an employer discriminated against an employee who did not adhere to female gender stereotypes by critiquing her behavior as "abrasive" or "brusque" and passing over her for promotion despite extraordinary work performance.³⁸ Since this decision, federal

³² See generally *Cooper v. Aaron*, 358 U.S. 1 (1958). Arkansas sued the federal government finding the implications of desegregating schools to be too onerous, possibly requiring the need for the Arkansas National Guard. *Id.* See also *Brown*, *supra* note 28.

³³ *United States v. Virginia*, 518 U.S. 515 (1996).

³⁴ *Id.* at 521. "VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and because its alumni are exceptionally close to the school. Women have no opportunity anywhere to gain the benefits of [the system of education at VMI]." *Id.* at 523.

³⁵ *Id.* at 558.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI's story continued as our comprehension of 'We the People' expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.'

Id.

³⁶ *Id.* at 557. "VMI, beyond question, 'possesses to a far greater degree' than the VWIL program 'those qualities which are incapable of objective measurement but which make for greatness in a . . . school,' including 'position and influence of the alumni, standing in the community, traditions and prestige.'" *Virginia*, 518 U.S. at 557.

³⁷ See The Civil Rights Act of 1964, 42 U.S.C. 21, §2000e-2. Further validating this protection is the caption, specifying that the terms of this act apply to "federally funded programs." *Id.* at §2000d.

³⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it

courts have determined that gender stereotyping is in direct violation of Title VII of the Civil Rights Act which further expands 14th Amendment protections to persons in protected classes of “race, color, religion, sex, and national origin.”³⁹ *Hopkins* has since been used as a pillar of unlawful gender stereotyping as sex discrimination in equal protection case law for transgender students facing discrimination in public schools, most recently for students using bathrooms matching their preferred gender identity.⁴⁰

Much of the 14th Amendment jurisprudence on healthcare access started with the right to privacy established in *Griswold v. Connecticut*.⁴¹ In this case, a director and physician from Planned Parenthood filed suit when they were sanctioned under a Connecticut statute for providing contraception advice and products to their married clients.⁴² The opinion written by Justice Douglas affirmed a right of privacy to medical patients as an unenumerated element of the 9th Amendment, and that state intrusion on this right violated the 14th Amendment.⁴³

This affirmation of rights created the foundation with which Jane Roe, also known as Norma McCorvey, brought suit against a Texas law criminalizing abortion within the state in 1973 with *Roe v. Wade*.⁴⁴ In his opinion, Justice Blackmun found the

is the employee's sex and not her interpersonal skills that has drawn the criticism.

Id. at 236.

³⁹ See The Civil Rights Act of 1964, 42 U.S.C. 21, §2000d.

⁴⁰ *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019). In addition to this case, the Supreme Court heard oral arguments using the same gender stereotypes discrimination arguments used in *Hopkins* in a transgender discrimination case against an employee who was fired for presenting in their preferred gender identity. See Factsheet, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSBLOG <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>.

⁴¹ See generally J. E. Leonarz, *Validity of regulations as to contraceptives or the dissemination of birth control information*, 96 A.L.R. 2D 955 (2019) (citing privacy laws stemming from “Connecticut Cases,” collection including *Griswold* setting forth current privacy standards).

⁴² *Griswold et al. v. Conn.*, 381 U.S. 479, 481 (1965).

⁴³ See *id.* at 487 (J. Goldberg, concurring).

In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, *ante*, at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding. . . The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Id. at 488, 491.

⁴⁴ 410. U.S. 113, 120 (1973).

Texas statutes barring such procedures for Roe were “without recognition of the other interests involved,” including Roe’s own physical health, financial security, and receipt of safe and adequate healthcare.⁴⁵ Blackmun’s decision received public accolade and staunch opposition from legislators and religious leaders that has lasted for decades after the decision.⁴⁶ Ultimately, Congressman Harry Hyde became the chief sponsor of a 1977 amendment that was considered a “compromise” to anti-abortionists under *Roe*.⁴⁷ Now known as the Hyde Amendment, the adopted policy prevented federal funds from

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the 1st, 4th, 5th, 9th and 14th Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

Id.

⁴⁵ *Id.* at 164; see also DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 110 (2015).

One day after *Roe v. Wade* and *Doe v. Bolton* were publicly announce, Harry Blackmun distributed to his eight colleagues an eight-page memorandum with detailed recommendations for how they should affirm, dismiss, or otherwise vacate and remand the other abortion cases that had been sitting quietly on the Court’s docket awaiting final disposition of *Roe and Doe*. . . at a February 16 conference the justices privately ratified all of Harry Blackmun’s recommendations as to how the other pending abortion cases should be resolved. On February 26, the high court publicly announced that the petitions for reconsideration for *Roe and Doe* had been denied, and that twelve additional cases, including those from Missouri, North Carolina, Utah, Kentucky, and South Dakota, plus three other criminal cases against doctors and two appeals each from both the Connecticut decisions and [an] Illinois case, had all been remanded to lower courts for resolution.

Id.

⁴⁶ *Id.* at 120.

⁴⁷ *Id.* at 122; see also *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion> (last visited Nov. 30, 2019). The constitutionality of the Amendment was upheld by the Supreme Court in *Harris v. McRae*. 448 U.S. 297 (1980).

We hold that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. We further hold that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment.

Id.

covering abortions unless the life of the mother was at risk or in cases of rape or incest.⁴⁸ The main groups of people affected by this amendment are low-income or people of color, the same groups that are traditionally “omitted” and “excluded” from access to private health insurance that could financially cover these services.⁴⁹

Since *Roe* and the Hyde Amendment, a number of states have used their 10th amendment power to further sculpt their desired abortion policies for constituents.⁵⁰ In 1992’s *Planned Parenthood of Southeastern Pennsylvania v. Casey*, an abortion provider clinic brought suit against the state governor because of onerous, codified obstacles to receiving abortion services in the state that ranged from waiting periods to spousal consent.⁵¹ While

⁴⁸ *See id.*; *see also* KENNETH J. LONG, *THE TROUBLE WITH AMERICA: FLAWED GOVERNMENT, FAILED SOCIETY* 17 (1st ed. 2008).

In many cases the costs of abortion include not only the fees for the procedure, but, given the controversy, terror and violence which surround this issue, the personal and economic costs of traveling hundreds of miles to find the nearest provider. . . . The results of the politics of compromise applied to the ‘moral’ issue of abortion are fascinating; abortion is rendered feasible for the middle and upper classes but not for many of the poor and young. It is easy to see why neither the pro-choice nor the pro-life are satisfied with the policy.

Id. at 18.

⁴⁹ PAULA DAIL, *WOMEN AND POVERTY IN 21ST CENTURY AMERICA* 120 (1st ed. 2011).

In reality, providing health-care services to rich and poor women alike is much more intensely driven by cost-benefit decisions than moral concerns on how to control reproduction. The only difference is that poor women are at the mercy of federal policies regulating available health care services. Non-poor women are better able to obtain private health insurance, which has been uniformly linked to better employment, or pay for wanted and needed medical care themselves, thus broadening their healthcare choices. . . . Since 1977, the Hyde Amendment has also been expanded to limit federal funds for abortion services in the Indian Health services and for abortion services for federal employees and women serving in the military.

Id. at 120-21.

⁵⁰ *See Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, *supra* note 47. Thirteen states – including Alaska, Hawaii, New York, North Carolina, Washington, California, Massachusetts, Minnesota, New Jersey, Oregon, Vermont and West Virginia – have mechanisms to provide abortion services for low income women with state funds or by court order. *Id.* The newest state to join this group is Maine, who provided this case through two bills – one mandating abortion coverage on all privately and publicly funded insurance plans, and another allowing for other medical professionals with advanced training, like nurses and physicians assistants, to provide abortion services to even more patients in the state. *See* Patty Wight, *Newly Blue, Maine Expands Access to Abortion*, NATIONAL PUBLIC RADIO (July 2, 2019, 3:51PM), <https://www.npr.org/sections/health-shots/2019/07/02/737046658/newly-blue-maine-expands-access-to-abortion>.

⁵¹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992). The bill codifying the obstacles to receiving abortion care was the Pennsylvania Abortion Control Act of 1982, which “ requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed.” *Id.* at 845.

a plurality led by Justices Kennedy, O'Connor and Souter affirmed the right to abortion services affirmed in *Roe v. Wade*, the opinion created a new threshold of abortion regulation coined as "undue burden."⁵² Here, the state needed to articulate a compelling interest to "inform" the person seeking abortion services, but ultimately could not create blatant barriers to accessing abortion care.⁵³ A disparaging result of this new threshold is the judicial bypass process, in which states requiring parental consent for a minor to have an abortion performed must allow them to also pursue the procedure with the consent of a state judge.⁵⁴ Currently, thirty-six states still allow for judicial bypass procedures to circumvent parental consent in a minor's abortion care journey.⁵⁵

⁵² *Id.* at 877. "To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard." *Id.*

⁵³ *Id.* at 847. "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* This phrase has been used by states to justify medically unnecessary and incorrect regulations on abortion services, including warnings of cancer risk, unnecessary pelvic exams, and medically incorrect counseling services. See *Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> (last visited March 22, 2020). "22 states include accurate information on the potential effect of abortion on future fertility; in 4 states, the written materials inaccurately portray this risk." *Id.*

⁵⁴ *Parental Involvement in Minors' Abortions*, GUTTMACHER INSTITUTE (2019), <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> (last visited November 29, 2019).

Some states require judges to use specific criteria when determining whether to grant a waiver of parental involvement. These criteria can include the minor's intelligence, emotional stability and understanding of the possible consequences of obtaining an abortion. Many states require a judge to use the unusually strict legal standard of "clear and convincing evidence" to determine whether a minor is sufficiently mature and the abortion is in her best interest prior to waiving the parental involvement requirement.

Id.

⁵⁵ *Id.* This has not stopped states opposing abortion access from implementing further obstacles into the judicial bypass process itself before the minor can schedule the procedure. See Abbey Marr, *Judicial Bypass Procedures: Undue Burdens for Young People Seeking Safe Abortion Care*, Advocates for Youth (2015), <https://advocatesforyouth.org/resources/policy-advocacy/judicial-bypass-procedures/> (last visited Nov. 27, 2019).

Judicial bypass exceptions do not ease the burden created by parental involvement laws. Far from ensuring that minors who cannot involve their parents are able to obtain the abortion care they have a right to, instead judicial bypass procedures are demeaning, unfair, and at times insurmountable. Judicial bypass procedures put young people on trial to receive the services they need. To truly ensure that young people have access to the full range of reproductive and sexual health services they need, parental involvement laws must be repealed entirely.

Id.

Major equal protection cases at the Supreme Court level are evaluated using one of three “tests” of judicial review for constitutionality – strict scrutiny, intermediate scrutiny, and rational basis.⁵⁶ The rational basis test, used for most equal protection cases, requires the federal government to justify the protection by “rationally further[ing] a legitimate state purpose.”⁵⁷ When introducing the intermediate scrutiny level of judicial review, usually in cases involving a semi-suspect class of discrimination like gender, the government will have the burden of proof to show an important objective achieved by substantially related means.⁵⁸ The most difficult level of judicial review is the strict scrutiny test and has historically been reserved for equal protection issues involving the substantive Due Process rights of those discriminated for their race or nation of origin.⁵⁹ In sexual health education, issues of religion, gender, sexuality, and race all intersect with the type of curriculum a public school district employs, suggesting that any one school district seeking judicial review could be subject to concurrent levels of scrutiny for their sexual health curriculum.⁶⁰ A logical solution to providing a comprehensive sexual health education without risk of judicial intervention would be to follow the lead of a state whose curricula has surpassed the most stringent level of scrutiny.⁶¹

Even in 2019, many states still maintain health education statutes through a heteronormative lens despite groundbreaking strides for LGBTQ jurisprudence.⁶² In *Romer v. Evans*, the Supreme Court overturned a Colorado statute that was intended to prevent towns and cities from passing municipal protections for LGBTQ people.⁶³ In this case, Justice Kennedy found that the goal of the legislation was to “make [LGBTQ

⁵⁶ See Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401 (2016).

All equal protection and substantive due process claims require a balancing of the government’s interests and individual rights, whether that is the right to be free from discrimination (when it is an equal protection claim) or a claimed liberty or property interest (when it is a substantive due process claim).

Id. at 403.

⁵⁷ *Id.* at 404 (quoting *Zobel v. Williams*, 457 U.S. 55, 60 (1982)). “Generally, a law will survive . . . scrutiny if the distinction it makes rationally furthers a legitimate state purpose.” *Id.* at 71.

⁵⁸ *Id.* at 404.

⁵⁹ *Id.* “Subjecting all laws that draw a distinction among people--which is virtually all laws--to heightened scrutiny would unduly limit the ability of the democratic process to govern. But subjecting no laws to heightened scrutiny would inadequately protect against invidious discrimination and fail to safeguard fundamental rights.” *Id.*

⁶⁰ See Naomi Rivkind Shatz, Note, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 524–30 (2008) (arguing parent’s right to opt-out of sex-ed for children is usually rooted in religious belief). *But see* S. 263, An Act Relative to Healthy Youth, 191st Gen. Ct. of Mass. (2019). “If a parent or guardian withdraws a s

tudent from all or part of the comprehensive sexual health education curriculum, the student shall not be subject to disciplinary action, academic penalty or any other sanction.” *Id.*

⁶¹ See Naomi Rivkind Shatz, Note, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 524–30 (2008)

⁶² See S.C. Code Ann. § 59-32-30 (2018); *see also* Ala. Code § 16-40A-2 (2019).

⁶³ *Romer v. Evans*, 517 U.S. 620 (1996).

people] unequal from everyone else.”⁶⁴ Much like *Brown*, this case began a pattern of the Supreme Court expanding the civil rights of LGBTQ persons when the laws showed clear animosity or unfounded basis of discrimination.⁶⁵ In 2003’s *Lawrence v. Texas*, police were sent to the adult plaintiff’s residence on a noise complaint and then arrested the plaintiff and another adult man upon finding them having consensual sex.⁶⁶ The Supreme Court overturned the Texas statute that deemed sodomy a crime, subsequently enforcing the notion that the government had no place in policing the private, sexual lives of queer, consenting adults.⁶⁷ *Lawrence* was a fundamental step in moving towards LGBTQ equality that was followed by *United States v. Windsor*, a case where the Internal Revenue Service attempted to deny a woman the estate tax exemption for surviving spouses because her marriage to her wife was not recognized outside of the state of New York.⁶⁸ The U.S. government argued that under the federal Defense of Marriage Act only recognizing marriage to be between heterosexual couples, there was no authority to make the New York marriage federally binding in all 50 states.⁶⁹ However, the Supreme Court found that the Defense of Marriage Act “creat[ed] two contradictory marriage regimes within the same State” and could not be constitutional as such.⁷⁰ The most recent expansion of marriage freedoms was in 2015’s *Obergefell v. Hodges*, where plaintiffs in six consolidated cases argued that their same-sex marriages had been refused recognition by at least one federal group or agency.⁷¹ In Justice Kennedy’s opinion, the Supreme Court confirmed

⁶⁴ *Id.* at 635.

⁶⁵ See generally David Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 AKRON L. REV. 621 (2011).

⁶⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

Id. at 563.

⁶⁷ *Grutter v. Bollinger*, 539 U.S. 338 (2003).

⁶⁸ *United States v. Windsor*, 570 U.S. 744 (2013).

⁶⁹ *Id.* In its overturn, the Supreme Court paved the way for same sex couples to be entitled to over 1,000 tax benefits as surviving spouses. See Hollis J. Fishman, *The Effect of United States v. Windsor on Same-Sex Estate Planning*, Curtin & Heefner LLP (Oct. 22, 2013), <http://www.curtinheefner.com/legal-updates/the-effect-of-united-states-v-windsor-on-same-sex-estate-planning/>.

⁷⁰ *Id.* at 747. In taking such a forward step to affirm the equality of same sex marriages in the eyes of the federal government, the Court did stop short and did not apply the decision retroactively so that other same-sex surviving spouses could also receive this benefit. *Id.*

⁷¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The named plaintiff, James Obergefell, had wanted similar surviving spouse recognition as in *Windsor* upon the death of his husband. See Michael Rosenwald, *How Jim Obergefell became the face of the Supreme Court gay marriage case*, THE WASHINGTON POST (April 6, 2015), https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aac_story.html.

that same sex marriages are a fundamental right and must be recognized by other states within the nation under the equal protections of the 14th Amendment.⁷²

In 2001, the “No Child Left Behind” Act attempted to assess student and school success on “adequate yearly progress” in age appropriate math and language arts concepts.⁷³ The most recent attempt to overhaul public education is the Common Core Standards Initiative, developed by the National Governors Association in 2010.⁷⁴ Initially spearheaded by the Obama administration, the goal was to create uniform benchmarks for each K-12 student to reach by the end of that school year in public schools across the nation.⁷⁵ By 2015, 41 states and the District of Columbia have formally adopted the age-

⁷² 135 S. Ct. 2584. Justice Kennedy went on to opine:

As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Id. at 2608.

⁷³ No Child Left Behind Act of 2001, 20 U.S.C. § 6311(f) (2002). “Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined.” *Id.* See also Corey Turner, *No Child Left Behind: What Worked, What Didn’t*, NATIONAL PUBLIC RADIO (Oct. 27, 2015, 4:29 AM), <https://www.npr.org/sections/ed/2015/10/27/443110755/no-child-left-behind-what-worked-what-didnt>.

⁷⁴ *Frequently Asked Questions*, COMMON CORE STATE INITIATIVES, <http://www.corestandards.org/about-the-standards/frequently-asked-questions/> (last visited March 22, 2020). The FAQ goes on to encourage parents, not educators, to look over the standards set by the committees. See *Read the Standards*, COMMON CORE STATE INITIATIVES, <http://www.corestandards.org/read-the-standards/> (last visited March 22, 2020).

The standards focus on core concepts and procedures starting in the early grades, which gives teachers the time needed to teach them and gives students the time needed to master them. The standards draw on the most important international models, as well as research and input from numerous sources, including educators from kindergarten through college, state departments of education, scholars, assessment developers, professional organizations, parents and students, and members of the public. Because their design and content have been refined through successive drafts and numerous rounds of state feedback, the standards represent a synthesis of the best elements of standards-related work in all states and other countries to date.

Id.

⁷⁵ *Id.* The Common Core developers go to the very limit of intervening on age appropriate milestones, but backtrack in a longer version of the Tenth Amendment:

While the standards set grade-specific goals, they do not define how the standards should be taught or which materials should be used to support

based success landmarks outlined by the Common Core Standards in an effort of nationwide uniformity.⁷⁶ Despite these gains, it must also be noted that a few states formally repealed the adoption of Common Core.⁷⁷ Studies have since shown an adverse effect on English language arts and math scores on state mandated exams in the year since the inception of the Common Core landmarks.⁷⁸ Only language arts and math were deemed appropriate topics to have nationwide standardization for each age group, despite the vital need for mastering sexual health education topics to maintain a variety of safe and healthy adult peer relationships.⁷⁹

II. THE FACTS OF SEX EDUCATION

One of those most important, and possibly most startling, facts of this issue is that sex education is not mandated by any federal statute.⁸⁰ As of 2018, 29 states and the District of Columbia have policies within their state mandating the inclusion of sexual health education, and of that group only 20 states require that education be medically,

students. States and districts recognize that there will need to be a range of supports in place to ensure that all students, including those with special needs and English language learners, can master the standards. It is up to the states to define the full range of supports appropriate for these students.

Id.

⁷⁶ *Id.*

⁷⁷ See Allie Bidwell, Tennessee Governor Signs Bill Stripping Common Core (May 12, 2015, 6:55pm) <https://www.usnews.com/news/articles/2015/05/12/tennessee-gov-bill-haslam-signs-bill-removing-common-core-standards>. “Only three states – Indiana, Oklahoma and South Carolina – have officially repealed the standards.” *Id.*

⁷⁸ *See id.*

What is surprising about the pushback in Tennessee is its position as an early implementation state with a governor and an education commissioner both strongly supportive of the Common Core,’ [an education policy analyst] told *U.S. News* earlier this year. ‘For it to be a state with that level of support, if the state were to drop the Common Core, the implications for the larger movement are pretty grim.’

Id.

⁷⁹ See *Frequently Asked Questions*, COMMON CORE STATE INITIATIVES, <http://www.corestandards.org/about-the-standards/frequently-asked-questions/> (last visited March 22, 2020). The materials stay silent on the possibility of Common Core benchmarks for other topics like science, social sciences and foreign languages. *Id.*

⁸⁰ Planned Parenthood Action Fund, SEX EDUCATION LAWS AND STATE ATTACKS, <https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks> (last visited March 29, 2020); see also Planned Parenthood Acton Fund, HOW SEX EDUCATION IS FUNDED, <https://www.plannedparenthoodaction.org/issues/sex-education/how-sex-education-funded> (last visited March 29, 2020). Public support for greater advocacy and funding surrounding teen pregnancy prevention began in the 1970s, which was quickly followed by *Roe v. Wade* at the Supreme Court. See *Pivo*, 457 U.S. at 856.

factually, and scientifically accurate.⁸¹ On the other hand, other states have statutes that may match social attitudes toward sexual health topics, like abstinence only sex education, but ultimately do not meet what the Center for Disease Control considers an “essential topic for healthy young people.”⁸²

A topic of particular concern is the disparaging treatment of LGBTQ students within their school communities.⁸³ A 2018 survey showed that 7 states still maintain laws prohibiting LGBTQ-sexuality education from being taught in schools.⁸⁴ As discussed above, a similar attitude is shown toward LGBTQ romantic expression where 44% of respondents in a 2017 youth survey reported disciplinary action after violating gender

⁸¹ SEX EDUCATION LAWS, <https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks> (last visited January 18, 2020). To this end, no state in the nation requires any mastery testing of any health education concepts – only the District of Columbia has piloted a testing model in 2012. See Grace Chen, *D.C. Schools Release First Standardized Testing on Sex Ed and Health Subjects*, PUBLIC SCHOOL REVIEW (June 10th, 2019), <https://www.publicschoolreview.com/blog/d-c-schools-release-first-standardized-testing-on-sex-ed-and-health-subjects>.

Many parents, educators and community members voice their disapproval over the addition of the new standardized tests, saying the district should be focusing on bringing up math and reading scores instead of introducing new examinations. Others believe the new examinations brought to light subjects and issues the district should be focusing on in the interest of protecting D.C. youth. Time will tell whether these new scores will be used in a positive, productive way to enhance the education of D.C. students.

Id.

⁸² Planned Parenthood Action Fund, SEX EDUCATION LAWS AND STATE ATTACKS, <https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks> (last visited March 22, 2020); see also *New Findings From CDC Survey Suggest Too Few Schools Teach Prevention Of HIV, STDs, Pregnancy*, CENTER FOR DISEASE CONTROL (2015), <https://www.cdc.gov/nchstp/newsroom/2015/nhpc-press-release-schools-teaching-prevention.html> (last visited March 22, 2020).

The proportion of high schools that teach all 16 topics as part of a required course in grade 9, 10, 11, or 12 ranges from 21 percent (in Arizona) to 90 percent (in New Jersey). In most states, fewer than half of high schools teach all 16 topics and only three states (New Jersey, New York, and New Hampshire) have more than 75 percent of high schools achieving this goal. The proportion of middle schools teaching all 16 topics in a required course in grade 6, 7, or 8 ranges from 4 percent (in Arizona) to 46 percent (in North Carolina). In no state did more than half of middle schools meet the goal, and in most states less than 20 percent did.

Id.

⁸³ *Biannual, The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN (<https://www.glsen.org/school-climate-survey>) at xxii.

⁸⁴ *Id.* The states in question are Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah. See Sexuality Information and Education Council of the United States (SIECUS), 2016 State Legislative Round-Up: Sexuality Education Activity Across the Country (2016).

influence school rules, ranging from dressing outside norms of their biologically-assigned sex to showing public displays of affection to their same sex peer partners.⁸⁵ When students are already feeling unfairly targeted by supervising figures, studies have shown that they are less likely to reach out to teachers or advisors with questions of sexual health behaviors, ultimately having a negative effect on public health.⁸⁶

Some states have made great strides in providing comprehensive sex education to their public school students.⁸⁷ In 2016 California enacted sweeping legislation that updated their sexual health curriculum to include topics featuring intimate partner violence and healthy boundaries.⁸⁸ This came at a critical point as the Center for Disease Control calculated that one in nine female-identifying adolescents would experience intimate partner violence from a partner.⁸⁹ Prior to this, Oregon enacted legislation that emphasized “the physical and psychological aspects of a healthy relationship” in their sexual health curricula, which starts in kindergarten.⁹⁰

⁸⁵ See The 2017 National School Climate Survey, GLSEN at 38. A key finding of this data is that those reporting incidences of disciplinary action shared that the same standard of conduct was not expected or punished amongst their non-LGBTQ peers. *Id.* The survey went on to explain:

Several of the questions about policies and practices were related to efforts to restrict students from identifying as LGBTQ, from being themselves in the school environment, and from expressing support for or interest in LGBTQ issues. Not only do these policies stifle students’ expression, but they also serve to maintain a silence around LGBTQ people and issues that could have the effect of further stigmatizing LGBTQ people.

Id.

⁸⁶ Chimerinsky, *supra*, note 59. Within the same survey, a majority of respondents (60.2%) reported that their school administrations as a whole were neutral or unsupportive about the wellbeing of LGBTQ students while attending their school. *Id.* at Table 2.4.

⁸⁷ Leonarz, *supra*, note 41.

⁸⁸ See Cal. Healthy Youth Act, Cal. Educ. Code Ch. 229 §51930 (2016). See also *Biannual, The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN (<https://www.glsen.org/school-climate-survey>) at 3 (praising California for this bill and for recent bans on LGBT conversion therapy for minors).

⁸⁹ See Factsheet, Preventing Teen Dating Violence, Center for Disease Control (2019) available at <https://www.cdc.gov/violenceprevention/pdf/tdv-factsheet.pdf>.

Unhealthy, abusive, or violent relationships can have severe consequences and short and long-term negative effects on a developing teen. For instance, youth who are victims of [teen dating violence] are more likely to experience symptoms of depression and anxiety, engage in unhealthy behaviors, like using tobacco, drugs, and alcohol, exhibit antisocial behaviors, like lying, theft, bullying or hitting, [or] think about suicide.

Id.

⁹⁰ *Id.*; see also Elizabeth Miller, *Oregon’s New Sex Ed Curriculum Has More Than Just Birds And Bees* (June 4, 2019 9:42am), <https://www.opb.org/news/article/oregon-school-sex-education-consent-gender-expression/>. Part of Oregon’s intent in codifying curricula aimed at such young children was to continue a national movement of teaching children how to identify and report if they are being physically abused, more commonly known as “Erin’s Law.” *Id.* “In 2016, Oregon adopted new health education standards. Beginning in kindergarten, students should be

Being a student who receives sexual health education does not mean that the curriculum is inclusive of all sexualities.⁹¹ Rather, student reports in a nationwide survey show that public schools tend to avoid all LGBTQ topics across disciplines in public schools.⁹² When not in classrooms led by instructors, students have found some positive outcomes in LGBTQ-focused peer-led groups – however, this also comes with parallel data showing that involvement with a LGBTQ focused club can result in higher instances of peer discrimination and harassment while at school for being “outed.”⁹³ The same fear applies to trusted adults within the classroom setting, with less than half of students replying that they would feel comfortable seeking out guidance or advice from any school-based adult on LGBTQ sexuality issues.⁹⁴

As referenced above, learning about sexuality within the health education context naturally leads to learning about intended and unintended pregnancy and conception.⁹⁵ However, an unspoken theme of state-controlled lessons includes those concepts omitted from state legislations and guidelines purposefully to avoid the topic in the classroom altogether.⁹⁶ Currently, only three states teach that abortion is a medical option for an unintended pregnancy, while nineteen states and the District of Columbia only cover

learning about media influence on health and ways to prevent diseases. Students should also be learning that there are many ways to express gender - and how to communicate respectfully with people of all sexual orientations.” *Id.*

⁹¹ See *The 2017 National School Climate Survey*, GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, <https://www.glsen.org/sites/default/files/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf> (last visited January 18, 2020) at 57. Of the thousands of students surveyed, only 21.8% received any mention of lesbian, gay or bisexual topics in the sexual health education classroom. *Id.* The more startling statistic was that the next largest reported group in this survey reported no sexual education of any kind. *Id.*

⁹² From the survey pool, over 80% of participants received no or negative inclusion of LGBTQ topics in classes outside of health education. *Id.* at 58.

⁹³ *Id.* “Just over half of LGBTQ students attended a school that had a Gay-Straight Alliance or Gender and Sexuality Alliance (GSA) or similar student club that addressed LGBTQ issues in education.” See *The 2017 National School Climate Survey* at 55.

⁹⁴ See *id.* at 59. This is further illustrated in what role-specific adults LGBTQ teens would feel comfortable seeking out, with less than 20% feeling comfortable asking questions to a gym or health education teacher. *Id.* at 60.

Supportive teachers and other school staff members serve an important function in the lives of LGBTQ youth, helping them feel safer in school as well as promoting their sense of school belonging and psychological well-being. One way educators can demonstrate their support for LGBTQ youth is through visible displays of such support, such as Safe Space stickers and posters.

Id.

⁹⁵ See *2017 National School Climate Survey supra*, note 7. “While some of these states’ health education standards make quick mention of pregnancy prevention and/or methods to prevent sexually transmitted diseases (STDs), they provide little detail on a suggested curriculum, make no mention of the development of healthy relationships, and do not separate standards by age.” *Id.*

⁹⁶ *Id.* Notably, 39 states and DC require provision of information on abstinence - 29 states require that abstinence be stressed, and 10 states and DC require that abstinence be covered. *Id.*

“negative outcomes of sex.”⁹⁷ With so few states covering abortion as a viable option, it is logical that some teens who are covered on Medicaid are not only being hindered by a lack of abortion education, but by a concurrent lack of education on how the Hyde Amendment further frustrates their reproductive health options.⁹⁸

The Center for Disease Control has reported a multiple percentage point increase in sexually transmitted diseases in 2017 and 2018.⁹⁹ This number includes participants starting at age 15, who are also identified as a “vulnerable group” that has declining rates of condom use.¹⁰⁰ A study in Canada has attributed this risk to a concerning prevalence

⁹⁷ See 2017 *National School Climate Survey supra*, note 7. See also Amanda Arnold, *The US States Prohibiting the Discussion of Abortion in High Schools*, VICE (Oct. 21, 2016, 1:15pm), https://www.vice.com/en_us/article/j5eqmy/the-us-states-prohibiting-the-discussion-of-abortion-in-high-schools (last visited March 22, 2020).

As outlined in New Jersey's 2014 Core Curriculum Content Standards, by the end of grade 12, students learn that "pregnancy, childbirth, and parenthood are significant events that cause numerous changes in one's life and the lives of others," and they allow must "compare the legal rights and responsibilities of adolescents with those of adults regarding pregnancy, abortion, and parenting." In Vermont's Education Code, students are taught comprehensive sexuality education, including "information regarding the possible outcomes of premature sexual activity, contraceptives, adolescent pregnancy, childbirth, adoption, and abortion." On the opposite end of the spectrum, a 2010 SIECUS study looked at states where "information or referrals about abortion services may not be given to students, or may only be addressed in the context of potential negative consequences." According to SEICUS, the eight states that currently restrict referrals for or discussion of abortion are: Arkansas, Connecticut, Kentucky, Louisiana, Michigan, Mississippi, South Carolina, and Oklahoma.

Id.

⁹⁸ See Alina Salganicoff et al., Kaiser Family Foundation, *The Hyde Amendment and Coverage for Abortion Services* (2019). About 2 in 10 women in the United States between the ages of 15 to 49 are enrolled in Medicaid, and roughly 48 percent of all low-income women were enrolled in the program in 2016." See also Ally Boghun, *Here's What You Need to Know About the Hyde Amendment and Efforts to End It*, REWIRE NEWS (2019), <https://rewire.news/article/2019/06/21/heres-what-you-need-to-know-about-the-hyde-amendment-and-efforts-to-end-it/> (last visited March 22, 2020). “. . . [B]ecause of social and economic inequality linked to racism and discrimination [,]women of color are disproportionately likely to be insured through Medicaid. . . therefore, they're disproportionately likely to be subject to the Hyde Amendment ban on abortion coverage.” *Id.* The creator of the bill, Rep. Henry Hyde, later testified being against any woman receiving abortion care in any capacity, and purposefully used Medicaid as a mechanism to target as many low-income women as possible.

Id.

⁹⁹ Center for Disease Control, *New CDC Report: STDs Continue to Rise in the U.S.* (2019), <https://www.cdc.gov/nchstp/newsroom/2019/2018-std-surveillance-report-press-release.html> (last visited March 16, 2020).

¹⁰⁰ See *id.* This number also includes condom use declining amongst young gay and bisexual men. *Id.*

Teens today are less likely than they were a decade ago to say they used a condom the last time they had sex (today about 59 percent say they did versus 63 percent in 2003). And nearly a quarter (22 percent) drank alcohol or used

of antibiotic resistant strains of gonorrhea that cannot be eradicated with normal, proven antibiotic methods.¹⁰¹ However, studies across multiple groups have shown that as adolescents age and have more sexual experiences with partners, they are also less likely to continue using condoms to prevent unwanted outcomes.¹⁰²

A 2019 study conducted by the Guttmacher Institute illustrated that not only are various sexual health education curricula covering different topics, but that they are also holding their state's teens to different standards in accessing contraceptives.¹⁰³ While almost half of states have codified rights for a minor to access contraceptive services, five states currently limit this freedom to a "mature minor" as determined by a healthcare provider.¹⁰⁴ Conversely, both Texas and Tennessee prevent state funds from being used to provide confidential contraceptive resources to a minor.¹⁰⁵

III. ANALYZING SEXUAL HEALTH EDUCATION

a. Missing Topics in Sex Education

drugs the last time they had sex – reflecting no progress in more than two decades.

Id.

¹⁰¹ M. Bodie et al., *Addressing The Rising Rates Of Gonorrhea And Drug-Resistant Gonorrhea: There Is No Time Like The Present*, 45 CAN. COMMUNICABLE DISEASE REP. 54, 55 (2019). "There are . . . key actions that clinicians and front-line public health professionals can take to stem the increase in rates of [gonorrhea] and drug resistant [gonorrhea]. First, normalize and increase [gonorrhea] screening based on risk factors and emphasize the need for safer sex practices." *Id.*

¹⁰² Factsheet, Adolescent Sexual and Reproductive Health in the United States, Guttmacher Institute (2019). "Adolescents' nonuse of contraceptives may be driven by many factors, including lack of access, the need for confidential care and low-cost services, a belief that they are unlikely to get pregnant and poor partner negotiation skills." *Id.* See also Factsheet, Time for Change: Sex Education and the Texas Health Curriculum Standards, Texas Freedom Network Education Fund and SIECUS (2019). "More than 60 percent [of Texas twelfth-grade participants] reported not using a condom the last time they had intercourse, 10 percentage points higher than the national average." *Id.* at 4.

¹⁰³ Factsheet, Minors' Access to Contraceptive Services, Guttmacher Institute (2019).

It also reflects the recognition that while parental involvement is desirable, many minors will remain sexually active but not seek services if they have to tell their parents. As a result, confidentiality is vital to ensuring minors' access to contraceptive services. Even when a state has no relevant policy or case law or an explicit limitation, physicians may commonly provide medical care to a mature minor without parental consent, particularly if the state allows a minor to consent to related health services.

Id.

¹⁰⁴ See *id.* The five states are Kansas, West Virginia, Nevada, New Hampshire and South Carolina. *Id.*

¹⁰⁵ See *id.* This diverts from the trend of other states granting expanded permissions of confidential contraceptive care on state fund to minors who are married, including in Connecticut, Indiana, Louisiana, Michigan, Missouri, Nevada, South Carolina, South Dakota, Utah, Vermont and West Virginia.

The data above includes a small insight into the effects of states employing non-comprehensive sexual health education policies – within their 10th Amendment right – to the detriment of students within their borders.¹⁰⁶ While some states may feel that topics their laws address meet an ideological standard as seen in *Lemon*, this is not particularly convincing when comprehensive data shows otherwise.¹⁰⁷ Collected data and the models set by other states are fundamental to understanding where a state can expand its sexual health education curricula to better prepare its students for the real world, and not a world forced to adapt to unprepared adults.¹⁰⁸

1. Consent

Bodily consent has been employed in some states at a number of grade levels, ranging from solely secondary grades to as early as kindergarten.¹⁰⁹ Regardless of which grade level it is introduced, the lessons remain prevalent throughout a student's adult

¹⁰⁶ See Brendan Peluse, *When it Comes to Education, the Federal Government is in Charge of ... Um, What?* HARVARD EDUCATION MAGAZINE, (2017), <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what> (last visited January 18, 2020).

[States] have some oversight, but individual municipalities, are, in most cases, the legal entities responsible for running schools and for providing the large majority of funding through local tax dollars. Still, the federal government uses a complex system of funding mechanisms, policy directives, and the soft but considerable power of the presidential bully pulpit to shape what, how, and where students learn.

Id. This author wrote this piece in response to accountability reports of state adherence to federal education bills including Common Core being rolled back by the administration change in 2017. *Id.*

¹⁰⁷ See Ala. Code § 16-40A-2. “Abstinence from sexual activity outside of lawful marriage is the expected social standard for unmarried school-age persons.” *Id.* at la. Code § 16-40A-2(a)(1). *But see* Ala. Code § 16-40A-2 (c)(8). “(8) An emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.” *Id.*

¹⁰⁸ See generally Or. Rev. Stat. 336.445 (2019). See also *The 2017 National School Climate Survey*, *supra* note 91.

¹⁰⁹ January 18, 2020 See *The 2017 National School Climate Survey*, *supra*, note 91.

Without lessons on sexual orientation or gender identity before, Hicks said teachers could define the terms, but didn't teach about the topics. “Now we have specific lessons to just address what each of those areas are – that they're not necessarily related, they often are very separate in people's lives, and that there are spectrums,” said Hicks. She says the lessons bring awareness to the LGBTQ community. And her students have noticed.

Id.

life.¹¹⁰ As seen above, those who had access to consent concepts earlier in their educational careers reported higher levels of interpersonal confidence in an intimate partner relationship.¹¹¹ Further corroborating data shows that students learning consent concepts earlier reported higher levels of confidence in navigating an intimate partner relationship if confronted with unwanted physical contact.¹¹² Pursuing this option can combat data showing that when accused of sexual misconduct, some teens did not know or realize that they lacked the consent to pursue their actions.¹¹³ Moreover, bodily consent topics presented at younger elementary years have proven successful even when framed outside the human sexuality lens.¹¹⁴ This can prepare students for more nuanced topics in human sexuality, knowing that bodily consent is a necessary part of any intimate partner relationship, regardless of sexual orientation.¹¹⁵

2. Healthy Relationships

In attempting to update their sexual health curriculum through the Healthy Youth Act, Massachusetts legislators contended that sexual health curriculum would teach students to “develop the . . . communication skills to form healthy, respectful relationships free of violence, coercion, and intimidation.”¹¹⁶ This language reflects similar standards

¹¹⁰ See Factsheet, Minors’ Access to Contraceptive Services, Guttmacher Institute, *supra*, note 103. “As they develop, [students] need access to evidence-based, holistic and nonstigmatizing information, education and services that support their lifelong sexual and reproductive health and well-being.” *Id.* See also *The Real Education for Healthy Youth Act (REHYA)*, SIECUS, <https://siecus.org/resources/the-real-education-for-healthy-youth-act-rehya/>. Because of access to sex education, young people are more likely to delay sexual initiation or use protection when they do initiate sex. *Id.*; see also *2019 Sex Education State Legislation Guide*, SIECUS, https://siecus.org/wp-content/uploads/2018/09/2018_mid-year_State_Leg_9-5-18_Update.pdf (highlighting California, Illinois, Michigan, Missouri, New Jersey and Rhode Island for their sex education curriculum expansions in the 2018 state legislative session).

¹¹¹ See *Time for Change*, *supra* note 103 at 19. “Because the behaviors and attitudes learned by young people shape how they act as adults, this information is essential throughout their lives.” *Id.*

¹¹² See *id.* at 9. “Teaching students about consent, personal boundaries, and healthy relationships helps young people differentiate between acceptable and unacceptable behaviors.” *Id.*

¹¹³ See *id.* “Doing so decreases the incidence of sexual harassment in schools, and young people are less likely to experience dating violence as well as more likely to avoid perpetrating sexual violence.” *Id.*

¹¹⁴ See *The 2017 National School Climate Survey*, *supra*, note 91. Kindergarteners are learning critical lessons about bodily consent that will carry over into their adult lives. *Id.* This school reported intersectional concepts being taught in sexual health education contexts and then successfully carried over into science, drama and literature lessons. *Id.*

¹¹⁵ See Factsheet, Minors’ Access to Contraceptive Services, Guttmacher Institute, *supra* note 103 at 3. “Teaching concepts related to consent and sexual assault beginning at a young age can help lay the foundation for understanding body autonomy and respect.” *Id.*

¹¹⁶ See *An Act Relative to Healthy Youth*, *supra* note 42. One goal of this bill would be to have students learn “to make healthy decisions about relationships and sexuality, including affirmative and voluntary consent to engage in physical or sexual activity, and skills to recognize and prevent dating violence.” *Id.* See also Matt Murphy, *Sex ed, school breakfast bills on state Senate's plate*, THE GLOUCESTER TIMES (Jan. 9, 2020), https://www.glocestertimes.com/news/local_news/sex-ed-

in other states that value the non-sexual parts of healthy intimate relationships.¹¹⁷ A positive correlation exists between the surveys showing that “healthy relationship” education combats reported instances of intimate partner violence and the surveys showing that LGBTQ students are more likely to experience intimate partner violence.¹¹⁸ Thus, state legislatures have an opportunity to act preventatively and include healthy relationship concepts in their health education to benefit students of all identities and orientations.¹¹⁹ In doing so, states employing this curriculum can combat false realities learned from unreliable media narratives that may not depict a successful navigation of intimate partner violence.¹²⁰

[school-breakfast-bills-on-state-senate-s-plate/article_7e45ddc0-35a0-5f00-ace2-d6f34df27198.html](https://www.governor.gov/school-breakfast-bills-on-state-senate-s-plate/article_7e45ddc0-35a0-5f00-ace2-d6f34df27198.html).

The curriculum would also instruct on how to effectively practice safe sex and help students develop the relationship and communication skills they will need to form respectful relationships free of violence or coercion. The bill's lead Senate sponsor, Assistant Majority Leader Sal DiDomenico, has called it "common sense for our kids to make good decisions," but the bill has run up against opposition from conservative groups who don't think that state government should mandate what local schools teach children about sex. The Massachusetts Family Institute has objected to what it believes will be some options taught to respond to unwanted pregnancies and argues that local communities should be able to decide what to teach.

Id.

¹¹⁷ See *supra* note 60 (highlighting West Virginia, Rhode Island and Oregon).

¹¹⁸ See SIECUS, *supra* note 84, at 59.

Further, more than a quarter of students (29.9%) were deterred from reporting harassment or assault because they felt that staff members at their school were homophobic or transphobic themselves. Staff who do hold such beliefs may not fully grasp the victimization LGBTQ students experience, or may simply choose not to help. Perhaps the most troubling, however, is that nearly one-tenth of victimized students (8.9%) in our survey said that school staff members were actually part of the harassment or assault they were experiencing, thus leaving students to feel that there is no recourse for addressing incidents of victimization at their school.

Id.

¹¹⁹ See *id.*

¹²⁰ See UNESCO, *supra* note 2, at 14.

Countries are increasingly acknowledging the importance of equipping young people with the knowledge and skills to make responsible choices in their lives, particularly in a context where they have greater exposure to sexually explicit material through the Internet and other media. . . . New considerations have emerged, including an increased recognition of gender perspectives and social context in health promotion; the protective role of education in reducing vulnerability to poor sexual health outcomes, including those related to HIV, STIs, early and unintended pregnancy and gender-based violence; as well as the influence of and widespread access to the Internet and social media.

Id.

3. LGBTQ History and Advocacy

As seen above, the majority of respondents in a nationwide survey reported having no mention of LGBTQ history or inclusion taught in a meaningful fashion.¹²¹ When data has shown that students without such lessons report higher instances of LGBTQ-focused harassment or discrimination, it seems like a logical fix to employ queer advocacy lessons in schools to mitigate these risks and prepare other members of the school community to prevent such instances.¹²² By addressing the teaching needs of all students receiving sexuality education, surveys have shown greater rates of preparedness in queer intimate partner relationships when queer sexuality, history, and advocacy is taught in the classroom as would typical heterosexual-focused topics.¹²³ However, this topic, much like consent, can be effectively introduced and grasped by students outside of the sexual health context in schools.¹²⁴ Despite states showing a preference or blatant rejection of same-sex sexuality concepts, it is critical for schools to intervene both within and outside of the sexual health education context to affirm both an acceptance of LGBTQ sexuality and a rejection of sexual orientation-based discrimination.¹²⁵

b. Leading the Charge on Sexual Health Education

¹²¹ See SIECUS, *supra* note 84, at 57.

¹²² See SIECUS, *supra* note 84, at 64. The survey elaborates on how peer-led groups can also use advocacy to create a more inclusive environment:

The vast majority (80.2%) indicated that they had engaged in at least one of these types of activism over the past year. The most commonly reported form of activism was using social media, with over two-thirds of LGBTQ students (67.9%) reporting that they had shared their views about social or political issues on platforms such as Facebook or Twitter. Other forms of activism were somewhat less common — as shown in the Figure below, approximately one-third of students reported having participated in an event where people express their political views or participated in a GLSEN Day of Action, such as the Day of Silence. Over a quarter of students had participated in a rally, protest, or demonstration and almost a fifth of students had contacted politicians or government officials to address an issue. Over 10 percent had participated in a boycott against a company or volunteered for a political campaign or cause.

Id.

¹²³ See *Biannual, The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, *supra* note 83.

¹²⁴ See SIECUS, *supra* note 84, at 56. “History/Social Studies and English were the classes most often mentioned as being inclusive of” LGBTQ topics. *Id.*

¹²⁵ See SIECUS, *supra* note 84

LGBTQ students who experienced LGBTQ-related discrimination at school were more than three times as likely to have missed school in the past month as those who had not (44.6% vs. 15.7%), had lower GPAs than their peers (3.1 vs. 3.4), were more likely to have been disciplined at school (44.0% vs. 26.5%), and had lower self-esteem and school belonging and higher levels of depression. Of the LGBTQ students who indicated that they were considering dropping out of school, a sizable portion (33.9%) indicated that they were doing so because of the hostile climate created by gendered school policies and practices.

Id. at xx.

The domain of the states to regulate education falls squarely under their 10th Amendment power.¹²⁶ However, this has not stopped third parties encouraging state legislators to expand the coverage of their sexual health curricula.¹²⁷ Coming from both the health and local government perspectives, external organizations have gone above and beyond to make sexual health education topics more accessible to students in their communities.¹²⁸

One example is seen in the “Game Change” initiative, a healthy relationship educational seminar spearheaded by the Massachusetts Attorney General’s Office and the New England Patriots Charitable Foundation.¹²⁹ This partnership provides a curriculum focused on preparing young people from identifying, mitigating, and peer-educating intimate partner violence or coercion.¹³⁰ While qualitative recounts show a successful implementation of the program, this also means that the results of the program are seen as indelible to the conduct of both the Attorney General’s Office and the New England

¹²⁶ See U.S. Const., *supra* note 21. See also Gerston, *supra* note 21 at 126.

From the standpoint of budget expenditures, no issue is more important to the states than public education. States and their local governments routinely pay more than 90% of the public education bill, with less than 10 percent contributed by the federal government. In recent years, as local governments have encountered more difficulties in paying for public education, states have become the single largest sources of funding. Today, numerous challenges confront public education, ranging from the requirements of the No Child Left Behind federal legislation to proposals for voucher programs and charter schools. The latter proposals have emerged in part because of concerns about the public education “product” that more times than not fails to live up to the public’s expectations.

Id.

¹²⁷ See *Parental Involvement in Minors’ Abortions*, *supra* note 54.

¹²⁸ See *id.*; see also SIECUS: SEX ED FOR SOCIAL CHANGE, <https://siecus.org/about-siecus/>. “SIECUS asserts that sex education is a powerful vehicle for social change.” *Id.*

¹²⁹ See Massachusetts AGO, *Game Change: The Patriots Anti-Violence Partnership*, <https://www.mass.gov/game-change-the-patriots-anti-violence-partnership> (last visited January 18, 2020). “Game Change brings together students, teachers, coaches, and sexual assault and domestic violence service providers to create positive change in their schools and communities.”

Id.

¹³⁰ *Id.*

The program, launched in 2015 by the New England Patriots Charitable Foundation and the Massachusetts Attorney General’s Office, is providing training in anti-violence strategies to students, faculty, and coaches at public high schools across Massachusetts. Game Change implements a long-term anti-violence and healthy relationship education in Massachusetts schools, with a focus on developing peer leaders at the high school level who can provide trainings to their middle school counterparts.

Id.

Patriots organization.¹³¹ Unfortunately, by having third party actors lead the expansion of sexual health education in lieu of states, the goodwill and ethics of those third party actors will never be separate from the outcomes of the curriculum they implement.¹³²

Yet there is no constitutional responsibility equivalent to the Tenth Amendment that compels third parties to act on behalf of community schools as states must.¹³³ The above referenced Common Core organization, despite having input and endorsement from the National Governor's Association, is an example of this type of third party advocate with no binding legal duty to overhaul language arts and mathematic milestones in the nation.¹³⁴ The only organization creating a similar "milestone" approach to provide comprehensive sexual health education is SIECUS, who has since recruited six states in following the milestone model that the group released.¹³⁵ Indicators of how difficult state adoption of SIECUS milestones has been can be calculated from the time the two proposals were introduced; three years after introduction over three-quarters of the states had adopted Common Core milestones, where only around ten percent of states have adopted SIECUS sexual health education milestones in the eight years since its introduction.¹³⁶ Finally, it is critical to have these milestones assessed after adequate time has been devoted to these important topics – and not simply as an afterthought.¹³⁷

¹³¹ See HOW SEX EDUCATION IS FUNDED, *supra* note 80. Planned Parenthood currently lost federal funding due to unresponsive federal partners. *Id.*; see also Antonio Villas-Boas, *Patriots Owner Robert Kraft Breaks Silence After Being Charged Following Florida Prostitution Spa Bust*, BUSINESS INSIDER (2019) <https://www.businessinsider.com/robert-kraft-breaks-silence-after-florida-prostitution-ring-spa-bust-2019-3/> (last visited March 22, 2020). But see Sarah Larson, "Sex Education," *Season 2: The Doctor Is In*, THE NEW YORKER (Jan. 18, 2020) at 18. "[Creator Laurie] Nunn created "Sex Education" [for Netflix in 2018] in part because sex wasn't discussed in her schools growing up. . . . The three T's [trust, talking, and truth] are [a supportive adult character's] suggested cure for the school's chlamydia panic – but as "Sex Education" teaches us and its character, as goes the bedroom, so goes life." *Id.* at 19.

¹³² *Id.*

¹³³ See Gerston, *supra* note 21 at 5-6.

¹³⁴ See *Frequently Asked Questions*, *supra* note 74.

¹³⁵ See 2018 Sex Ed State Legislative Mid-Year Report, *supra* note 111; see also REYHA, *supra* note 111.

Current federal investments in adolescent health promotion programs are an important step in the right direction, but much remains to be done to strengthen, enhance, and expand sex education efforts to meet the needs and rights of all young people. The availability and quality of sexual health information and sex education varies drastically across the country. Less than half of all high schools and only 20% of middle schools in the U.S. provide all 16 of the CDC-identified topics critical to ensuring sexual health. In addition, many young people face barriers to accessing health information and services, resulting in persistent inequity and health disparities.

Id.

¹³⁶ *Id.* See also *supra* note 74.

¹³⁷ See Chen, *supra* note 81.

Shana Bartley, a peer health and sexuality education program director at the Young Women's Project, told the Washington Post that she thought high school scores on sexuality issues would go up if schools spent more time

c. Assessing the Success of Sexual Health Education

As mentioned above, the implementation of No Child Left Behind created a wave of state-compelled standardized testing to normalize benchmarks of success in schools nationwide.¹³⁸ Although the act was overturned by the Every Student Succeeds Act in 2015, the remnants of standardized testing remained to ensure adequate grasp of age-appropriate topics.¹³⁹ While standardized testing remains a historic measure of student success in the classroom, it has only been used in measuring sexual health education concepts within the last decade.¹⁴⁰ The District of Columbia was the first school district

teaching on these issues. Bartley said many of the young women they see at the project have had relatively little classroom instruction on subjects like contraception and safe sex. They have one week to learn about condoms and anatomy and then they move on to fire safety,” Bartley explained.

Id.; see also UNESCO, *supra* note 2, at 99.

Critical to the success in these countries were: strong leadership from the government; partnerships between the government and experienced non-government organizations and universities; adequate resources; and, a shared commitment between stakeholders to the long process of translating policy and plans into actions which ultimately will have an impact in young people’s lives.

Id.

¹³⁸ See Turner, *supra* note 74.

Under NCLB, schools were judged on something called Adequate Yearly Progress. The goal was to get every child to grade-level in reading and math by 2014. It was an impossible goal that infuriated teachers and administrators alike because it held all children — and all schools — to the same timeline. The law didn't care if a child had begun the year three grades behind in reading and a teacher helped her make two years' worth of progress by May. According to NCLB's strict proficiency guidelines, that student was still a year below grade-level.

Id.

¹³⁹ Emma Brown, *Trump signs bill overturning Obama-era regulations*, CHICAGO TRIBUNE (March 27, 2017, 4:26pm), <https://www.chicagotribune.com/nation-world/ct-trump-overturn-education-regulations-20170327-story.html>.

Trump's move scraps new requirements for programs that train new K-12 teachers and rolls back a set of rules outlining how states must carry out the Every Student Succeeds Act, a bipartisan federal law meant to hold schools accountable for student performance. In a signing ceremony at the White House on Monday, the president hailed the measures for "removing an additional layer of bureaucracy to encourage freedom in our schools.

Id.

¹⁴⁰ See Chen, *supra* note 81. “The exams were given at the same time as other standardized tests, including math and reading examinations. According to the Washington Post, more than 11,000 D.C. students took the examinations during the previous school year, with results of those exams recently released by the district.” *Id.*

to employ standardized testing on health education in 5th, 8th, and 10th grades on concepts ranging from healthy decision making to sexuality and contraception.¹⁴¹

d. Media and Sexuality

As noted above, media is commonly used as a tool to learn sexual health topics for many adolescents.¹⁴² Anecdotal data has shown that this is not always the primary intent of digesting media, but usually a secondary affect or benefit welcomed after a lack of discussion around sexual education topics at home or in the classroom, regardless of sexual orientation.¹⁴³ In lieu of preventing sexuality education via media absorption, research has shown that using digital tools used by teens outside of the sexual health context can be powerful in spreading accurate and helpful information for healthy interpersonal relationships.¹⁴⁴ This digital dissemination of useful knowledge on already-existing platforms could plateau the unequal access that many students have and illustrate

¹⁴¹ *Id.*

High school students who took similar standardized tests on age-appropriate subjects had very different results. This group scored highest on safety skills at 78 percent, followed by sexuality and reproduction at 75 percent. The lowest scores for high school students were seen in the categories of locating health information and assistance (46 percent) and physical education (52 percent).

Id.

¹⁴² See Demoupoulos, *supra* note 4.

Adolescents use the media as sources of information about sex, drugs, AIDS, and violence as well as to learn how to behave in relationships. Practitioners should address preadolescent and adolescent patients' use of electronic media and the Internet, television viewing patterns, and R- and X-rated movie attendance or video rentals when assessing risk behavior for a thorough medical history.

Id. See also Larson, *supra* note 132.

¹⁴³ See Demoupoulos, *supra* note 4. "When Megan Meador was in fifth grade, her Las Vegas-area public school held its first sex education class. It consisted solely of watching one animated video about STDs. The 10-year-old hardly understood it. "They basically gave us a plastic baggie with a tampon and said, 'Have fun,'" Meador, now 19, said. No one brought up birth control." *Id.* The described TikTok videos use the hashtag "birth control", which has 3.8 million followers alone on the application. *Id.*

¹⁴⁴ See UNESCO, *supra* note 2, at 98.

Digital media-based delivery of sexuality education appears to offer rich opportunities, especially because of the ability to tailor digital interventions to the specific needs of users, including sub-groups of young people who may not be adequately addressed in static, curriculum-based programmes that are delivered to school classes. Recent studies of sexuality education programmes delivered via digital media have found changes in target behaviors, including delayed initiation of sex, as well as changes in knowledge and attitudes, for example on condom self-efficacy, abstinence attitudes and knowledge of HIV/STIs and pregnancy.

Id.

the current gaps in health education that students face.¹⁴⁵ However, digital dissemination – regardless of whether pursued by a state or independent actor – will likely face the same scrutiny and censorship based on that jurisdiction’s values on “appropriate content.”¹⁴⁶

IV. Conclusions

As stated above, sexual health education presented in schools as part of a thoughtful and inclusive curriculum is an ideal environment to learn concepts of human sexuality and healthy behaviors that will lead to healthy choices during adulthood. Each state uses their 10th Amendment powers to define what an adequate sexual health education is within their state, thus creating a vast disparity in what “adequate” means across the nation. While some data shows a promising decline in teen pregnancy rates, other studies illustrate a growing threat of antibiotic-resistant sexually transmitted infections, intimate partner violence prevalence, and a decline in prophylactic use. Third parties like sexual health centers and nonprofit partners can provide independent resources to supplement classroom concepts but do so at the risk of losing public funding or goodwill that could perpetuate the stigma and taboo already associated with sexuality education. While the federal government has shown consolidated strength in creating tenable education policy for age appropriate progress in some subjects, it is unlikely to create a similar model for sexuality health education because of state resistance, claims of educational autonomy, and scientifically incorrect bias. Thus, it is clear that the onus on creating a comprehensive, data-driven sexual health education curriculum must be on the states themselves. While the federal government could easily intervene at a macro level as it did in No Child Left Behind and the Common Core Initiative, the program would need to be immune from volatile partisan attitudes to ensure lasting, scientifically-based values and concepts are taught to generations of students. By following the models of states trailblazing with kindergarten-level health education benchmarks or standardized testing of health education concepts, more and more states can take the health of their citizens into their own hands to prepare each and every student for a healthy and empowered adulthood.

¹⁴⁵ See Demopoulos, *supra* note 4.

Still, Dr. Lincoln will not be deterred. “I’ve had women on Instagram tell me their posts were the reason they told their OBGYN about their postpartum depression, or the reason they went to the hospital and had their complications treated,” she wrote. “If I can do the same on TikTok, helping girls and women know how to empower themselves and understand their bodies—why would I let a few bumps in the road get in my way?”

Id.; see also *Taking Stock with Teens Survey: Fall 2018 Results*, BUSINESS INSIDER, October 22, 2018 at 7. “Netflix remains the leader in video consumption. Teens spend 38% of their time watching Netflix (essentially unchanged from Spring 2018).” *Id.* at 44.

¹⁴⁶ See *id.* “Suddenly, the post [showing how to correctly and safely use a condom] disappeared, with Cavill getting a notification that it “violated TikTok’s community guidelines.” [Cavill] emailed the support team, and has yet to hear any explanation as to why the video is so offensive.” *Id.*; see also Chen, *supra* note 81. “Parents were allowed to opt out of allowing their students to answer the questions on sex, contraception and drugs, if they chose. Around five percent of fifth graders opted out of sex-related questions, while approximately two percent of eighth graders and high school students did so.” *Id.* This suggests that the most likely group of independent actors using their capacity to censor sexual health education topics or to thwart state education actions will be parents. *Id.*