Lesson One: Your Gender is Your Destiny — The Constitutionality of Teaching Sex Stereotypes in Abstinence-Only Programs

By Bonnie Scott Jones and Michelle Movahed

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Abstinence-only "sex education" programs taught in U.S. public schools suffer from numerous flaws that should be recognized as fatal: they are ineffective in causing teens to remain abstinent; they give students misinformation; they don't provide students the information they need to avoid pregnancy and sexually transmitted diseases; they ignore the needs and circumstances of lesbian, gay, bisexual, and transgender youth; they propagate religious values; and they harm the health and well-being of girls.[1] A number of authors have argued that these infirmities rise to the level of constitutional violations by, for example: violating the separation of church and state;[2] imposing a disparately harmful impact on people of color;[3] imposing a disparately harmful impact on girls;[4] and infringing upon students' informational and decisional privacy.[5] Additionally, at least one commentator has asserted that abstinence-only education in this country violates the federal government's obligations under international human rights law to respect minors' rights to health, freedom of information, and equal treatment.[6] This Issue Brief focuses on a less commonly discussed but deeply harmful flaw, which is that some abstinence-only programs perpetuate and reinforce gender stereotypes by teaching those stereotypes as facts.[7] This teaching of stereotypes does not exist in every abstinence-only

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[1] *See, e.g.*, CHRISTOPHER TRENHOLM ET AL, MATHEMATICA POLICY RESEARCH, INC., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS (2007), *available at*: http://www.mathematica-mpr.com/publications/PDFs/impactabstinence.pdf (demonstrating ineffectiveness of abstinence-only programs in terms of increasing teen abstinence); SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS), CURRICULA REVIEWS, www.communityactionkit.org/curricula_reviews.html (last visited Sept. 10, 2008) (evaluating abstinence-only curricula); JULIE F. KAY WITH ASHLEY JACKSON, LEGAL MOMENTUM, SEX, LIES & STEREOTYPES: HOW ABSTINENCE-ONLY PROGRAMS HARM WOMEN AND GIRLS 3 (2008), *available at* http://www.legalmomentum.org/site/DocServer/SexLies_Stereotypes2008.pdf?docID=1001 [hereinafter SEX, LIES & STEREOTYPES].

[2] *See, e.g.*, Julie Jones, *Money, Sex, And The Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075 (2002); Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495 (2008).

[3] *See, e.g.*, Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*¸10 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2008).

[4] *See, e.g.* Danielle LeClair, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should be Overturned*, 21 WIS. WOMEN'S L. J. 291 (2006).

[5] Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 WOMEN'S RTS. L. REP. 27 (2002).

[6] Leah J. Tulin, *Can International Human Rights Law Countenance Federal Funding of Abstinence-Only Education?*, 95 GEO. L.J. 1979 (2007).

[7] In her excellent article, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L. REV. 941 (2007), Nina Pillard addresses gender-stereotyping in sex education as a component of her argument for a broad, equality-based approach to women's reproductive lives. This Issue Brief takes a different approach, for a different purpose. The Issue Brief focuses exclusively on the teaching of sex-

program; nor does it necessarily permeate the entirety of those programs in which it exists. But where this flaw exists, the programs teach boys and girls that their abilities, natures, capacities, and potential are defined and limited by gender. Such generalizations, which characterize the qualities of an individual based on his or her sex, without reference to the individual's unique characteristics, will be referred to herein as "stereotypes."

Part I of this Issue Brief briefly describes abstinence-only education in this country, and illustrates the types of sex stereotypes taught in some of those programs. Part II argues that although the Supreme Court has not yet explicitly addressed the constitutionality of government-sponsored teaching of gender stereotypes, such teachings deny equal protection to both girls and boys under the Court's sex discrimination jurisprudence.[8] Part III examines the difficulties posed by judicial line-drawing in this area, but concludes that where governments teach gender stereotypes as facts in public schools, the need for judicial intervention outweighs these difficulties, and can be engaged through a fact-specific, as-applied challenge. Part IV offers suggested reforms for policy makers and educators who fund or provide abstinence-only programs, and who have the duty to prevent equal protection violations in those programs even in the absence of a court judgment.

I. Factual Context: The Use of Gender Stereotyping in Abstinence-Only Curricula

A. Overview of Abstinence-Only Education in the United States

Although the federal government may not directly control the contents of curricula taught in local schools, it can and does use federal funds to provide powerful financial incentives to shape those curricula.[9] Since 1982, the federal government has spent over $1.5 billion on grants and matching grants to promote the teaching of abstinence-only education programs.[10] The federal funds are currently expended through three primary funding streams: the Adolescent Family Life Act ("AFLA"),[11] the Maternal and Child Health Services Block Grant ("Title V" of the Social Security Act),[12] and the Special Programs of Regional and National Significance-Community-Based Abstinence Education program ("CBAE").[13] AFLA, which was passed in

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stereotypes in abstinence-only programs, and it closely reviews and explains the Supreme Court's relevant equal protection jurisprudence in order to bring the constitutional infirmity of such teachings into sharper focus for policy-makers, educators and advocates.

[8] Numerous commentators have examined the related issue of the legality, under Title VII of the Civil Rights Act of 1964, of sex-stereotyping in the employment context. *See, e.g.,* Amy Lifson-Leu, *Enforcing Femininity: How* Jespersen v. Harrah's Operating Co. *Leaves Women in Typically Female Jobs Vulnerable to Workplace Sex Discrimination*¸ 42 U.S.F. L. REV. 849 (2008); Ellen M. Martin et al., *Evolving Theories of Sex, Race, and Color Discrimination Under Title VII*, 763 PRAC. L. INST./LIT. 153 (2007); Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?*¸ 21 LAB. LAW. 213 (2006).

[9] *See, e.g.,* No Child Left Behind Act of 2001 § 1905, 20 U.S.C. § 7371 (2006).

[10] SEX, LIES & STEREOTYPES, *supra* note 1, at 3 (providing a fuller discussion of federal funding for these programs).

[11] 42 U.S.C. §§ 300z-z-10 (2006).

[12] Social Security Act, Title V, 42 U.S.C. § 710 (as amended by Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 912, Pub. L. 104-193, 110 Stat. 2354 (1996)).

[13] *See* Dep't of Health & Human Servs., Admin. for Children & Families, Community-Based Abstinence Education Program Funding Opportunity 2008, *available at*: http://www.acf.hhs.gov/grants/pdf/HHS-2008-ACF-ACYF-AE-0099.pdf.

1981, was the first law to provide federal funds for abstinence-only education; this funding stream has been now far surpassed in size by two others.[14] Title V, which was passed in 1996, made a much larger pool of federal money available as matching funds for states who provided grants to organizations, such as schools and community organizations, that provide abstinence-only programs.[15] The CBAE block grant provides by far the largest federal funding stream for abstinence-only education, and it provides grants from the Department of Health and Human Services ("HHS") directly to organizations providing abstinence-only education, rather than involving the states in the funding and grantee selection.[16] Recipients of Title V or CBAE must comply with guidelines that preclude them from teaching comprehensive sex education[17] by requiring that each recipient program:

> (A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity; (B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children; (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems; (D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity; (E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects; (F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society; (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.[18]

Abstinence-only programs have grown in prevalence in the United States: approximately 35% of public school districts that have a policy to teach sex education require that abstinence be taught as the only option for unmarried people, and they either ban discussion of contraception altogether or permit discussion only of the ineffectiveness of contraception.[19]

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[14] MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 3 (Comm. Print 2004) (prepared for Rep. Henry A. Waxman) [hereinafter WAXMAN REPORT].

[15] *Id.* at 2; 42 U.S.C. § 710 (b)(2) (2006).

[16] WAXMAN REPORT, *supra* note 14, at 1-2; *see* SEX, LIES & STEREOTYPES, *supra* note 1 (noting that direct funding is authorized by Title XI, § 1110 of the Social Security Act).

[17] The Sexuality Information and Education Council of the United States (SIECUS) defines sexuality education as "a lifelong process of acquiring information and forming attitudes, beliefs, and values. It encompasses sexual development, sexual and reproductive health, interpersonal relationships, affection, intimacy, body image, and gender roles." SIECUS, Sexuality Education Q&A, http://siecus.org/index.cfm?fuseaction=page.viewpage&pageid=521&grandparentID=477&parentID=514 (last visited Jul. 1, 2008).

[18] 42 U.S.C. § 710 (b)(2)(2006).

[19] GUTTMACHER INST., FACTS ON SEX EDUCATION IN THE UNITED STATES (2006), http://www.guttmacher.org/pubs/fb_sexEd2006.html (last visited July 16, 2008).

B. Gender Stereotypes in Abstinence-Only Curricula

The prevalence of gender stereotypes touted as facts in abstinence-only curricula has been well documented, both by the Minority Staff of the House Committee on Government Reform, who prepared a report on the matter for Representative Henry Waxman,[20] and by a number of non-governmental organizations.[21] Recipients of federal abstinence-only funds, including public schools, utilize a number of different curricula in their programs. However, certain of these curricula are widely used by multiple grantees.[22] To illustrate the nature of the stereotypes taught in such curricula, this Issue Brief will provide examples primarily from just two series – "WAIT (Why Am I Tempted?) Training" and "Choosing the Best" – which are among the most widely-used abstinence-only curricula used in the United States.

Both series present boys and girls as fundamentally different in ways that correlate with traditional stereotypes about masculinity and femininity. The series characterize particular emotional characteristics and basic needs as inherently, and exclusively, masculine or feminine. Choosing the Best instructs that boys "feel loved when" their "competency is acknowledged" and they "feel unloved when" they are "criticized" or "rarely affirmed."[23] Girls, by contrast, "feel loved when" their "feelings are acknowledged" and "feel unloved when" they are "not listened to" or "their feelings are not validated."[24] Choosing the Best also instructs that, "[t]o fulfill [a woman's] need for assurance, [a man] must remind her over and over how much he loves her and how devoted he is to her."[25] The WAIT Training curriculum explains that each gender has a different set of "5 major needs" – for boys, these are "sexual fulfillment, recreational companionship, physical attractiveness, admiration, domestic support" but for girls, these are "affection, conversation, honesty and openness, financial support, and family commitment."[26]

These two curricula also teach that girls and boys relate to others in different, gender-stereotypical, ways. The WAIT Training curriculum claims that girls are more sensitive and relationship-oriented: "[a girl will] usually have a greater intuitive awareness of how to develop a loving relationship. Because of her sensitivity, she is initially more considerate of his feelings and the feelings of others around her."[27] Choosing the Best explains that boys are "more objective and focused" in their "communication process" and their "communication purpose" is "to report information" whereas girls are "more subjective and intuitive" and communicate in order "to affirm rapport, while sharing information."[28] Other widely-used curricula echo these themes, teaching that boys "may place a higher premium on status or dominance … they tend to

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[20] WAXMAN REPORT, *supra* note 14, at ii, 16-18.

[21] *See, e.g.*, SEX, LIES & STEREOTYPES, *supra* note 1, at 20; SIECUS, Curriculum Review, *supra*, note 1 (explaining that the Why kNOw curriculum teaches "as psychological fact" that "young girls especially have a tendency to get their identity from a young man and the relationship").

[22] WAXMAN REPORT, *supra* note 14, at 5-7.

[23] BRUCE COOK, CHOOSING THE BEST SOULMATE (STUDENT MANUAL) 43 (Choosing the Best, Inc 2004).

[24] *Id.*

[25] ABSTINENCE AND RELATIONSHIP TRAINING CTR., WAIT (WHY AM I TEMPTED?) TRAINING (STUDENT MANUAL) 60 (2d Ed.) [hereinafter WAIT].

[26] *Id.* at 62.

[27] *Id.*

[28] Bruce Cook, CHOOSING THE BEST SOULMATE (STUDENT MANUAL) 43 (Choosing the Best, Inc 2004).

be much more argumentative than girls"[29]; that boys "are usually better at spatial reasoning … [their] superior skills in this area give them an advantage in math, engineering, and architecture"[30]; and that girls "are much freer than boys in discussing their feelings—love, hate, anxiety, sadness."[31]

These stereotypes about the "inherent differences" between boys' and girls' emotional makeup and relationships are building blocks for the curricula's messages on boys' and girls' attitudes about sex and sexual behavior. Chooses the Best explains that in men's perceptions, "Sex ≠ Personal Relationship," but in women's perceptions "Sex = Personal Relationship,"[32] and that"[f]or boys …sex is a biological urge, and for girls, there is a biological urge, but it's also incorporated through their emotional needs, and they see sex more as intimacy, rather than just biology."[33] WAIT Training instructs that women are "stimulated more by touch and romantic words" and "far more attracted by a man's personality" whereas men are "stimulated by sight[,]" and while a woman "often needs hours of emotional and mental preparation" for sex, "a man needs little or no preparation."[34] Similarly, another widely-used curriculum explains that men may "[u]se 'love' to get sex, e.g. tell a girl he loves her, so she will do things sexually" whereas women may "[u]se 'sex' to get 'love,' e.g. do something sexually to 'hold on to' the boy."[35]

Delivery of these gender-stereotyped messages in public school curricula gives those messages an institutional weight that maximizes the pressure on adolescents to conform themselves to them. Moreover, a significant body of research data indicates that teaching gender stereotypes to adolescents harms their psychological well-being, self-protective capacity and sexual behavior. For example, internalizing traditional ideology about femininity—such as the message that girls should be seen and not heard—appears to minimize teenaged girls' ability to articulate and act on their own wishes about sexual contact.[36] Further, girls' adoption of conventional beliefs about femininity correlates with decreased acceptance of their sexuality and a heightened tendency to "censor and compromise" themselves in relationships.[37] Gender stereotypes also negatively affect boys. Adolescent boys who have internalized messages about masculinity are less able to engage in close interpersonal relationships or to express their

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[29] Rose Fuller et al., FACTS—FAMILY ACCOUNTABILITY COMMUNICATING TEEN SEXUALITY (SENIOR HIGH HANDBOOK) 11 (2000) (quoting Dr. Aaron Beck, LOVE IS NEVER ENOUGH (Harper & Row Pub., Inc. 1988)) [hereinafter FACTS].

[30] Patricia J. Sulak & Dee Dee A. Fix, WORTH THE WAIT (HIGH SCHOOL), Section 5-11 (Scott & White Sex Educ. Program, 2003).

[31] FACTS, *supra* note 29, at 11.

[32] Bruce Cook, CHOOSING THE BEST LIFE (STUDENT MANUAL) 7 (Choosing the Best, Inc. 2004).

[33] Choosing the Best LIFE Videotape, Segment One ("Males vs. Females") (Choosing the Best, Inc. 2003).

[34] WAIT, *supra* note 25, at 62.

[35] FACTS, *supra* note 29, at 12.

[36] Emily A. Impett, et al. *To Be Seen and Not Heard: Femininity Ideology and Adolescent Girls' Sexual Health*, 35 ARCHIVES SEXUAL BEHAV. 129 (2006); *see also* Deborah A. Tolman, et al., *Looking Good, Sounding Good: Femininity Ideology and Adolescent Girls' Mental Health*, 30 PSYCHOL. OF WOMEN Q. 85 (2006).

[37] Deborah A. Tolman, *Femininity as a Barrier to Positive Sexual Health for Adolescent Girls*, 54 J. AM. MED. WOMEN'S ASS'N 133, 136 (1999); *see also* L.Y. Bay-Cheng, *The Trouble of Teen Sex: The Construction of Adolescent Sexuality Through School-Based Sexuality Education*, 3 SEX EDUCATION 61 (2003).

emotional experiences.[38] This growing body of social science research would provide helpful evidentiary support to a court challenge to the teaching of gender stereotypes. Additionally, as explained below, the harmful nature of gender stereotypes has been established as a matter of law for purposes of constitutional analysis.

II. The Constitutionality of Teaching Class-Based Stereotypes.

The Supreme Court has not yet confronted an equal protection challenge based solely on the *teaching* of gender stereotypes; the gender stereotypes addressed by the Court in prior cases had been used by government defendants as justifications for conferring different benefits or burdens on men and women. Nonetheless, this Issue Brief explains that the constitutional infirmity of teaching gender stereotypes flows inevitably from the Court's existing equal protection jurisprudence.

A. Rule Against Stereotypes in Justifying Differential Treatment of the Sexes

The Supreme Court has long and consistently held that the Equal Protection Clause prohibits state actors from relying on gender stereotypes in drawing classifications for the provision of benefits, services, or opportunities.[39] Most recently, the Court in *United States v. Virginia* ("*VMI*") held that Virginia's exclusion of women from the Virginia Military Institute violates the Equal Protection Clause. In doing so, the Court rejected reliance on evidence about "typical" male and female "tendencies" and "gender-based developmental differences," holding that "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"[40]

More than three decades of precedent supported the Court's rejection of gender stereotyping by state actors in *VMI*. In a series of decision in the 1970s, the Court repeatedly struck down statutes based on stereotypes about men's and women's roles in the home and workplace. In *Stanton v. Stanton*, the Court invalidated a Utah statute that established different ages of majority for females and males, and which Utah attempted to justify on the basis of generalizations "that it is the man's primary responsibility to provide a home [;] . . . that girls tend to mature earlier than boys; and that females tend to marry earlier than males."[41] The Court rejected the classification as based on overbroad stereotypes: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[42] Similarly, in *Weinberger v. Wiesenfeld*, the Court struck down a Social Security provision that awarded survivor benefits to widowed mothers but not widowed fathers

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[38] Judy Y. Chu, et al., *The Adolescent Masculinity Ideology in Relationships Scale: Development and Validation of a New Measure for Boys*, 8 MEN & MASCULINITIES 93 (2005); *see also* Joseph H. Pleck, et al., *Masculinity Ideology: Its Impact on Adolescent Males' Heterosexual Relationships*, 49 J. SOC. ISSUES 11 (1993).

[39] *See, e.g.*, Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) ("[r]eliance on [gender] stereotypes cannot justify the States' gender discrimination"). For a general discussion of modern sex discrimination law and the forces, including Title VII jurisprudence, impacting its development, see Mary Ann Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1463-64 (2000).

[40] United States v. Virginia, 518 U.S. 515, 541-42 (1996) (internal citation omitted).

[41] Stanton v. Stanton, 421 U.S. 7, 14 (1975).

[42] *Id.* at 14-15.

because that distinction was based on the "overbroad generalization" that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support."[43] The Court in *Califano v. Westcott* likewise struck down a section of the Aid to Families with Dependent Children program that granted benefits to children deprived of support due to the unemployment of their father, but denied benefits to children deprived of support due to the unemployment of their mother. The Court concluded that Congress based this distinction on an assumption "that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary," and the Court rejected these justifications as "the 'baggage of sexual stereotypes[]' . . . that presumes the father has the 'primary responsibility to provide a home and its essentials . . . while the mother is the 'center of home and family life.'"[44]

In subsequent years, the Court continued to strike down statutes based on a range of gender stereotypes. For example, the Court in *Caban v. Mohammed* rejected New York's justification for treating unmarried mothers and unmarried fathers differently in its adoption statutes. The Court held that the State's premise that "a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does" represented an overly broad stereotype because "maternal and paternal roles are not invariably different in importance."[45] In *Mississippi University for Women v. Hogan*, the Court struck down a state university's policy of admitting only women to its nursing program because that policy "len[t] credibility to the old view that women, not men, should become nurses."[46] The *Hogan* Court held that courts must analyze gender discrimination claims "free of fixed notions concerning the role and abilities of males and females[, and must] . . . ascertain[] whether the statutory objective itself reflects archaic and stereotypic notions."[47] And, in *J.E.B. v. Alabama ex rel T.B.*, the Court struck down the state's use of peremptory challenges based on gender, which had been defended on the grounds that the state believed women would be more sympathetic to the complaining witness, and men more sympathetic to the defendant, in the state's paternity action on behalf of the mother of an out-of-wedlock child. The Court held this defense to be "the very stereotype the law condemns," and the Court "reaffirm[ed] what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." [48]

The existence of a constitutional rule against government reliance on stereotypes to justify differential gender treatment is reflected in a number of cases in which particular justices' conclusions about whether stereotypes underlie a sex classification plainly determine whether those justices will uphold that classification. For example, in *Michael M. v. Superior Court*, the Court upheld a California statutory rape law that criminalized engaging in intercourse with a female under the age of 18, and thus created a crime in which females can only be victims and

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[43] Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975).
[44] Califano v. Westcott, 443 U.S. 76, 88-89 (1979) (internal citations omitted).
[45] Caban v. Mohammed, 441 U.S. 380, 388-89 (1979).
[46] Mississippi University for Women v. Hogan, 458 U.S. 718, 730 (1982).
[47] *Id.* at 724-25.
[48] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 138 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)), 130-31(1994).

males can only be perpetrators. The majority rejected the suggestion that the law's sex classification was "invidious," concluding instead that it "rather realistically reflects the fact that the sexes . . . are not similarly situated with respect to the problems and the risks of sexual intercourse [because only females have the capacity to become pregnant]."[49] By contrast, Justice Brennan, in dissent, found that the law rested on stereotypes, having been "enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse."[50] In *Hogan*, the majority concluded that the female-only admission policy at Mississippi University for Women perpetuated the stereotype "that women, not men, should become nurses," and it accordingly struck down the policy.[51] Justice Powell, who dissented, found that the policy sought to serve legitimate, non-stereotyping ends, namely "accommodat[ing] the legitimate personal preferences of those desiring the advantages of an all-women's college."[52] In *J.E.B.*, the majority struck down the use of peremptory challenges based on sex because it found "virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes" and it refused "to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box."[53] By contrast, Chief Justice Rehnquist, who dissented, reasoned that "[t]he two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that those differences may produce a difference in outlook which is brought to the jury room."[54] Finally, in *Nguyen v. Immigration and Naturalization Service*, the Court upheld an immigration provision that confers citizenship automatically on a child born abroad to a citizen mother and non-citizen father, but that confers citizenship on a child born abroad to a citizen father and non-citizen mother only if the father establishes paternity during the child's minority by one of three specified mechanisms. The majority concluded that this differential treatment of unmarried fathers and unmarried mothers rests not on stereotypes, but on biological differences between the sexes that make mothers and fathers dissimilarly situated for purposes of proving parenthood, and that make the opportunity to develop a meaningful relationship with the child a "biological inevitability" for the mother but not the father.[55] The dissenting justices sharply disagreed, and would have struck down the provision on the grounds that its differential treatment rests not on biology, but on the stereotype "that mothers are significantly more likely than fathers . . . to develop caring relationships with their children."[56]

In each of these cases, the majority and dissenting justices reached different outcomes precisely because they reached different conclusions about whether the challenged classification rested on stereotypes. Where the justices perceive gender stereotypes to be the basis for a classification, they uniformly conclude that the classification violates the Constitution.

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[49] Michael M. v. Superior Court, 450 U.S. 464, 469-71 (1981).
[50] *Id.* at 494 (Brennan, J., dissenting).
[51] *Hogan*, 458 U.S. at 730.
[52] *Id.* at 740 (Powell, J., dissenting).
[53] *J.E.B.*, 511 U.S. at 139.
[54] *Id.* at 156 (Rehnquist, C.J., dissenting).
[55] Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 at 63, 65 (2001).
[56] *Id.* at 89 (O'Connor, J., dissenting) (quoting Miller v. Albright, 523 U.S. 420, 482-83 (1998)) (internal quotation marks omitted).

This rule against gender stereotyping was also recently reflected in *Nevada Department of Human Resources v. Hibbs*, in which the Court held that there was sufficient evidence of a history of unconstitutional actions by the states to justify Congressional abrogation of the states' sovereign immunity for purposes of a damages remedy under the Family Medical Leave Act.[57] The Court based this holding on its conclusion that the States' "participation in, and fostering of," more favorable employment leave policies for pregnant women who take time away to give birth than for employees who take employment leave for other reasons constituted evidence of sex discrimination by the states. That conclusion represents a shift away from the reasoning of an earlier decision, *Geduldig v. Aiello*, in which the Court held that the exclusion of pregnancy from a comprehensive disability policy was not sex discrimination because the differential impact of the disability program was based simply on *biology* (i.e., only women can become pregnant).[58] The *Hibbs* Court reached a different result precisely because it found that the differential treatment in the employment leave policies was based on stereotypes, not simply on the biological capacity to become pregnant.[59]

In light of this long line of precedent, one commentator has aptly concluded that as a practical matter, the Court's sex discrimination analysis in this area consists of just two questions: "1) Is the rule or practice at issue sex-respecting, that is to say, does it distinguish on its face between males and females? and 2) Does the sex-respecting rule rely on a stereotype?"[60] If both questions are answered in the affirmative, the rule or practice will inevitably be struck down as unconstitutional sex discrimination.

B. Recognition of the Self-Perpetuating and Harmful Nature of Stereotypes

In establishing this rule against sex-stereotyping, the Supreme Court has explicitly acknowledged the self-perpetuating nature of government reliance on such stereotypes. For example, in striking down an Alabama alimony statute that authorized husbands, but not wives, to be ordered to pay alimony, the Court noted that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."[61] Likewise, when the Court struck down the lower age of majority for females under Utah law, the Court explained that:

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[57] Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

[58] Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974). Numerous commentators have correctly criticized *Geduldig*'s contorted reasoning. *See, e.g.*, Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983-84 & nn. 107-08 (1984) (discussing *Geduldig*'s reasoning and citing articles "condemn[ing] both the Court's approach and the result").

[59] *Hibbs*, 538 U.S. at 736 ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave."); *see also* Reva Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1873 (2006) (concluding that under *Hibbs*, "[w]here regulation of pregnant women rests on sex-role stereotypes, it is sex based action within the meaning of the Equal Protection clause").

[60] Case, *supra* note 39 at 1449-50 (2000) (footnote omitted). Professor Case defines a stereotype as "any imperfect proxy, any overbroad generalization." *Id*.

[61] Orr v. Orr, 440 U.S. 268, 283 (1979).

> [t]o distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported as long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.[62]

Similarly, in *Hogan*, the Court held that Mississippi University's policy of admitting only women to its nursing school "makes the assumption that nursing is a field for women a self-fulfilling prophecy."[63] More recently, in *Hibbs*, the Court emphasized that "mutually reinforcing stereotypes [about men's and women's roles in the family] created a self-fulfilling cycle of discrimination. . . ."[64]

The Court has also recognized that sex stereotypes cause immediate and direct harms by devaluing individual dignity, and by steering males and females into strictly stratified, and often prejudicially perceived, roles. Thus, the Court explained in *Roberts v. United States Jaycees*:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.[65]

Likewise, in striking down the use of gender-based peremptory challenges, the Court in *J.E.B.* pointed out that "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes . . . When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women."[66] These decisions accord with the broader equal protection principle that the government must treat people as individuals, rather than on the basis of generalized assumptions about their class membership.[67]

C. The Constitutional Irrelevance of Evidence of a Stereotype's "Accuracy"

Because of the self-perpetuating and harmful nature of governmental adoption of gender stereotypes, the Court has held that states may not rely on those stereotypes to generalize about differences between the sexes even where the stereotype constitutes an accurate description of the present state of some or many members of the sex being stereotyped. Thus, the Court

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[62] *Stanton*, 421 U.S. at 15.

[63] *Hogan*, 458 U.S. at 730.

[64] *Hibbs*, 538 U.S. at 736.

[65] Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

[66] *J.E.B.*, 511 U.S. at 140; *see also, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955) (striking down the practice of segregating schoolchildren by race, making special note of evidence that the practice had harmful and stigmatizing psychological effects).

[67] *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (upholding race-conscious admissions program that allowed for individualized consideration of applicants, and stating that "the Fourteenth Amendment protect[s] *persons*, not *groups*.") (internal citation omitted, emphasis in original).

repeatedly has deemed constitutionally irrelevant the fact that a stereotype describes the current circumstances of some women or men. For example, the *Weinberger* Court struck down the Social Security scheme's sex-based classification even though "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support."[68] Likewise, in *Craig v. Boren*, the Court held that the state's showing of some degree of correlation between sex and underage drunk driving, did not "satisfy [the Court] that sex represents a legitimate, accurate proxy for the regulation of drinking and driving."[69] The Court in *Caban* similarly rejected the State's generalizations about differences in mothers' and fathers' relationships with their children because the appellant father had a substantial relationship with his children, thus belying "any universal difference between maternal and paternal relations at every phase of a child's development."[70] As the Court explained in *J.E.B.*: "Gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization. . . . The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination."[71] More recently, in *VMI* the Court emphasized that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[72]

In *Nguyen*, discussed above, the Court took a step away from this largely consistent approach by upholding an immigration rule based on generalizations about differences between the sexes that are sometimes, but not always, accurate. The Court upheld the differential treatment of mothers and fathers by the challenged immigration rule on the grounds that (a) there is an incontrovertible biological relationship between a child and the mother who gave birth to it, but not between a child and its father; and (b) a mother, unlike a father, inevitably attends the child's birth and thereby inevitably has an opportunity to develop a relationship with the child.[73] While these generalizations are often accurate, they are not always so, such as where a citizen father establishes his paternity through DNA tests and attends the birth of his child. Thus, the sex classification in the immigration rule does not precisely match up with the legislative concerns addressed by the immigration rule and according to the principles of earlier precedent, should have been struck down.[74] However, the Court distinguished that precedent on the grounds that the generalization in *Nguyen* was based on "basic biological differences" between

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[68] *Weinberger*, 420 U.S. at 645.

[69] *Craig*, 429 U.S. 190, 204 (1976).

[70] *Caban*, 441 U.S. at 389.

[71] *J.E.B.*, 511 U.S. at 139 n.11.

[72] *VMI*, 518 U.S. 515, 550 (1996) (emphasis in original). The Court has followed similar reasoning in the race context. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (acknowledging the existence of racial prejudice, and the potential harms it might impose on the child of a Caucasian woman married to a black man, but nonetheless holding that those factors could not be relied upon by the state in removing the child from the custody of her mother).

[73] *Nguyen*, 533 U.S. at 62-65.

[74] *See id.* at 89 (O'Connor, J., dissenting) (arguing that the classification was based on stereotypes, not biology); Case, *supra* note 39, (arguing that modern sex discrimination jurisprudence requires invalidation of sex classifications that are less than "perfect proxies").

the sexes.[75] This case, along with the Court's much earlier decision in *Michael M.*, also discussed above, signals the possible existence of a narrow exception to the Court's general prohibition against sex-based distinctions where the Court perceives the treatment to be based on biological differences between the sexes, rather than on generalizations about the way women or men are. As discussed below, however, such an "exception" would have no application to the sex stereotypes taught by abstinence-only programs because those stereotypes do not describe biological differences between men and women (or boys and girls).

D. The Equal Protection Violation in the Teaching of Sex Stereotypes.

The Court analyzes equal protection challenges using a two-step approach, in which the Court first assesses whether the challenged government action classifies along suspect, or quasi-suspect, class lines, or impinges upon fundamental rights, and then applies the correlating level of scrutiny to determine whether the government has sufficiently justified its line drawing. Where government action facially classifies on the basis of sex, the Court applies an "intermediate" level of scrutiny, under which the government must show an exceedingly persuasive justification to support its differential treatment; that justification must demonstrate "that the [challenged] classification serves important government objectives and that the discriminatory means employed are substantially related to those objectives."[76]

Here, the first step of the analysis requires determining whether the teaching of sex stereotypes in abstinence-only programs constitutes a sex-based classification. That question has not yet been presented to the Court because prior sex discrimination cases have always involved the perpetuation of sex stereotypes *in connection with* segregating men and women or providing men and women with different benefits or obligations. (Nor has the Supreme Court yet addressed the constitutionality of teaching other class-based stereotypes, such as stereotypes based on race or national origin.) In the context of discriminatory abstinence-only programs, the state is indoctrinating students with sex stereotypes, but it is not necessarily taking any *further* discriminatory action on the basis of sex. Nonetheless, the teaching of sex stereotypes should be held to facially discriminate on the basis of sex for two reasons.

First, such teaching officially adopts certain stereotypes about males and other stereotypes about females, and perpetuates those stereotypes by conveying to the larger community that the government believes those stereotypes to be true, and that it expects its students to act in accordance with them. Such adoption and reinforcement of stereotypes by the government – which is comparable, for example, to Congress passing a resolution declaring that women possess certain qualities (such as a need for financial support) and men others (such as a need for domestic support) – discriminates on the basis of sex in and of itself. Second, such teaching indoctrinates female and male students with different messages about who they are. It conveys to the female students in the class that they have certain abilities, natures, capacities, and/or potential because they are female, and that they differ in these respects from males; and it conveys to the male students in the class that they have certain abilities, natures, capacities, and/or potential because they are male, and that they differ in these respects from females. For example, the WAIT Training curriculum teaches female students that they, unlike males, are in

[75] *Nguyen*, 533 U.S. at 73.

[76] *VMI*, 518 U.S at 533 (internal quotation omitted).

need of affection and financial support, and it instructs male students that they, unlike females, are in need of admiration and domestic support. The Choosing the Best curricula teach boys that they are objective and that the primary purpose of their communications is to report information, while they teach girls that they are subjective and that the primary purpose of their communications is to affirm rapport while sharing information. That same program instructs male and female students that they should feel loved for sex-specific, stereotypical reasons: it informs male students that what makes them feel loved is having their competency acknowledged, and it informs female students that what makes them feel loved is having their feelings acknowledged.

By perpetuating sex stereotypes and indoctrinating students about who they are on the basis of sex, these abstinence-only programs draw gender classifications, just as they would draw racial classifications if they taught students that Asian-Americans are "passive" and "more equipped for technical than people-oriented work,"[77] and just as they would draw nationality classifications if they taught students that Colombians are the "drug lords" of the cocaine trafficking industry.[78] The Court has recognized that schools wield substantial persuasive authority over students,[79] and that school-age students are particularly vulnerable to ideological manipulation by their schools. [80] Thus, in *Brown v. Board of Education*, the Court acknowledged that children are particularly receptive to a discriminatory message delivered in a public school setting, and it concluded that segregating children on the basis of race taught African-American children "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[81]

The second step of the analysis here would require the state to justify its gender-based line drawing. The teaching of sex stereotypes in abstinence-only programs would be extremely difficult, if not impossible, for a state to defend under intermediate scrutiny. As illustrated above, the Court has held repeatedly that the government may not rely on stereotypes in its attempt to justify its differential treatment of the sexes. It is hard to imagine how the government could attempt to justify its teaching of sex stereotypes without relying on the very same stereotypes. Moreover, even if one presumes the importance of the abstinence-only programs' objectives, the Court's repeated rejection of governmental reliance on sex stereotypes, and its recognition of the dignitary and other harms caused by perpetuation of those stereotypes, would seem to preclude the Court from concluding that teaching those stereotypes bears a substantial

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[77] Chin v. Runnels, 343 F. Supp. 2d 891, 906-08 (N.D. Cal. 2004) (describing studies that show Asian-Americans are "widely stereotyped as passive, and unassertive, as well as more equipped for technical than people-oriented work and therefore not leadership material") (internal quotation marks and citations omitted).

[78] Rivera v. Dipaolo, 989 F. Supp. 356, 358 n.4 (D. Mass. 1997) ("In the context of cocaine trafficking, … the stereotype of the Colombian druglord prevails [and thus] discrimination based on nationality may exist even if discrimination based on race does not.")

[79] *See* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("[T]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure"); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (explaining that schools instruct students in values and educate them for citizenship).

[80] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (recognizing that university students "are less impressionable than younger students and should be able to appreciate" that the state university could remain neutral as to religion even if religious student groups were allowed to meet on campus).

[81] Brown v. Board of Education, 347 U.S. 483, 494-95 & nn. 10, 11 (1954).

relationship to the government's objectives. The Court has effectively told federal and state governments that regardless of the ends desired, acting on the basis of sex-stereotypes is not a legitimate means. Any attempt to provide an exceedingly persuasive justification for teaching sex stereotypes also would be undercut by the lack of any evidence demonstrating that teaching sex stereotypes causes students to remain abstinent or to avoid the risks of sexual activity.

A state that utilizes stereotyping abstinence-only curricula might attempt to rely on *Michael M.* and *Nguyen* to argue that the Court permits differential treatment of the sexes where men's and women's different roles in reproduction are at issue. Even assuming that those cases correctly apply equal protection principles,[82] they cannot be read so broadly. They permitted sex-based treatment only because the Court found the treatment to be based on objective, actual physical differences between the sexes, rather than stereotypes, and found the differential treatment to be substantially related to serving important government objectives. Neither would be the case here, where the generalizations taught are stereotypes, rather than biological facts, and where the teaching of those stereotypes is not substantially related to any legitimate governmental goals.

The Supreme Court's sex discrimination jurisprudence thus readily supports the conclusion that teaching sex stereotypes in abstinence-only programs violates the Equal Protection Clause. The Court stated in *VMI* that equal protection principles are violated whenever public actors deny "to women, simply because they are women," (and presumably to men, simply because they are men,) "equal opportunity to aspire, achieve, participate in and contribute to our society based on their individual talents and capacities."[83] That promise of equal opportunity is flatly denied to both young men and young women when the state teaches them that their "talents and capacities" are governed not by their individual characteristics, but by their gender.

III. Line-Drawing Difficulties Presented by the Judicial Review of School Curricula

Recognition that state indoctrination of students with sex stereotypes may violate the Equal Protection Clause raises significant questions about the nature of the courts' review of challenged school curricula. Control over school district operations is generally reserved to the states; federal courts are accordingly often reluctant to override states' policy decisions.[84] The courts may be particularly reluctant to do so in this area, where they will be called upon to carefully draw lines between improperly teaching students to adopt or accept stereotypes as truth,

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[82] The dissenting justices in each of those cases, along with a number of commentators, would certainly disagree with this supposition. *See, e.g.*, Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222 (2003) (criticizing the Court's equal protection analysis in *Nguyen*); Erin Chlopak, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967 (2002) (same); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002) (criticizing the Court's equal protection and sex discrimination analyses in both *Nguyen* and *Michael M.*).

[83] *VMI*, 518 U.S. at 532.

[84] Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (internal footnote and citations omitted) (emphasis in original).

and permissibly using materials or engaging in discussions that contain, but do not perpetuate, stereotypes. For example, the assignment of reading material containing sex stereotypes would not violate the Equal Protection Clause if the instructor used the material to lead the students in a discussion about sex stereotypes and encouraged them to think critically about the way that stereotypes are constructed, presented, and can be challenged.[85] As the Ninth Circuit explained in rejecting a challenge to a school's use of literary works containing racist stereotypes:

> The fact that a student is required to read a book does not mean that he is being asked to agree with what is in it. It cannot be disputed that a necessary component of any education is learning to think critically about offensive ideas – without that ability one can do little to respond to them.[86]

On the other hand, those same reading materials would pose serious constitutional concerns if the instructor assigned the materials as part of a lesson that presented the sex stereotypes to students as facts. In the latter circumstance, judicial intervention is justified by the promise of equal protection despite the difficulties of line drawing.[87] Thus, courts confronted with an equal protection challenge to a school's use of a particular abstinence-only curriculum must conduct an as-applied review to assess whether stereotypes are present and whether they are presented to students as facts that the students are expected to accept. The inclusion of generalizations about the way that boys and girls "are" should trigger strong judicial suspicion, and should be deemed stereotypes unless they reflect only objective biological facts about the differences in the male and female physiology. Notably, the judicial relief granted against such discriminatory teachings would not necessarily consist of exclusion of the entire challenged curriculum. A court might simply enjoin the teaching of stereotypes and leave the school discretion to decide whether to "repair" the challenged curriculum and continue using it or whether to replace it with a curriculum that does not rely on unconstitutional stereotyping. [88] Such a remedy would not, of course, address all of the other problems with abstinence-only education highlighted in the introduction to this paper.

Judicial evaluation of curricula also raises issues about the appropriate balance between equal protection considerations, First Amendment values and issues of government speech.[89] First Amendment interests, however, are circumscribed by the requirements of the Constitution,

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[85] *See* Pillard, *supra* note 7, (arguing that comprehensive sex education should include critical discussion of sex stereotypes); *see also* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1032 (9th Cir. 1998) (rejecting equal protection and Title VI challenge to required reading literary works containing racist language and ideas); *see also* Grimes *ex rel.* Grimes v. Sobol, 832 F. Supp. 704, 712-13 (S.D.N.Y. 1993) (rejecting equal protection challenge to curricula that allegedly omitted adequate representation of African-Americans, among other things); Shorter v. St. Cloud Univ., No. Civ. 00-1314, 2001 WL 912367, at *10-11 (D. Minn. Aug. 14, 2001) (rejecting similar Title VI challenge on basis of Title IX regulation).

[86] *Monteiro*, 158 F.3d at 1031 (explaining that inclusion of challenged works by Mark Twain and William Faulkner did not signify that students were taught to embrace the racist language and ideas contained therein).

[87] *Id.* at 1032 (rejecting Equal Protection and Title VI claims where the challenged works had literary value but explicitly noting that the court was not confronted with a claim that the government was attempting to indoctrinate students with racist ideology and that such a claim would present a different analysis).

[88] *Cf. Monteiro*, 158 F.3d at 1029 (removing literary work from reading list because of potential legal liability would infringe on students' First Amendment rights).

[89] *See, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *Epperson*, 393 U.S. 97.

including the Equal Protection Clause,[90] and "the first amendment does not provide private individuals or institutions the right to engage in discrimination."[91] Accordingly, while courts reviewing curricula for equal protection violations must be mindful of First Amendment concerns about intrusions on academic freedom and censorship of literary works, they must prioritize students' rights not to be discriminated against by their governments through their schools.

IV. Proposed Reforms

As this Issue Brief has shown, the teaching of sex stereotypes as facts by public school abstinence-only programs violates the Equal Protection Clause and is vulnerable to court challenge. Even absent such litigation, however, public officials, who have a duty to uphold the Constitution and respect individual rights,[92] have an obligation to end this discrimination and the harms it causes. Educators, legislators, and the next administration in Washington should all take steps to promptly end this government-sponsored inculcation of sex-stereotypes in our school children. First, in recognition of the substantial body of literature demonstrating that abstinence-only programs are ineffective, harmful, and unconstitutional, federal and state legislators should cease funding abstinence-only programs in favor of non-discriminatory, comprehensive sex education programs. If they are unwilling to take that step, they should at the very minimum prohibit the teaching of sex stereotypes in any school program that receives public funding. In addition, the Department of Health and Human Services (HHS) should explicitly prohibit sex discrimination, including the teaching of sex stereotypes, in all grant agreements for sex education programs. This step has the potential to dramatically curtail the teaching of sex-discriminatory curricula because HHS administers all three of the major, federal abstinence-only funding streams, as discussed earlier. Finally, educators must also take responsibility for ensuring that their curricula do not adopt or perpetuate sex stereotypes. This may require schools to choose different sex education curricula; to alter portions of those curricula; and/or to teach their students how to think critically about gender stereotypes, and to recognize the diversity of characteristics possessed by individuals of each gender. Each of these efforts should be undertaken with great urgency to prevent further violation of our children's right to a public education free of the lesson that their gender is their destiny.

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[90] Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982); *cf.* Edwards v. Aguillard, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (recognizing that academic freedom "necessarily is circumscribed by the Establishment Clause").

[91] *Grove City College*, 687 F.2d at 702.

[92] *See, e.g.*, Hein v. Freedom From Religion Foundation, Inc., ___ U.S. ___, 127 S.Ct. 2553, 2573 (2007) (Kennedy, J., concurring) ("Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.").