THE BEST PROTECTION IS ABSTINENCE (FROM FUNDING): THE ILLEGALITY AND UNCONSTITUTIONALITY OF ABSTINENCE-ONLY SEX EDUCATION IN THE UNITED STATES

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The United States funds abstinence-only sex education through a variety of spending programs, such as the Title V Sexual Risk Avoidance Education (SRAE) program. Receiving abstinence-only sex education is correlated with higher teen pregnancy rates, more frequent instances of sexually transmitted diseases and infections among young people, young people’s engagement in sexual activity with a greater number of partners, and even a reduced average age of engagement in vaginal intercourse. Federal funding of programs which carry these risks must cease immediately. Scholars and litigants have raised challenges to the constitutionality of programs like SRAE; legal scholar James McGrath purports that such programs are a violation of the Establishment Clause, and as a student author, Peggy Rowe argues they are a violation of substantive due process.

This article introduces a new constitutional challenge and a new statutory challenge: Funding for SRAE and programs like it is unconstitutional under the Equal Protection Clause and illegal under Title IX of the Educational Amendments Act of 1972 because it is discrimination on the basis of sex. This paper analyzes how the funding of abstinence-only sex education amounts to the disparate treatment of and discrimination against girls. An understanding of this funding’s violations of the Equal Protection Clause and Title IX contributes to a larger conversation on sex education reform and constitutional challenges to SRAE and programs like it. There are many moving parts in this research and movement: SRAE funding is unconstitutional through violations of the Establishment Clause and substantive due process. Such funding also denies equal protection to LGBT youth. The policy does not reflect the national majority view of parents and voters. Moreover, sex education is but a piece of the culture wars regarding reproductive and sexual health policy in the United States—which affect everyone, including the most vulnerable and easily neglected. Within this broader picture, this article seeks to advance the interests of girls who receive federally funded sex education.

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* J.D. 2023, University of Pennsylvania Carey Law School; B.A. 2020, Indiana University. Associate, Duane Morris LLP. I traversed abstinence-only sex education myself and I hope that, one day, no one will have to do the same. I’d like to thank Professors Michael Davis and Serena Mayeri for guiding me in the production of this piece.
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I. INTRODUCTION

Children practice risky behaviors. Among these is unprotected sexual activity. When children are uninformed about how to protect themselves when engaging in sexual activity, they face serious consequences, such as pregnancy and sexually transmitted diseases. Although the United States federal government has the power to prevent these consequences by funding effective, medically accurate, and comprehensive sex education, government officials instead choose to prioritize abstinence-only sex education, which fails to address and even exacerbates the problem. Abstinence-only and abstinence-only-until-marriage sex education discriminates against girls and children vulnerable to pregnancy,1 does not mitigate instances of pregnancy in adolescents, and is ineffective at preventing the spread of sexually transmitted diseases and infections among children.

This article uses the term “abstinence-only sex education” to refer to both abstinence-only and abstinence-only-until-marriage programs, as they are functionally the same for the purpose of educating adolescents, most of whom will not marry until adulthood. Additionally, this article primarily uses the terms sex education or sexual education to encompass all types of programming designed to teach children about sexual function and sexuality. However, at times I also use the term sexuality education in discussions of comprehensive sex education programs or in quotations that reference such programs. Sexuality education programs discuss issues beyond those covered in sex education—particularly abstinence-only sex education—programs, such as gender roles and societal attitudes toward sex and sexuality.2 Because this article concentrates on the inefficacy, illegality, and unconstitutionality of funding for abstinence-only sex education, it does not explore the substance and role of sexuality education itself.

Abstinence-only sex education is discriminatory against girls and children vulnerable to pregnancy. Often, programs subject girls to public shaming for their sexualities, comparing girls who have engaged in sexual activity to chewed up gum and using other dehumanizing analogies. Furthermore, girls bear the brunt of the adverse effects of abstinence-only sex education’s failure. Girls and children vulnerable to pregnancy suffer psychologically, physically, socially, economically, and educationally when they face unintended pregnancies which abstinence-only sex education does not prevent. These consequences are not only foreseeable, but inevitable, and these consequences demonstrate that the curricula of federally funded programs result in disparate treatment of and a disparate impact on girls and children vulnerable to pregnancy. Such discrimination is illegal many times over: it violates Title IX of the Educational Amendments Act of 1972, the purpose of the Equal Education Opportunity Act of 1974, the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Additionally, federal funding for these programs is essentially government funding of the religious organizations that invest in and lead abstinence-only programming. Thus, this

1 Throughout this article, I strive to use the most gender-inclusive language possible while maintaining an emphasis on the children who are the most important stakeholders in this conversation. My language will vary based on what characteristics make children—mostly girls—vulnerable to discrimination due to abstinence-only sex education. Notably, children who are vulnerable to pregnancy have almost always been socialized as girls from birth, so the discriminatory content included in many abstinence-only sex education programs profoundly affects them, as it does girls assigned female at birth.

funding also violates the Establishment Clause of the First Amendment of the U.S. Constitution. Among this host of violations, this article concentrates on those infractions violating protections specifically guaranteed to girls by Title IX and the Equal Protection Clause.

Given the disparate impact of pregnancy on girls and children vulnerable to pregnancy, and the strictly discriminatory programming that shames girls for their sexualities, abstinence-only sex education programs violate both Title IX and the Equal Protection Clause. This article provides evidence of these violations and proceeds in seven Parts. Part II reviews the available literature on the history of sex education in the United States and on the inefficacy of abstinence-only sex education programs. Part III analyzes the interests at play in sex education policy. Part IV demonstrates the disparate impact of poor sex education on girls and children vulnerable to pregnancy. Part V briefly reviews abortion rights and restrictions in the United States, specifically those restrictions targeting minors, and analyzes explores how these regulations exacerbate the disparate impact of poor sex education on girls and children vulnerable to pregnancy. Part VI presents Title IX disparate treatment and disparate impact challenges to federal funding for abstinence-only sex education. Part VII presents constitutional challenges to the same, including this article’s Equal Protection Clause challenge. Finally, Part VIII proposes a policy solution to the United States’ broken and discriminatory sex education funding. Part IX concludes.

II. LITERATURE REVIEW

A. A Brief History of Sex Education in the United States

Since World War I, the United States has faced the consequences of rampant uneducated sexual activity.3 In the 1910s, venereal disease (VD) and prostitution were especially prevalent, leading to the first movement for the implementation of sex education programs.4 The need for sex education was emphasized—particularly for students on college campuses and soldiers in combat zones in Europe — in the interest of “social hygiene,” a popular term used at the time that referred to the prevention of the spread of VD.5 In 1914, the principle activist organization for sex education, the American Social Hygiene Association (ASHA), formed.6 Following the war, ASHA maintained its focus on preventing VD and prostitution, highlighting that such prevention was a lacuna in public hygiene policy in its post-war “History and Forecast.”7 ASHA believed this issue had not been properly addressed due to “[i]gnorance, prudery, bigotry, [and] indifference.”8 Among its policy initiatives, ASHA advocated for “sex education in institutions for formal instruction, namely high schools, normal schools, colleges[,] and universities.”9 It should be noted that by today’s standards, ASHA and the

4 American Social Hygiene, supra note 3; Shatz, supra note 3, at 496.
5 American Social Hygiene, supra note 3 (illustrating the beginning of sex education for young adults in the 1910s during WWI); Shatz, supra note 3, at 496 (detailing the history of sex education in the US).
6 American Social Hygiene, supra note 3.
7 Id.
8 Id.
9 Id.
sexual education programs which it helped facilitate were far from progressive. They focused on “wholesome sex within marriage” and warning against the practice of masturbation in its film *The Gift of Life.*

In the 1930s through 50s, sex education continued to become more prominent in the U.S. and to gain support from the federal government. In 1964, another major organization promoting sex education emerged: the Sexuality Information and Education Counsel of the United States (SIECUS). Founded by Mary Calderone, a former medical director of Planned Parenthood, SIECUS sought to expand the curriculum promoted by ASHA to include more comprehensive and medically accurate information and to include messaging portraying sexuality as “a natural and healthy part of life.” However, religious conservative organizations strongly protested SIECUS and the sexual revolution of the 1960s and 70s. Newly emerged organizations, such as Christian Crusade, opposed sex education in schools entirely, claiming it furthered sexual immorality and communist ideas.

The religious conservative scorched-earth warfare against all sex education gave way to a call for abstinence-only and abstinence-only-until-marriage programming, which excludes, or at the very least erodes, discussions of contraception today. Religious conservative activism proved effective. In 1981, the Reagan administration implemented the Adolescent Family Life Act (AFLA), aimed at preventing pregnancy through chastity. With AFLA, the federal government began its decades-long practice of providing funding for abstinence-only sex education programming in public schools.

Although federal funding of abstinence-only sex education ostensibly began as an effort to prevent pregnancies in children, the Clinton administration overtly broadened the goals of such programs by passing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which established what is now the Title V Sexual Risk Avoidance Education (SRAE) grant program. Title V, Section 510 defines these abstinence-only sex education programs for which grantees receive federal funding as programs that “[ha]ve [their] exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity” and that “teach[ ] that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity [and that] sexual activity outside of marriage is likely to have harmful psychological and physical

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10 Id.; see also Johannah Cornblatt, *A Brief History of Sex Ed in America*, NEWSWEEK (Oct. 27, 2009, 8:00 PM), https://perma.cc/5RUY-YES5; Shatz, *supra* note 3, at 496.
12 Id.
15 Cornblatt, *supra* note 10; see also Shatz, *supra* note 3, at 496.
18 Id.

23
effects.” Title V SRAE program grantees must provide medically accurate information but may not provide comprehensive sexual education by providing or even demonstrating proper use of contraceptive products, in keeping with the program’s abstinence-only mission. Discussion of contraception takes place “within a broader conversation that strongly emphasizes the value of waiting for sex.” Originally, SRAE received $50 million in federal funding; however, in 2017, the government increased the program’s funding to $75 million, supporting grantees in 44 states and five territories. U.S. states and territories, local governments, tribal governments, both public and private postsecondary institutions, and small businesses may apply for and receive grants.

The Obama administration pushed back against the status quo by passing funding for comprehensive sex education and research on its efficacy through the new Teen Pregnancy Prevention Program (TPPP) and Office of Adolescent Health (OAH). In 2015, Congress expanded TPPP funding in exchange for its increase in SRAE funding. TPPP later faced trying circumstances during the Trump administration, when the administration sought to overhaul and convert the program into another abstinence-only sex education program. However, several organizations sued the administration and prevailed, as courts held that efforts to redirect the program’s mission were contrary to congressional intent. In February 2020, the Trump administration appeared to reverse course, passing TPPP funding that did not include abstinence-only language.

As of December 30, 2022, at least 27 private organizations are receiving two-year SRAE grants. These include the First Assembly of God of Victorville, Worship Centre Church, Wyoming Families First, Young Women on the Move, Inc., and Youth for Christ Central Valley. Every U.S. state and territory accepts SRAE funding.

22 Sexual Risk Avoidance, supra note 21.
23 Guttmacher Inst., Federally Funded Abstinence, supra note 19; Santelli et al., supra note 20, at 275.
24 Guttmacher Inst., Federally Funded Abstinence, supra note 19.
26 Santelli et al., supra note 20, at 275.
27 SIECUS, supra note 25.
28 SIECUS, supra note 25.
31 Id.
B. The Inefficacy of Abstinence-Only Sex Education

Abstinence-only sex education is wholly ineffective at achieving its goals of preventing pregnancy, sexually transmitted diseases, and teenage engagement in sexual activity. A study published in the Journal of Adolescent Health found that teenagers aged 15 to 19 who received comprehensive sex education reported fewer pregnancies and were slightly less likely to have engaged in vaginal intercourse than those who received abstinence-only or no sex education. In 2007, the Bush administration’s Department of Health and Human Services found that children who received Title V programming were no more likely to abstain from sexual activity or limit their engagement in sexual activity to fewer partners than children who received the standard health and sex education offered by their schools and communities. As a result of that study, the Department concluded “continued rigorous research on programs for preventing teen pregnancy” was still needed.

The incidences of teen pregnancy in the United States as compared to other countries provides further evidence that the abstinence-only sex education programs, which states are encouraged by the promise of federal funding to adopt, fail to achieve their goals. In 2015, the United States had the highest rate of teen pregnancy of the 21 countries for which complete data was available. A comparison of the United States and Switzerland provides further evidence that this data is the result of insufficient sex education. Switzerland offers comprehensive sex education, free family-planning assistance, affordable emergency contraception, and has a teen pregnancy rate more than seven times lower than that of the United States.

Children who received abstinence-only sex education are also more likely to contract a sexually transmitted disease (STD) also referred to as a sexually transmitted infection (STI). In 2012, the CDC found that teens who received comprehensive sex education had fewer incidences of STIs. Meanwhile, abstinence-only sex education programs produced no change in incidences of STI transmission, although no conclusions could be drawn about the effectiveness of group-based abstinence education. Relatedly, the same study found that teens who received comprehensive sex education were more likely to use condoms and engage in sexual activity with fewer partners.

The failure of abstinence-only sex education stems partially from these programs’ refusal to accept the reality that because young people today are marrying later than ever before, they are likely to engage in sexual activity before marriage, beginning on average at age 17.8. Under Section 510, in describing the aims of SRAE programming, the government asserts that sexual practices will cause

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34 Grantees of the Family, supra note 19.
35 Id.
37 Id.
38 Santelli et al., supra note 20.
39 Id.
40 Id. at 275.
young people psychological harm; however, there is ample research contradicting this assertion.\textsuperscript{41} This research demonstrates instead that girls may face psychological harm upon becoming sexually active due to “cultural norms and social sanctions,” such as abstinence-only sex education programs that often employ shame-based tactics and send the message that young girls may become used up if they begin having sex before marriage.\textsuperscript{42}

\section*{III. Analysis of Interests at Stake in Sex Education at Stake}

\subsection*{A. Parents’ Interest}

As taxpayers, parents have an interest in what and how their children are taught in public schools as they are directly funding the curriculum.\textsuperscript{43} More importantly, parents have a strong interest in protecting their children’s health and ensuring that they receive an adequate education in every subject, including sex education.\textsuperscript{44} Parents strive to uphold their children’s health while instilling in them the values they believe are important; therefore, it seems intuitive that most parents would favor abstinence-only or abstinence-only-until-marriage sex education. However, studies have found just the opposite is true.\textsuperscript{45}

For example, a study conducted by researchers from the University of North Carolina at Chapel Hill found that parents in North Carolina, a state with restrictive abstinence-only sex education state laws, favored comprehensive sex education.\textsuperscript{46} Parents who participated in the study “overwhelmingly support sexuality education in schools.”\textsuperscript{47} Parents who favored sexuality education in schools (91% of respondents) also by and large supported comprehensive curricula (89% of respondents who favored sexuality education in schools).\textsuperscript{48} Additionally, only a small percentage of parents opposed the inclusion of any specific topic (such as oral sex) in sexuality education curricula.\textsuperscript{49} Finally, a clear majority of parents (90%) believed parents and healthcare professionals, as opposed to legislators, should determine the curricula of sex education.\textsuperscript{50}

\footnotesize
\begin{itemize}
  \item \textsuperscript{41} See Santelli et al., supra note 20; see also KATHRYN KOLBERT & JULIE F. KAY, CONTROLLING WOMEN: WHAT WE MUST DO NOW TO SAVE REPRODUCTIVE FREEDOM 97 (2021).
  \item \textsuperscript{42} Id. Sex education curricula that shames girls and children with vaginas is discussed infra in Part IV(b).
  \item \textsuperscript{44} Id.; see generally Leslie Kantor & Nicole Levitz, Parents’ views on sex education in schools: How much do Democrats and Republicans agree?, PLOS ONL. (July 2017), https://perma.cc/N7W3-49MK (showing bipartisan parental support for a comprehensive middle and high school sex education across a variety of states, including North Carolina).
  \item \textsuperscript{45} Id.; see also Juliana Menasce Horowitz, Parents Differ Sharply by Party Over What Their K-12 Children Should Learn in School, PWE RSCH. CTR. (Oct. 26, 2022), https://perma.cc/EX8M-6F8T (finding 59% of parents prefer their children to learn about contraception compared to 22% of parents who prefer abstinence-only education).
  \item \textsuperscript{46} See Kantor & Levitz, supra note 44.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Id.
  \item \textsuperscript{49} Id.
  \item \textsuperscript{50} Id.
\end{itemize}
Of course, not all parents agree on whether sex education should be provided in schools and what should be included in that education. For example, some parents believe sex education is centered around morality, which should be taught at home. Parents may also believe their children are unique and should receive more individualized sex education. The parents who oppose sex education in schools are likewise concerned about the inefficacy and negative outcomes of such an education. However, the majority of parents in the United States favor comprehensive sex education programming. The results of the North Carolina study are clear and reveal that public opinion even in states with conservative sex education laws aligns with the data: parents’ primary interest is keeping their children safe and healthy. Parents deserve a version of sex education that is excellent at achieving those outcomes.

B. State’s Interest

The U.S. Supreme Court has made clear the state retains an interest in teen activity generally and that the state has more power to protect that interest than it does to protect its interest in regulating adult activity. For example, in Prince v. Massachusetts, the Court recognized the state’s interest in protecting children from various physical and psychological dangers that could arise from “street preaching” and allowed the state to prohibit children from taking part in the activity, although adults remained permitted to participate.

However, in Carey v. Population Services International, the Court held that a state may not limit minors’ access to contraception, citing decisions such as Planned Parenthood v. Danforth, discussed in Part V. In both Carey and Danforth, the Court reasoned that the right to privacy in family planning decisions guaranteed to adults extended to children. The Court weighed the state’s interest in discouraging minors’ sexual activity against children’s constitutional right to privacy. Holding that the state’s interest did not outweigh children’s right to privacy, the Court further concluded that evidence did not support claims that limiting access to contraception would limit teenage sexual activity.

In the case of AFLA and SRAE programming, the state proffers a similar interest of reducing children’s sexual activity. Sex education policy implicates states’ interests in “the health, safety, and morals of [its] citizens.” The foundations of the state’s articulated interests in abstinence-only sex education can be seen in congressional sponsors’ arguments for AFLA. Congressional sponsors

53 Id.
54 Id.
57 Id.
59 Id. at 693; Danforth, 428 U.S. at 74–75.
60 Carey, 431 U.S. at 693; Danforth, 428 U.S. at 74–75.
61 Rowe, supra note 11, at 548; see also Carey, 431 U.S. at 694 (discussing states’ interests in regulating sexual activity for health, safety, and morality).
characterized AFLA, then called the chastity bill, as “pro-family legislation.”\textsuperscript{62} Senator Jeremiah Denton, a co-author of the bill, focused on the objectives of reducing teen “promiscuity” and its emotional and moral “damage.”\textsuperscript{63} Denton encouraged the state, through his proposed legislation, to take an interest in teenage chastity as well as the decisions of pregnant teenagers by encouraging them to put their children up for adoption.\textsuperscript{64} Notably, Denton’s bill was co-sponsored by Orrin Hatch of Utah, who only recently departed the U.S. Senate in 2019.\textsuperscript{65} The interests and motivations articulated in this era are far from outdated.

In 1996, when the Clinton administration funded what are now SRAE grants, lawmakers echoed Denton’s concerns, discussing the “harmful psychological and physical effects” of pre-marital sexual activity.\textsuperscript{66} The administration targeted low-income and minority groups in its promotion of abstinence-only sexual education programming,\textsuperscript{67} demonstrating the paternalistic and protectionist nature of its alleged interests in young people’s health and wellness. The \textit{Los Angeles Times} emphasized the state’s stated interest in decreasing teen pregnancy specifically, quoting Senator Lauch Faircloth of North Carolina, a sponsor of the program:

> Most welfare reform proposals try to pick up the pieces after an out-of-wedlock birth has occurred. It is much more effective to prevent young women from getting pregnant in the first place. And teaching young people to abstain from sexual activity is one of the best ways to accomplish that.\textsuperscript{68}

Finally, the Trump administration articulated similar state interests in its efforts to undermine the Obama administration’s TPPP programming.\textsuperscript{69} The Trump administration, like those before it, stressed pregnancy prevention and “sexual risk reduction” as primary state interests to justify the funding shift discussed in Part I.\textsuperscript{70}

\textbf{C. Child’s Interest}

Children are the stakeholders with the greatest interest and the most to lose when they receive poor sex education. As discussed \textit{infra} in Part III, children’s health, which includes their physical, psychological, social, and financial health, is put at risk when they receive inadequate sex education. Additionally, children have an interest in the protection of their constitutional rights, even and especially when they are in school, as expressed by the Court in such cases as \textit{Tinker v. Des Moines}.\textsuperscript{71} This is to say that although the state has more power to regulate the activities of minors than adults,\textsuperscript{72} children


\textsuperscript{64} Id.

\textsuperscript{65} Id.; Gregory Lewis McNamee & Chelsey Parrott-Sheffer, \textit{Orrin Hatch}, \textit{BRITANNICA} (Sept. 14, 2023), https://perma.cc/TF56-6RYB.


\textsuperscript{67} Id.

\textsuperscript{68} Id.


\textsuperscript{70} Id.


nonetheless have an interest in protecting their constitutional rights, in this case, particularly girls’ rights to equal protection and privacy.  

IV. DISPARATE IMPACT ON GIRLS AND CHILDREN VULNERABLE TO PREGNANCY AS COMPARED TO BOYS AND CHILDREN NOT VULNERABLE TO PREGNANCY

A. Impact of Poor Sex Education on Boys

Boys face many negative consequences when they engage in uninformed sexual activity. All children, including boys, are negatively impacted by poor sex education, facing consequences such as STD and STI transmission, as discussed supra. Additionally, boys face many consequences when an unintended pregnancy occurs during their teen years. Notably, among these consequences is the enforceability of child support obligations on minor parents, even in cases in which the child is a result of the statutory rape of the boy.  

B. Impact of Poor Sex Education on Girls

While unplanned teenage pregnancy resulting from abstinence-only sex education significantly harms boys financially and emotionally, girls and children vulnerable to pregnancy face far more serious consequences. Therefore, girls suffer a disparate impact in the harm caused by abstinence-only sex education. They face stigma when receiving abstinence-only sex education, psychological and social consequences as a result of pregnancy, and the severe physical consequences of pregnancy, all of which boys do not experience.

Abstinence-only sex education programs creates a stigma that not only results in a disparate impact on girls, but also stokes schools’ disparate treatment of female students during sex education classes. For example, an abstinence-only program may discuss girls’ sexuality using a chewing gum analogy: “[O]nce you’ve been ‘chewed,’ nobody else is going to want you.” Other analogies that shame girls for their possible engagement in sexual activity include passing around a piece of chocolate “to see how dirty it becomes after being touched by multiple people,” sticking a piece of tape to multiple children’s arms to demonstrate how it loses its “tight bond,” having children spit into a cup and asking the class who would choose to drink the finished product, and passing around a rose and removing the petals.


75 Additionally, girls and people with vaginas are more vulnerable to STDs such as HIV because, those with vaginas are more likely to contract an STD during vaginal sex than people with penises, according to several studies. See, e.g., HIV and Women, AVERT, https://perma.cc/WYK2-G689 (Mar. 30, 2023). Furthermore, young girls are even more likely to contract these infections due to increased vaginal inflammation and the immaturity of their cervixes. 10 Ways STDs Impact Women Differently from Men, CDC (Apr. 2011), https://perma.cc/GQR4-FFTD; Rachael C. Dellar et al., Adolescent Girls and Young Women: Key Populations for HIV: Epidemic Control, 18 J. INT. AIDS SOC. 64, 66 https://perma.cc/R88Z-PQYB.

76 KOLBERT & KAY, supra note 41, at 97.
petals.77 When accompanied by the common myth that vaginas become “looser” when they experience multiple sexual partners, such analogies clearly disproportionately impact girls and children with vaginas by creating emotional harm and fostering shame.78 This disproportionate impact is discriminatory. And the programming that causes this discrimination arbitrarily chooses to shame girls, who have historically faced similar shaming, rather than comprehensively educating children on sexuality and sexual decision-making. Grantees’ choice to teach this curriculum also represents disparate treatment of girls, creating a legal challenge to their programs specifically that will be analyzed in Part V.

Abstinence-only sex education programs most clearly disproportionately harm girls and children vulnerable to pregnancy because they are ineffective at aiding children in preventing pregnancy. Pregnant teenagers face greater mental health risks than teenagers who do not experience pregnancy. For example, according to some studies, pregnant teens experience depression at a substantially higher rate than non-pregnant teens.79 As a result, some studies have shown that up to 30% of adolescent mothers experience suicidality.80 Another study found almost 50% of participating teen parents suffered from post-traumatic stress disorder, in part because adolescent mothers are more likely than adult mothers to experience intimate partner violence and other traumatic events.81 Finally, teenagers who become pregnant are less likely to complete a secondary and postsecondary education than are teenagers who do not become pregnant.82

Most notably, girls and children vulnerable to pregnancy face the physical consequences of pregnancy when they are provided ineffective sex education, while boys do not. Pregnancy is a serious health condition, as evidenced by the World Health Organization’s finding that “[c]omlications from pregnancy and childbirth are among the leading causes of death for girls aged 15–19 years globally.”83 In the developed world, the United States has the highest rate of maternal mortality, with people of color being the most at risk.84 Importantly, for each person who dies as a result of pregnancy, “dozens more come close.”85 Girls and children are more susceptible to the dangerous complications which lead

81 Id.
82 Id. Latinx and Black teens ages 15 to 19 are up to twice as likely as white teenagers to give birth, demonstrating an even greater disparate impact of poor sex education on girls of color and of a low socioeconomic status. KOLBERT & KAY, supra note 41, at 90; Adolescent Pregnancy, WORLD HEALTH ORG. (Jan. 31, 2020), https://perma.cc/MNQ7-P66L (“Adolescent pregnancy tends to be higher among those with less education or of a low economic status.”). Additionally, girls of a low socioeconomic status who choose to keep a child resulting from a teenage pregnancy face blatant societal backlash, as evidenced by television shows such as 16 and Pregnant and public service announcements that present messaging such as “you’re supposed to be changing the world . . . not changing diapers.” KOLBERT & KAY, supra note 41, at 91 (citation omitted). Finally, at least for the purposes of some grantees, SRAE programming is often aimed toward “vulnerable youth,” including those of low socioeconomic status and children of color. Sexual Risk Avoidance Education Grant, S.D. DEPT. OF HEALTH, https://perma.cc/76PC-3XKJ (Sept. 8, 2023). These factors together demonstrate an additionally and severe disparate impact on and disparate treatment of girls and children of color and of a low socioeconomic status, an in-depth discussion of which is outside the scope of this article.
83 KOLBERT & KAY, supra note 41, at 91.
84 Adolescent and Young Adult Health, WORLD HEALTH ORG. (Apr. 28, 2023), https://perma.cc/6SY8-VTY5.
86 Id.
to adverse outcomes—such as eclampsia, puerperal endometriosis, and infections—than women and adults are.86

In adulthood as well as adolescence, pregnancy causes intense physical changes, some of which continue long after childbirth. During pregnancy, a person may experience nausea, vomiting, fatigue, cramping, constipation, congestion,87 weight gain, Braxton-Hicks contractions, skin changes and stretch marks, dental issues, dizziness, urinary tract infections,88 backaches, shortness of breath, heartburn, and issues such as hemorrhoids, spider veins, and varicose veins resulting from increased blood circulation.89

A pregnancy may end by miscarriage, as is the case for 14% of teenagers who become pregnant.90 A miscarriage can cause many powerful negative emotions, partially resulting from hormonal changes, including guilt, anger, disbelief, sadness, and depression that can manifest through physical symptoms such as fatigue, trouble sleeping, and loss of appetite.91 Physical symptoms caused by the miscarriage itself include vaginal bleeding for up to a week, lower abdominal pain, and breast engorgement and leakage.92

If a person chooses to have an abortion via medication and they are able to obtain this abortion, they may experience fatigue, cramping, bleeding, a milky discharge from their breasts, chills, fever, nausea, vomiting, and diarrhea.93 Normal side effects of a surgical abortion include bleeding and cramping; however, a person may also experience complications, which have symptoms such as severe bleeding, symptoms of infection such as fever and body aches, severe abdominal pain, hot flushes, and swelling.94

If a person chooses to or is forced to carry the fetus to term and is willing and able to deliver vaginally, they will experience three phases of labor and delivery: (1) uterine contractions, which includes a latent phase of dilation and an active phase of dilation, (2) complete dilation and delivery, and (3) delivery of the placenta.95 Potential complications include failure to progress, intrapartum hemorrhage, and postpartum hemorrhage.96 Additionally, up to 90% of people who deliver vaginally for the first time experience vaginal tearing, grazes or small cuts, or an episiotomy, which is a cut “into the perineum and vaginal wall” made by a healthcare provider to create additional space for delivery

86 Adolescent Pregnancy, supra note 81.
91 After a Miscarriage: Surviving Emotionally, AM. PREGNANCY ASS'N (2021), https://perma.cc/4PM8-XLNY.
92 After a Miscarriage, AM. PREGNANCY ASSN’N (2021), https://perma.cc/49ZA-D6WG.
93 What Can I Expect After I Take the Abortion Pill?, PLANNED PARENTHOOD (2021), https://perma.cc/VHU3-75XO.
96 Id.
when necessary. In the long term, the vagina may change in shape, possibly causing incontinence, become drier during breastfeeding, and become painful or sore, especially during sexual activity.

When someone delivers via a cesarean section, a person may experience infection, blood loss and heavy bleeding, side effects of anesthesia, blood clots, surgical injury, and increased risks to future pregnancies. Up to 18% of those who undergo cesarean sections experience chronic pain in their scars.

The consequences of poor sex education on girls, as compared to boys, demonstrate the government’s abstinence-only sex education grant program’s disparate impact on girls. Poor sex education disparately impacts girls and children vulnerable to pregnancy. Girls face more severe social, psychological, and physical consequences if they become pregnant during their teenage years than those faced by boys who impregnate someone during their teenage years. Girls and children vulnerable to pregnancy of a low socioeconomic status and/or of color are more likely to experience these consequences, as well as inadequate health care, even greater social stigma, and partner violence. Although boys face some consequences associated with poor sex education when a lack of knowledge contributes to an unplanned pregnancy, these consequences pale in comparison to those faced by girls of the same age when they become pregnant. Girls face a very serious health condition and social backlash when they experience an unplanned pregnancy in their teen years. Because the consequences for boys simply do not compare, the outcomes of the government’s spending program are more adverse for a protected group than they are for an unprotected group. Therefore, the SRAE funding program has a disparate impact on girls.

Girls receive an unequal and inferior sex education as compared to boys because they are missing information that could protect their own bodies, not only regarding the prevention of STDs, but with regard to the prevention of the serious health condition of pregnancy. Meanwhile, boys miss only information that could protect them from the same STDs (to which, as established supra, young girls are more vulnerable) and from financial obligation. Such inequity and its resultant unequal sexual educational opportunities to protect one’s health are not permitted under Title IX.

Legislators modeled Title IX, which protects students from discrimination based on sex, after Title VI, which prohibits discrimination in education based on “race, color, or national origin.” Disparate impact discrimination includes instances in which a protected group receives “fewer services or benefits or inferior services or benefits” as a result of a government-funded “policy or practice.” In cases such as Lau v. Nichols, the Supreme Court has held that policies that provide a facially equal education programs that ultimately inadequately educate only a protected class violate Title VI. In Lau, a school district conducted classes almost exclusively in English despite the presence of many

97 Perineal tears during childbirth, ROYAL COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (2021), https://perma.cc/13XW-PMVS.
100 See Bavis, supra note 84.
102 See generally Title IX Legal Manual, U.S. DEPT. OF JUST., https://perma.cc/84S9-3GW6 (explaining that the core inquiry of disparate impact analysis focuses on whether disproportionate, adverse outcomes of a facially sex-neutral policy or practice exist).
105 See Title IX Legal Manual, supra note 102.
students who did not speak English in class.\textsuperscript{107} The district also required proficiency in English in order for a student to graduate high school.\textsuperscript{108} Holding this practice to be a violation of Title VI, the Court reasoned “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”\textsuperscript{109} Similarly, girls who are taught abstinence-only sex education are “foreclosed from any meaningful” opportunity to be educated on how to protect themselves from the hugely disparate and dangerous consequences of unplanned pregnancy as compared to those boys experience.\textsuperscript{110}

Furthermore, Congress strengthened the weight of the Court’s holding and reasoning in \textit{Lau} with the Equal Educational Opportunities Act of 1974 (EEOA).\textsuperscript{111} Congress presented a declaration of policy in the law, which states that “all children enrolled in public schools are entitled to equal educational opportunity without regard to … sex[.]”\textsuperscript{112} Although the act focuses on abolishing school segregation by race, the policy nonetheless rejects arbitrary and illegal educational disparities that deny girls equal educational opportunities in protecting and understanding their own health, like the one caused by the federal funding of abstinence-only sex education.\textsuperscript{113} In Part V, this article analyzes the legal challenges under Title IX to SPRAE programs that this disparate impact theory presents.

V. A (VERY) BRIEF HISTORY OF ABORTION RIGHTS IN THE UNITED STATES

This Part will present a very abbreviated literature review of abortion rights in the United States. It should be noted that abortion rights and an analysis of the history and destruction of this essential right are not the focus of this article; therefore, the following literature review and discussion of the Court’s analysis in each case is far from comprehensive.

A. The History of Pregnant People’s Access to Abortion from Roe to Dobbs

Safe and legal abortion is vital to protecting the health of people vulnerable to pregnancy due to the severe risks and consequences of the serious health condition, as described \textit{supra}. In 1973, the Supreme Court determined access to this vital healthcare service to be a right protected by the U.S. Constitution in the seminal case \textit{Roe v. Wade}.\textsuperscript{114} In \textit{Roe}, the Court determined a Texas criminal statute banning abortion except in cases in which the pregnant person’s life is at risk to be unconstitutional under a substantive due process and right to privacy theory.\textsuperscript{115} The Court held that access to abortion

\textsuperscript{107} Id. at 564.
\textsuperscript{108} Id. at 566.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{112} 20 U.S.C. § 1701.
\textsuperscript{113} Id.
\textsuperscript{115} Id.
is a fundamental right protected by the Fifth and Fourteenth Amendments. Therefore, because a fundamental right is at stake, the state must present a compelling interest in order to restrict abortion rights. In Roe, the Court determined the relevant compelling state interests to be protecting the health of the pregnant person and “potentially of human life.” These interests were held not to be sufficient to ban abortion entirely or before the fetus is viable in the second trimester.

Planned Parenthood v. Casey is another seminal reproductive rights case decided in 1992. In Casey, the Court upheld the right to choose, albeit not as broadly as in Roe. Rather than affirming Roe’s trimester test to determine the constitutionality of state regulation of abortion, the Court introduced the “undue burden” test. This test outlined that placing a “substantial obstacle” between a pregnant person and access to safe and legal abortion was unconstitutional. For example, “[u]nnecessary health regulations which have the purpose or effect” of imposing a “substantial obstacle” on a pregnant person’s right to choose to have an abortion are unconstitutional. Applying the undue burden test, the Court held that informed consent requirements, including the state requirement that healthcare workers provide anti-abortion literature to a pregnant person before conducting an abortion, do not present a substantial obstacle. The informed consent requirement, the Court concluded, was constitutionally valid. The Court has since upheld Casey’s undue burden test in cases such as Whole Woman’s Health v. Hellerstedt.

Despite this favorable precedent, the Supreme Court overturned Roe and Casey in Dobbs v. Jackson Women’s Health Organization. The Court held that the word “liberty,” in the context of the Fourteenth Amendment, “does not protect the right to an abortion.” Such reasoning directly overturned the Court’s holdings in Roe and Casey and established that substantive due process—or “liberty,” as Justice Samuel Alito describes it—does not protect reproductive rights. So ends the era of safe and legal abortion.

B. The Center of the Abortion Universe: Children’s Lack of Autonomy of Choice in Their Reproductive Healthcare

Children have been at the center of a host of ultimately successful efforts to undermine the right to choose. In Planned Parenthood v. Danforth, the Court held that Missouri’s attempt to require

116 Id.
117 Id. at 154–55.
118 Id. at 162.
119 Id. at 163.
121 Id.
122 Id.
123 Id. at 878.
124 Id. at 881; g. Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976) (arguing that the informed consent and presentation of anti-abortion materials to all parties involved, including the pregnant person’s spouse, is constitutional).
125 Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (using Casey’s undue burden test to hold a Texas requirement that abortion facilities meet standards of a surgical center was unconstitutional).
127 Id. at 2235.
128 Id. at 2235–36.
parental consent for a minor to obtain an abortion in all cases was unconstitutional. The Court likened the parental consent requirement to another challenged in the same case, which required spousal consent for a married person to obtain an abortion. A few years later, in Bellotti v. Baird, the Court held a state could not prohibit abortions entirely without parental consent; instead, a state must allow children to receive judicial consent in lieu of parental consent. In Bellotti, Justice Lewis Powell’s opinion also set forth the four criteria the Court applied in the Roe and Casey era to determine if judicial bypass was sufficient: (1) the minor must be allowed to demonstrate their maturity in making the decision to have an abortion, (2) the court must determine the procedure is in the minor’s best interest, (3) the minor’s anonymity, shielding them from their parents, must be guaranteed, and (4) the judicial bypass must be expeditious. More recently, in Ohio v. Akron Center for Reproductive Health, the Court permitted the state of Ohio to use a clear and convincing evidence standard in evaluating such cases. As a result of these decisions, many states have adopted parental involvement requirements before children can obtain an abortion.

Requiring parental consent in abortion decisions is not beneficial to families. Many parents are incredibly uncomfortable with the idea of their children engaging in sexual activity, which can intensify their reactions in such crises as a child needing an abortion. Even if a parent is capable of managing their emotions in order to assist and support a child who needs an abortion, government intrusion in the family is unnecessary as most children choose to discuss their reproductive health needs with their parents regardless of the law.

i. Abortion Restrictions Worsen Preexisting Disparate Impacts of Poor Sex Education on Girls and Children Vulnerable to Pregnancy

As described above, pregnancy is a serious health condition. Disallowing a child to choose abortion on their own detracts from their autonomy over the health conditions that their body and mind experience. Moreover, the result of denying any person access to abortion is forced birth. As discussed at length in Part III, the impacts of delivery, vaginally or by c-section, are extreme. Children subjected to forced birth will almost certainly experience some form of vaginal tearing or cutting or an invasive surgery, all of which result in adverse effects that can last a lifetime. The disparate impact of abstinence-only sex education on girls is increased exponentially by forced birth. Rather than experiencing only the physical consequences of pregnancy, which boys are spared, these children will suffer the physical consequences of full-term pregnancy and delivery.

131 Bellotti, 443 U.S. at 649.
132 Id. at 643–44.
135 See, e.g., id. (demonstrating that such laws do not correlate to stronger families and may jeopardize the health outcomes of pregnant teens).
136 See KOLBERT & KAY, supra note 41, at 88–89.
Even more seriously, foreclosing abortion as an option for almost all pregnant people has had catastrophic effects. Many people, particularly children, have and will continue to develop serious, potentially fatal complications as a result of not having a needed or desired abortion. Many unintended pregnancies are partially caused by limiting children’s knowledge of sexual activity to abstinence-only sex education. Consequently, the impacts of forced birth on girls and children vulnerable to pregnancy are also the impacts of federal funding for abstinence-only sex education.

VI. TITLE IX DISPARATE TREATMENT AND IMPACT CHALLENGES

A. Challenging Grantee Programs That Implement Shameful Sex Education Programs Under a Disparate Treatment Theory

Grantees which implement an abstinence-only sex education curricula arbitrarily treat girls with more hostility than they do boys. Abstinence-only education shames and belittles girls based on their sexuality and grantees accept federal funding to support these programs. These grantees violate Title IX’s prohibition of disparate treatment on the basis of sex, a prohibition with an identical standard as Title VI. Under this standard, educators receiving federal funding may not intentionally treat students differently because of sex, regardless of whether such treatment is a result of malice towards the protected group.

Evidence of such intent may be demonstrated through either direct or circumstantial evidence. In this case, circumstantial evidence demonstrating a connection between the metaphors used by such programs and the myth that vaginas themselves become used up serve to prove discriminatory intent and disparate treatment. Because these myths are so prevalent, the idea that girls and children with vaginas would feel ashamed of their sexualities is clearly foreseeable. Such foreseeability can create a strong inference of discriminatory intent. Because this evidence is circumstantial, the burden shifts to the grantee to produce a legitimate non-discriminatory reason for shaming girls and people with vaginas based on their sexualities and body parts. A grantee may argue that their program simply promotes abstinence, preventing pregnancy and upholding morality. This argument is clearly pretextual. Abstinence-only sex education is ineffective at preventing pregnancy, and shame tactics certainly do not support any success it may be supposed to have. Rather, grantees who use these tactics intentionally and arbitrarily treat girls and people with vaginas poorly and

138 See, e.g., Rosemary Westwood, Bleeding and in pain, she couldn’t get 2 Louisiana ERs to answer: Is it a miscarriage?, NPR (Dec. 29, 2022, 05:00 AM), https://perma.cc/4U7M-AWT6 (describing doctors’ fears of treating miscarriage patients in a state with strict abortion prohibitions).
140 See Title IX Legal Manual, supra note 102 (explaining the standard for the disparate treatment theory of discrimination).
141 See generally id.
142 Id.
143 See, e.g., Culp-Ressler, supra note 77 (detailing harmful analogies presented to girls during sex education); see also Pase, supra note 78 (discussing the myth of the “used up” vagina).
145 See Title IX Legal Manual, supra note 102.
146 See SIECUS, supra note 25 (showing the Trump’s administration’s attempted shift to ineffective abstinence-only education for TPPP).
humiliate them in front of their peers. Any argument to the contrary is pretext, given the history of treatment of vaginas and people with vaginas in the United States and around the world.147

B. Challenging Federal Government Spending on Abstinence-Only Sex Education Under a Disparate Treatment Theory

As explained in detail in Part I, abstinence-only sex education is ineffective in every way. Just as it is foreseeable that girls will feel shame for their sexualities when grantees compare them to chewed-up gum, it is also foreseeable that girls and children vulnerable to pregnancy will suffer adverse consequences as a result of the implementation of abstinence-only sex education programs. Girls who become pregnant endure a grueling physical process and face physical risks to their health and lives that boys do not. Part III explains in detail how these adverse consequences are far more serious than those that boys in similar situations face. These consequences are an inevitable result of ineffective sex education programming and creates an inference of discriminatory intent. Many children could bring forward Title IX lawsuits under a disparate treatment theory as individuals after receiving SRAE programming and becoming pregnant.148 When such a lawsuit is filed, the burden shifts to the federal government and its grantees to rebut this inference, as an inference is not absolute proof.149 Because these programs are ineffective at achieving the government’s, and most grantees’, stated goals to prevent pregnancy, STDs, and teenage sexual activity, the defendants may have a very difficult time overcoming such an inference.

C. Challenging Federal Spending on Abstinence-Only Sex Education Under a Disparate Impact Theory

As established in Part III, girls and children vulnerable to pregnancy receive an unequal and inferior sex education as compared to boys. Schools that implement abstinence-only sex education, many of which the federal government funds, shortchange girls by failing to effectively teach them how to protect themselves from the serious health condition of pregnancy. Boys do not learn how to protect themselves from both the same STDs to which girls are more susceptible and from the financial obligations and emotional consequences that may accompany an unplanned pregnancy. Without the right to choose not to carry a pregnancy to term, all consequences of unplanned pregnancy become even more severe. Because of Dobbs, abstinence-only sex education has a permanent disparate impact on girls. Allowing states to ban abortions aggravates the disparate impact caused by abstinence-only sex education by forcing girls to experience the physical and psychological consequences of pregnancy and delivery.

147 See Pasc, supra note 78 (discussing the myth of the “used up” vagina).
148 See, e.g., Feeney, 442 U.S. at 279 (holding that proof of discriminatory intent is required to challenge a facially gender-neutral law under the Equal Protection Clause.); see also C.R. DIV., U.S. DEPT. OF JUST., supra note 102 (stating that the “fundamental task” of Title IX disparate treatment claims is to demonstrate that “similarly situated individuals were treated differently because of, or on the basis of their sex”).
149 See Title X Legal Manual, supra note 102 (“If the case file contains sufficient evidence to establish a prima facie case of discrimination, the investigating agency must then determine whether the recipient can articulate a legitimate, nondiscriminatory reason for the challenged action.”); see also Feeney, 442 U.S. at 279 n.25 (“[A]n inference is a working tool, not a synonym of proof.”).
While there is uncertainty as to whether plaintiffs can pursue a private right of action against schools in disparate impact claims arising out of Titles IX, they are not foreclosed from relief entirely.\textsuperscript{150} The Department of Education, which can also bring Title IX claims, employs a scheme originally developed in the Title VII employment discrimination context that recognizes the disparate impact theory of discrimination.\textsuperscript{151} Under Title IX, as in Title VII employment discrimination claims, a plaintiff must present evidence that a facially neutral policy or practice has a disproportionate and adverse impact on the basis of sex and that the policy or practice is the cause of the disproportionate and adverse impact.\textsuperscript{152} The defendant may then present a “substantial legitimate justification” for the practice, such as a “business necessity” in the Title VII context.\textsuperscript{153} Finally, the plaintiff may rebut the defendant’s substantial legitimate justification by presenting “equally effective alternative practices.”\textsuperscript{154}

SRAE programs violate Title IX under a disparate impact theory. Girls receive inferior services and benefits from sexual education, as discussed in Part III. Girls’ health is at serious risk because of poor sex education, while boys face a comparable but less severe risk of STDs and financial consequences from unplanned pregnancy. Girls receive inadequate benefits in terms of pregnancy prevention when they receive inadequate sex education. As described in Part III, SRAE programs can present an allegedly substantial legitimate reason for the policy which will include sexual risk avoidance, including emotional risk, moral risk, and risk of pregnancy. In response, the Department of Education should recognize the proposal outlined in Part VII as a much more effective alternative to SRAE programs. As discussed supra, Switzerland’s sex education policy clearly demonstrates that there are effective alternatives, as the students’ outcomes after completing Switzerland’s comprehensive sex education programs are much more favorable than those who complete the U.S.’s abstinence-only programs.\textsuperscript{155}

VII. CONSTITUTIONALITY CHALLENGES

This Part will discuss two previously attempted or proposed constitutional challenges to federal funding of abstinence-only sex education: a challenge under the Establishment Clause and a proposed challenge under a due process right to privacy theory. Then, this Part proposes a third theory under which such funding could be found unconstitutional: an Equal Protection theory. As will be demonstrated, the SRAE funding scheme is a violation of the Equal Protection Clause of the Fourteenth Amendment because the scheme intentionally discriminates against girls and children vulnerable to pregnancy.

\textsuperscript{150} This uncertainty arises due to the question of whether Title IX mirrors Title VI’s lack of a private right to bring disparate impact claims. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 169 (2005); Title IX Legal Manual, supra note 102 (stating that the Supreme Court’s interpretation if Title VI impacts the judicial interpretation of Title IX).

\textsuperscript{151} Title IX Legal Manual, supra note 102.

\textsuperscript{152} Zachary W. Best, Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education, 99 Geo. L.J. 1671, 1686 (2011); Title IX Legal Manual, supra note 102.

\textsuperscript{153} Title IX Legal Manual, supra note 102.

\textsuperscript{154} Id.

\textsuperscript{155} Teen Pregnancy, supra note 36.
A. Past Constitutionality Challenge: The Establishment Clause of the 1st Amendment

Abstinence-only sex education funding has been challenged in the Supreme Court in the past, beginning with an Establishment Clause challenge to the AFLA in Bowen v. Kendrick in 1988. The Establishment Clause prohibits the federal government from making a law “respecting an establishment of religion.” In Bowen, the plaintiffs argued that abstinence-only funding through AFLA violated the Establishment Clause. Although the district court in Bowen agreed with the plaintiffs, the Supreme Court overruled and remanded the case for evaluation on a grantee-by-grantee basis.

In Bowen, the Court applied the Lemon v. Kurtzman three-prong test to determine whether or not AFLA violated the Establishment Clause. Under this test, the government may not implement a program which implicates religion if it is “motivated only by an impermissible purpose, its primary effect is the advancement of religion, or if it requires excessive entanglement of the church and state.” The Court found AFLA was enacted for a primarily secular purpose, which was minimizing issues related to children’s sexual activity, satisfying the first prong of the Lemon test. As for the second prong, the Court asserted that “any effect of advancing religion under the AFLA was ‘at most incidental and remote’” because the moral views expressed by the funding scheme were not necessarily religious and its action and cooperation with religious organizations served its goals of reducing pregnancy among children. Finally, the Court determined that the third prong of the Lemon test was satisfied, holding there was no excessive entanglement between church and state under the AFLA scheme.

Some scholars persist with the argument that the AFLA and modern schemes like it are unconstitutional. In 2004, James McGrath published “Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional,” arguing in part that such funding schemes violate the Establishment Clause. McGrath argues that, as abstinence-only sex education programs are proven to be ineffective, the Court’s 1988 Bowen decision is rendered inaccurate under the Lemon test. For example, McGrath argues the AFLA scheme should be held unconstitutional for failing to satisfy the second prong of the Lemon test requiring that a scheme’s primary effect be something other than promoting religion because abstinence-only sex education is so ineffective that it does not forward the goals of reducing the risks of children’s sexual activity. McGrath also points out the Court’s hypocrisy for appealing to the majority of the country’s moral values when upholding anti-sodomy laws in Bowers v. Hardwick while permitting the federal government to fund abstinence-only programs that disseminate religious, moral values which are unpopular among parents.
Funding for abstinence-only sex education clearly violates the Establishment Clause of the First Amendment of the United States Constitution. Funding is often granted to religious organizations who seek to spread their ideas about what is moral and what is a mortal sin. Even grantees who are not religious organizations rely on unpopular moral messaging based in religion. The federal government is not permitted to support such efforts to further religious messaging under the Constitution.

B. Proposed Past Constitutional Challenge: Right to Privacy under the Due Process Clause of the Fourteenth Amendment

Abstinence-only sex education, when it is supported by any branch of the government, including state governments, is unconstitutional under the Fifth and Fourteenth Amendments that guarantee the right to privacy, as explained supra in Part V’s discussion of the history of the right to choose in the United States. The right to privacy, like other important constitutional rights, is not “shed . . . at the schoolhouse gate” and has been protected in schools in other contexts. For example, in Ingraham v. Wright, the right to due process has been recognized with regards to punishment in school as a form of “bodily restraint and punishment.” Therefore, precedent supports the idea that students’ right to comprehensive sex education in school could be protected by the Due Process Clause of the Fourteenth Amendment.

Other scholars have argued extensively that the right to comprehensive sex education is protected by the Due Process Clause. For example, in “States’ Rights or States’ Wrongs? The Constitutional Argument for Medically Accurate and Comprehensive Sex Education,” Peggy Rowe applies the Supreme Court’s analysis of fundamental rights under the Fifth and Fourteenth Amendments as outlined in Obergefell v. Hodges to her argument that students have a right to comprehensive sex education. She argues the right to comprehensive sex education meets each prong required by Obergefell and therefore qualifies as a fundamental right: (1) it is clearly defined, (2) there is a “discussion of history and tradition in the area of liberty that supports its recognition,” (3) this area of liberty has evolved and that evolution warrants discussion and reevaluation, and (4) there is an argument to be made comparing the right to comprehensive and accurate sex education with previously recognized fundamental rights.

Rowe argues the right to medically accurate and comprehensive sex education is clearly defined. If a student receives sex education, the information they receive must be complete and accurate. Abstinence-only sex education does not provide complete and accurate information. In fact, even if a program receiving SRAE funding discusses any form of contraception, the program may not demonstrate how to use each form properly. Without this instruction, the discussion of a contraceptive method is inaccurate, as is easily demonstrated by the analogous situation of receiving a prescribed medication. If a doctor or pharmacist did not explain how and when to take such medication,

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169 Rowe, supra note 51, at 549–50.
172 Rowe, supra note 51, at 541.
173 Id. at 551–52.
174 Id. at 552.
175 Title V Sexual Risk Avoidance Education: Fact Sheet, FAMILY AND YOUTH SERVICES BUREAU (2021) [hereinafter Title V Fact Sheet], https://perma.cc/8DJR-JS6W (requiring that instructors cannot include simulations or demonstrations when educating on contraception, if contraception is included at all).
the patient would not receive accurate information about her medical care. Therefore, federally funded sex education programs fail to provide students with accurate information.

Rowe explains how comprehensive sex education is similar to other more recently recognized fundamental rights, such as the right to access contraception and the right to sexual autonomy.\textsuperscript{176} Rowe and this article argue that such fundamental rights are maintained in school, in accordance with \textit{Tinker} and \textit{Ingraham}.

Finally, Rowe elaborates on how such unenumerated rights build to the right for children to receive comprehensive and accurate sex education under the Fifth and Fourteenth Amendments.\textsuperscript{177} The author explains that the Court has articulated three reasons children have different constitutional rights than adults: (1) children are more vulnerable than adults, (2) children do not make critical and mature decisions when compared to adults, and (3) parents should maintain some control over their children.\textsuperscript{178} As Rowe argues, it is for precisely these reasons that children are guaranteed the right to comprehensive sex education under the Due Process Clause. In order to make informed, mature decisions as adults and protect them from their own vulnerabilities, they must be properly educated.\textsuperscript{179} Furthermore, the majority of parents are in favor of comprehensive sex education; therefore, this concern is assuaged as well.\textsuperscript{180}

Denying children the opportunity to receive comprehensive and accurate sex education is a violation of their substantive due process rights under the Fourteenth Amendment. Children do not lose their constitutional rights when they enter their school buildings, and the right to gain all the necessary information to make informed decisions about sexual activity is an important right protected by the Constitution.

\textbf{C. A New Constitutional Challenge to SRAE Program Funding: The Equal Protection Clause of the Fourteenth Amendment}

Abstinence-only sex education funding violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates against girls and children who are vulnerable to pregnancy.\textsuperscript{181} These funding programs arbitrarily place the onus of responsibility for avoiding pregnancy squarely on those who can become pregnant, then fail to provide these children with the necessary information to fulfill this mandate. Therefore, they should be held to be unconstitutional using an intermediate scrutiny-level analysis of the state’s interests in funding the programs.

The SRAE program requirements allow grantees to place responsibility for avoiding pregnancy entirely on girls and children vulnerable to pregnancy. Abstinence-only sex education programs have connected prevention of pregnancy and the morality of the United States’ youngest

\textsuperscript{176} Rowe, \textit{infra} note 51, at 550–51.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.} at 564–66.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} McGrath, \textit{infra} note 55, at 689.
\textsuperscript{181} See, e.g., United States v. Virginia, 518 U.S. 515 (1996) (holding that excluding women from a military college program on the basis of sex violates the Fourteenth Amendment); \textit{Bostock v. Clayton Cnty.}, 140 S. Ct. 1731 (2020) (holding that discriminating because of one’s sex is unlawful, including based on one’s sexual orientation).
since Senator Denton’s proposed his chastity bill. As a result, legislators and society writ large hold girls and children vulnerable to pregnancy responsible for the morality and abstinence of their male classmates. The SRAE program requirements clearly support these assertions of discrimination. While the SRAE program does not require grantees to teach children to respect the giving or withholding of consent, the program does require grantees to teach children “strategies on how to resist and avoid, and receive help regarding, sexual coercion and dating violence.” This requirement, when combined with the absence of any requirement regarding respecting consent, clearly and squarely establishes female children’s responsibility to prevent their male classmates from impregnating or raping them.

Placing the onus of moral protectivism on girls is an arbitrary distinction between sexes. There is no practical reason girls should be responsible for protecting the United States’ youth from so-called sexual immorality. Therefore, the federal government and its grantees arbitrarily discriminate against a protected class. Although the funding scheme is facially neutral, the government proceeds with an arbitrary and discriminatory program by permitting a disparate impact to occur despite its foreseeability and by failing to require programs to teach consent, a lesson which would emphasize that children share responsibility in their sexual choices and their consequences. Such arbitrary decision-making violates the Equal Protection Clause of the Fourteenth Amendment under Yick Wo v. Hopkins. In that case, the Court held that a facially neutral policy may not be used at the discretion of public officials to arbitrarily discriminate against a protected group. Here, public officials have chosen to create a scheme which places responsibility on girls to prevent pregnancy and sexual “immorality” through its decision to include avoidance of dating violence in its curriculum while failing to require any discussion of consent. Furthermore, by disallowing any discussion of contraceptive methods, the government arbitrarily discriminates against girls by giving them an inferior education to boys that fails to inform them of how to protect their own health.

An ideal plaintiff to bring an equal protection challenge against the SRAE program would be a pregnant girl in her mid-teens who is enrolled in a public school that receives SRAE funding for its sexual education program. The plaintiff’s case would be even stronger if she had participated in a sexual education program which employed tactics, as described in Parts III and IV, that shame girls and children with vaginas for their sexuality because, as discussed above, such programs demonstrate discriminatory intent. The plaintiff would argue that her pregnancy was caused by the SRAE program’s

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182 See generally Peterson, supra note 63.
183 Title V Fact Sheet, supra note 175.
184 Id.
186 Id.
189 Virginia, 518 U.S. at 533.
190 Id.

https://scholarship.law.upenn.edu/jlasc/vol27/iss1/1
DOI: https://doi.org/10.58112/jlasc.27-1.2
failure to give children the information they needed to prevent her pregnancy. She, like individuals
asserting Title IX disparate treatment challenges, would establish an inference of the discriminatory
intent of the federal government based on the foreseeability of the severity of the adverse consequences
of abstinence-only sex education on girls.\textsuperscript{191}

The government may first argue that the SRAE grant program furthers state interests in
helping children “develop healthy life skills, increase individual protective factors that reduce risks,
make healthy decisions, engage in healthy relationships, and set goals that lead to self-sufficiency and
marriage before engaging in sexual activity.”\textsuperscript{192} A court will likely affirm that this is an important
interest.\textsuperscript{193} However, the state must also present evidence that SRAE programming, and all that it
requires and fails to require, is substantially related to this interest.\textsuperscript{194} SRAE programming is not
substantially related. Rather, SRAE programming is less likely to prevent pregnancy and delay sexual
activity than comprehensive sex education programs.\textsuperscript{195}

The U.S. government’s view of what sexual activity is appropriate for girls and children
vulnerable to pregnancy—and its burdening this group with the responsibility of regulating sexual
activity—is the motivation behind abstinence-only sex education funded programs. Such discrimination
violates the Equal Protection Clause of the Fourteenth Amendment.

\section*{VIII. Policy Proposal}

Abstinence-only sex education, like that funded by the government through SRAE grants,
is ineffective at preventing adverse outcomes of children’s sexual activity and at slowing the rate of
premarital sex as compared to comprehensive sex education.\textsuperscript{196} Therefore, the United States must not
only do away with illegal funding for such programs, but also develop a comprehensive sex education
program to take its place.

\subsection*{A. Success in Switzerland}

As discussed in Part I, Switzerland’s comprehensive sex education policy is wildly
successful as compared to that of U.S.-funded abstinence-only programs.\textsuperscript{197} Switzerland has led the way
in Europe and the Global North in lowering adverse outcomes resulting from uninformed sexual
practice by creating a norm of sexual liberation and contraception usage.\textsuperscript{198} Switzerland offers not only

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\item \textsuperscript{191} See Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).
\item \textsuperscript{192} Title V Fact Sheet, supra note 175.
\item \textsuperscript{193} See Carey v. Population Servs. Int’l, 431 U.S. 678, 692–93 (1977) (holding that the government may inhibit the privacy rights
of children if the policy serves any significant state interest “not present in the case of an adult”); see also Prince v. Massachusetts,
321 U.S. 158, 169–70 (1944) (holding that the power of the state to control children reaches beyond the scope of its authority
over adults).
\item \textsuperscript{194} United States v. Virginia, 518 U.S. 515 (1996).
\item \textsuperscript{195} See Kohler et al., supra note 33, at 351.
\item \textsuperscript{196} SIECUS, supra note 25.
\item \textsuperscript{197} See U.S. DEPT. OF HEALTH & HUM. SERVS., supra note 19.
\item \textsuperscript{198} Francoise Narring & Michal Yaron, Adolescent Pregnancy in Switzerland, INT’L HANDBOOK OF ADOLESCENT PREGNANCY 599,
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comprehensive sex education, but also family planning assistance and affordable emergency contraception. Switzerland has employed comprehensive sex education since the 1970s and contraception access since the 1960s, including through national campaigns promoting condom use during the AIDS epidemic.

B. Comprehensive Sex Education and Individualized Attention the United States

With the abolition of unconstitutional programs like SRAE, the United States has the opportunity to introduce new, effective programs. Although the nation appears unlikely to implement the affordable healthcare programs that support Switzerland’s success, the federal government and individual states could provide comprehensive and medically accurate sex education. Comprehensive sex education should be the standard required by law and should include demonstrations of proper use of various contraception options, including barrier methods such as male and female condoms which prevent STDs and pregnancy. Finally, the federal government, individual states, and schools should make school nurses or other healthcare professionals available to talk with students individually about any sexual concerns they may have, including their sexual safety in terms of physical, mental, and interpersonal health.

IX. Conclusion

The federal government currently funds programs that provide abstinence-only sex education. These programs are ineffective and illegal due to their discrimination against girls and children vulnerable to pregnancy, violating Title IX and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Other challengers and scholars have also asserted these same programs violate the First and Fifth Amendments. Therefore, the United States, individual states, and schools must change their policies to create effective and legal sex education. A new policy could include comprehensive and medically accurate sex education that demonstrate contraceptive use and the opportunity for students to receive one-on-one medical and social advice from a trained professional. Such a program would be a significantly better, legal, and non-discriminatory allocation of federal funds.

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199 Id. at 600–03.
200 Id.
201 See Shatz, supra note 3, at 499–500; McGrath, supra note 55, at 686; Rowe, supra note 51.