PARENTAL RIGHTS CHALLENGES TO ABSTINENCE-ONLY EDUCATION: AN UNEASY FIT

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Introduction

In 1994 in Caddo Parish Louisiana, a group of parents sued the Caddo Parish school board, asserting that “Sex Respect”, and “Facing Reality,” two abstinence-only curricula adopted by the school board, contained medically inaccurate information, moral and ethical judgments, and promoted damaging gender stereotypes, all in violation of state law. The Louisiana Court of Appeals in Coleman v. Caddo Parish School Board agreed with the parents, and ordered most of the challenged passages deleted from the curriculum. That same year parents in California and Florida brought similar state law challenges to abstinence-only curricula, which resulted in removal of the offending programs, and replacement with comprehensive sexuality education in one case and HIV/AIDS education in another. Each case was “either a legal or political success”, according to Lorraine Kenny & Julie Sternberg of the ACLU.

As is apparent from these lawsuits, some states have enacted statutes mandating standards for sex education curricula. What is also apparent is that in these lawsuits, parents acted to ensure that their children received accurate and unbiased sex education.

This is somewhat novel. While parental challenges to sex education in schools are not new, historically these challenges have either opposed school authority to implement sex education at all, or have opposed sex education curricula for giving students too much information in contravention of parental or religious rights. In contrast, the parents who challenged the abstinence-only sex education curricula in the above cases acted to ensure that their children received accurate and neutral sex education so that they would not be ill informed.
and vulnerable. These parents may have realized that the curricula at issue, which contained medically inaccurate information about contraception, fetuses and conception, portrayed teenage boys as uncontrollable sexual aggressors and teen girls as responsible for keeping boys in check, and included statements such as “No one can deny that nature is making some kind of comment on sexual behavior through the AIDS and herpes epidemic;” were not only harmful to their children, but undermined their ability as parents to raise healthy, well-informed children; whether they give their children accurate facts about sex at home or look to schools to educate them. If, as the Supreme Court found in Meyer v. Nebraska and Pierce v. Society of Sisters; parents have a “fundamental right” to raise their children and direct their education, is that right infringed by sex education curricula that contain such potentially harmful information as that found in Caddo Parish? In other words, in states that do not provide statutory standards for sex education curricula, can parents bring a successful claim against inaccurate, misleading and non-comprehensive abstinence-only curricula as violating their constitutional parental right to raise their children?

Abstinence-only sex education is unpopular, ineffective and may even be harmful to the students who receive it. Studies show that abstinence-only curricula are not effective in combating teen pregnancy and STD infection, and may even leave teens more vulnerable to these health risks. Parents understandably want to ensure that their children do not become teen pregnancy or STD statistics, and thus may oppose abstinence-only curricula because they do not supply students with necessary contraceptive information. According to Planned Parenthood, the “vast majority of Americans and parents” support comprehensive, medically accurate sexuality education. Although several states have enacted statutes that mandate accuracy in sex education like the Louisiana statute at issue in Caddo Parish, many states lack such statutes, and parents in those states thus have little recourse to state law to challenge abstinence-only sex education that does not give students accurate or
comprehensive information. Parents can of course lobby on the state level for laws mandating accuracy, or on the federal level to combat federal funding for inaccurate and misleading abstinence-only education, but legal challenges to these curricula are likely to have a more immediate impact on schools’ sex education choices. As Kenny and Sternberg argue, lawsuits against abstinence-only education can result in “real change,” and “can serve as fair warning to all abstinence-only programs receiving public dollars” that the community is monitoring these programs and how they spend public money. While Kenny and Sternberg are referring primarily to state law challenges, federal constitutional challenges to abstinence-only education would serve the same warning purpose, as well as perhaps calling into question the constitutionality of the extensive federal funding of these programs.

The constitutional parental right to “direct the upbringing and education” of their children thus at first glance seems a natural ground for challenges to abstinence-only sex education, where parental interest in accurate comprehensive sex education aligns with that of their children, and where parents have a more established “fundamental right” than students to challenge school practices. There are several problems with the parental rights doctrine, however. First, notwithstanding the fact that the parental right to raise children is supposed to be “fundamental,” parents actually have little power to challenge school policies, especially where curriculum choice is concerned. Second, although strengthening parental rights to challenge school decisions seems to be a legal and political trend, and would allow parents to challenge many ineffective or even harmful school policies, too much parental interference in the ability of schools to set policies undermines the ability of school boards and states to figure out what works, and further undermines cooperation between parents and school boards. Lastly, expanding parental rights in this context
may not allow adequate consideration of the rights of the parties most directly affected by sex education curricula, the students themselves.

Although the interests of the parents in *Caddo Parish* aligned with that of their children, this may not always be the case. Where sex education is concerned, parents may not have a clue what is best for their child, and in some cases, less parental involvement in sex education rather than more would better serve students’ interests. Relatedly, the parental rights doctrine assumes an intact nuclear family structure that does not exist for a lot of families today, for example, how does a court accommodate the parental rights of divorced or separated parents, or deal with the rights of a student who has been subjected to familial sexual abuse to receive information about contraception? In this latter case, an expansion of the parental right would conversely contract the rights of the minor who needs the information.

Part I of this paper describes abstinence-only education, its goals and funding, and examines whether it is effective or not in combating teen pregnancy and STD infection, or even in promoting abstinence. This part concludes that because abstinence-only education is ineffective and may even be harmful to students who receive it, it should be challenged in court as well as advocated against. Part II examines one avenue of legal challenge to abstinence-only education: the constitutional parental rights doctrine. This part traces the history of this doctrine, examines why parental rights challenges to school policies usually fail, and proposes how these challenges might be framed differently in the context of abstinence-only education in order to give parents a better chance at making a successful claim. This part also looks at whether the current understanding of parental rights as reaffirmed by *Troxel v. Granville*[^16^] has expanded these rights in the context of educational challenges. Part III examines several problems that would result from an expansion of
parental rights, and argues that ultimately there should not be any expansion of the right, even to allow parents to challenge abstinence-only education. This part concludes that any right to challenge abstinence-only curricula should rest with students themselves, and that parents should instead seek legislative change. A brief conclusion discusses some possible challenges to abstinence-only curricula based on students’ rights, but concludes that the best option is probably lobbying for legislative change on the federal or state level.

Part I: Abstinence-Only Education

The U.S. has the highest rate of teen pregnancy in the developed world, and American adolescents are contracting HIV faster than almost any other demographic group.\(^{[17]}\) Why? The Alan Guttmacher Institute found that “[I]n comparison with their peers in other developed countries, sexually active teenagers in the United States are less likely to use contraceptives,”\(^{[18]}\)-although they are no less likely to be sexually active. Further, the Guttmacher report found that teens in other developed countries not only had better access to contraceptives and reproductive health services than teenagers in the United States, but that they received comprehensive education about pregnancy and STD prevention in schools in contrast to “sex education that exclusively promotes abstinence [which] is common in U.S. public schools.”\(^{[19]}\). These findings indicate that abstinence-only education not only does not address teen health problems associated with risky sexual behavior, it does not increase abstinence. Despite such reports, the federal government funds abstinence-only education heavily, and does not fund comprehensive sexuality education at all. In fact, federal funding for abstinence-only education is growing. In fiscal year 2005 the federal government will spend approximately $170 million on abstinence-
only curricula. This is more than twice the amount spent in 2001, with almost $1 billion spent in federal and state matching funds since 1996.[20]

What is “abstinence-only” sex education? The terms “abstinence-only”, and “abstinence-only-until-marriage” education refer to sex education curricula that promote abstinence from sexual activity for teens and unmarried people as the only morally acceptable way to prevent pregnancy and STD infection. Abstinence-only curricula do not teach students about contraceptives (except to emphasize their failure rate, often with inaccurate data),[21] limit topics to abstinence and to the negative consequences of pre-marital sexual activity, frequently include stereotypical gender messages, and often use fear-based tactics to promote abstinence.[22] By contrast, most “comprehensive” sexuality education programs teach that abstinence is the best method for avoiding STDs and unintended pregnancy, but also include factual information about using condoms and contraception to reduce the risk of unintended pregnancy and of infection with STDs, including HIV.[23] Comprehensive sexuality education may also contain accurate, factual information on abortion, masturbation, and sexual orientation, and other sexuality related topics, such as relationships, interpersonal skills, sexual expression, and sexual health.[24]

Sex education that promotes abstinence is not a new phenomenon. Naomi K. Seiler states that the rise of teen pregnancy rates through the 1970s prompted attempts to address the problem both through expanded comprehensive sex education and through “new” approaches based on abstinence.[25] With the rise of AIDS in the 1980s, states again came under pressure to re-examine their sex education policies. In 1981, the first of the three federal programs that fund abstinence-only education was enacted: the American Family Life Act (AFLA). AFLA was “broadly designed to address the adverse effects of teenage sexual activity and childbearing,”[26] by promoting
“chastity” and “self-discipline.” AFLA was “quietly signed into law” without congressional hearings or floor votes. In addition to the AFLA, Section 510 of Title V of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), (the “Welfare Reform Act”), passed in 1996, was created with the “exclusive purpose” of promoting abstinence. Title V requires state matching funds of $3 for every $4 in federal money, and received $250 million in federal funds over five years. Section 510 programs must emphasize only one of eight “messages” mandated in the statute, but cannot contradict any of them. Lastly, the Special Programs of Regional and National Significance – Community-Based Abstinence Education (SPRANS), is the “largest and fastest growing” of the federal abstinence-only funding programs, with $104 million in federal funds appropriated for fiscal year 2005. Grantees under SPRANS must emphasize all eight of the messages set out in Section 510 of PRWORA. All three abstinence-only funding curricula have promoting abstinence as an explicit purpose, not preventing or reducing teen pregnancy and STDs.

These three funding streams are not the only sources of federal money for abstinence-only curricula. SIECUS states, “additional pots of money exist in numerous places within the federal budget, such as “through organizations such as the Abstinence Clearinghouse and the Medical Institute (formerly known as the Medical Institute for Sexual Health), which receive funds specially earmarked by Congress.” The current availability of federal funding for abstinence-only education has attracted numerous providers of these curricula, from large non-profit organizations to small for-profit producers.

While controversies over some form of sex education have raged for most of the 20th century, the current controversy stems in part from the massive federal funding
for abstinence-only curricula, and in part from recent findings that many of these curricula disseminate inaccurate information. There are no federal standards for these curricula, other than promoting the abstinence messages set forth above, which has allowed many providers to put out programs that contain irresponsibly inaccurate data. In December 2004, Representative Henry A. Waxman published a report on abstinence-only education in which he found that these curricula gave students “inaccurate and misleading” information about contraceptives, abortion and AIDS, presented gender stereotypes as fact, and “blurred religion with science.”[38] The report found that over 80% of the curricula used by 2/3 of the funding grantees in 2003 contained “false, misleading or distorted” information about reproductive health.[39]

Secondly, abstinence-only curricula are not effective, either in preventing teen pregnancy or in “promoting abstinence.” Although proponents of abstinence-only curricula insist that they are effective in, at the very least, delaying sexual activity in students who receive abstinence-only education and those who take “virginity pledges,”[40] research indicates that this is not true. A number of studies show that abstinence-only curricula do not work in preventing or reducing teen pregnancy and STD infection, and that that they are largely ineffective in reducing teen sexual activity and sexual risk taking behavior. In other words, they do not “promote abstinence.” For example, the most recent Sexuality Information and Education Council of the United States (SIECUS) Report on sexuality education in the U.S. asserts that:

“SIECUS is aware of only eleven states that have evaluated their Title V programs and publicly released the results. These evaluations have ranged from finding abstinence-only-until-marriage programs ineffective to finding that these programs are potentially harmful. Not a single evaluation has arrived at the conclusion that this experiment has been a wise investment of taxpayer money” (emphasis added).[41].
Thus, abstinence-only education is potentially harmful to students who receive it, in that it may actually increase the possibility that a student who receives it will have unprotected sex. The American Psychological Association’s recently released “Resolution in Favor of Empirically Supported Sex Education and HIV Prevention Programs for Adolescents,” expresses concern that abstinence-only-until-marriage programs put youth at risk for contracting HIV/AIDS, and finds that scientifically sound studies of abstinence-only programs show that teens who attend these programs often have unprotected sex at first intercourse and during later sexual activity, in contrast with teens who receive comprehensive sexuality education.[42]. Dr. Peter Bearman of Columbia University states, “It’s truly shocking how little medically accurate information teens are getting about how to protect themselves from pregnancy and disease. The scare tactics and negative messaging used by today’s abstinence-only sex education programs put young people in harm’s way.”[43].

Worse, if many teens who receive abstinence-only education are no less likely to engage in sexual behavior, but are less likely to practice safe sex or use contraception when they do, abstinence-only curricula implicitly prescribe pregnancy or STDs for at least some of those teens who do not follow their tenets, an unintended result similar to one that Justice Brennan, writing in Eisenstadt v. Baird, found “unreasonable” in the context of restrictions on contraception: “it would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication.”[44].

Even if abstinence-only education is ineffective or harmful, if the same claims can be made against comprehensive sexuality education, attacks against abstinence-only curricula lose their urgency. Proponents of abstinence-only education argue that
comprehensive sexuality education has failed at combating teen pregnancy and STDs. However, there is evidence that programs that teach teens about abstinence and contraceptive use “can help teens delay the onset of sexual intercourse, reduce the frequency of sexual intercourse, and reduce the number of sexual partners they have,” as well as “increas[ing] use of condoms and other contraception among those teens who are sexually active” (emphasis in original).[45] Further, comprehensive sexuality education has never been widely implemented in the U.S., and has no federal funding stream.

The European experience suggests that comprehensive education works to lower teen pregnancy and STD infection. Advocates for Youth states that “the Dutch, the Germans and the French spend less time trying to prevent young people from having sex, and more time educating them to behave responsibly when they do.”[46] According to Advocates for Youth, this results not only in lower teenage birth and STD infection rates, but in teens commencing sexual intercourse on average a year or two later than U.S. teens. The experience of at least one U.S. state, California, also shows that comprehensive sexuality education can make a difference in teen birth and STD numbers. California implemented a state-sponsored comprehensive sexuality program under Republican Governor Pete Wilson, and Democratic Governor Gray Davis increased funding for the program.[47] Schools in California emphasize abstinence, but must also provide information on contraception, a shift in sex education policy that has been credited with the more than 40 percent drop in teen pregnancy rate in California in the last decade.[48] However, proponents of the comprehensive program are concerned that the program may be at risk, because financially strapped California may be pressured to accept federal funding for abstinence-only education.[49] California’s experience illustrates the coercive power
that abstinence-only federal funding programs have, even despite evidence of the success of comprehensive sexuality education.

- There are other, less visible problems with abstinence-only education. Teaching abstinence-only assumes that teens have a *choice* about sexual activity, and ignores those who may be victims of date rape or sexual abuse at home or at school. For these teens, “abstaining” is not possible, and knowledge, while perhaps not fully adequate to protect them, at least gives them some power and choice in their future by giving them information about contraception and disease prevention. Additionally, abstinence-only education frequently teaches, as fact, gender stereotypes that are damaging to both boys and girls.\[^{50}\] Further, it ignores or denigrates Lesbian, Bisexual, Gay, and Transgendered (LBGT) youth by either explicitly presenting homosexuality as abnormal and wrong, or by presenting abstinence before and outside of heterosexual marriage as “the only expected standard” of behavior, thereby relegating those for whom heterosexual marriage is not an option to abstinence the rest of their life, and withholds information about disease protection, thereby increasing the vulnerability of these students to STDs and HIV/AIDS.

As the Alan Guttmacher Institute has noted, there is a true disconnect between public opinion and public policy with respect to funding abstinence-only sex education.\[^{51}\] Abstinence-only education is unpopular with teens *and* with their parents. Although parents may cringe at the thought of their children having sex, many realize that if their teens *are* sexually active, abstinence-only curricula’s “just say no” message may result in unprotected sex, and thus may be harmful to them. Planned Parenthood reports that seventy-five percent of parents want their children to receive “a variety of information on subjects including contraception and condom use, sexually transmitted infection, sexual orientation, safer sex practices, abortion, communications and coping skills, and the emotional aspects of sexual
relationships." Advocates for Youth puts the parental preference for comprehensive sexuality education at 80-85%. Advocates for Youth also encourages parental involvement in their children’s sex education, and their website has a “Parent” page, which contains information and tips for better communications between parents and their children about sex. This view, although somewhat utopian, recognizes that parents and their children can have an aligned interest in comprehensive sex education as a way to combat the adverse health consequences of unprotected sex. Thus, abstinence-only curricula lack popular support among the very population that would be expected to have the most interest in it: parents; however they feel about their children’s sexual activity.

If abstinence-only curricula are inaccurate, ineffective and even harmful; federal funding for them does not make sense. Implementing federal standards of accuracy for these programs, providing funding streams for comprehensive sexuality education, or persuading states to enact statutes that mandate accuracy standards for sexuality education are all options for combating the pernicious effects of abstinence-only education as it stands today. However, as SIECUS notes in their Community Action Kit, “Although supporters of the abstinence-only-until-marriage approach often represent a small minority of the community, they can be very vocal and as a result quite successful.” The political process has not controlled the excesses of abstinence-only education, and numerous providers, anxious to receive federal funds, continue to supply inaccurate, distorting and misleading sex education to students. Therefore, legal challenges to these curricula serve as a more immediate way for parents and students to combat the misinformation and danger posed by abstinence-only education.

• Part II: Parental Rights Challenges: A Double-Edged Sword
The constitutional parental right to “direct the upbringing of their children” was first recognized by the Supreme Court in two 1920s cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Meyer and Pierce were both cases in which the Supreme Court found that certain state educational policies infringed the rights of parents to make educational choices for their children. In *Meyer*, the Court articulated what would later become a foundation for its “fundamental liberties” doctrine:

- “[Constitutional liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”

Thus, the Supreme Court recognized that the parental right to direct the upbringing of their children had constitutional protection, and recognized this right in the context of challenges to state educational policies. However, the scope of this right and the current level of scrutiny for infringements to it are unclear even when parents attempt to bring challenges to school curriculum or policies under *Meyer* and *Pierce*.

1. Meyer and Pierce: Restricting State Restrictions

In *Meyer*, a teacher was convicted for teaching German under a Nebraska statute that prohibited schools from teaching modern foreign languages below the eighth grade. The Supreme Court actually invalidated the statute in part on economic substantive due process grounds, under the now discredited economic due process jurisprudence of *Lochner v. New York*, holding that the statute restricted the teacher’s right to earn a living, as well as the parents’ right to educational choices for their children, and stating that “[the teacher’s] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.” The Court held that the statute prohibiting foreign language instruction was therefore an unreasonable restriction on educational choice. *Meyer* thus seems to stand for the right of parents to challenge states’ and schools’ power to set curriculum, especially if the state or school completely restricts access to certain kinds of knowledge. While this right could have been read broadly, the Supreme Court in *Meyer* stressed that states retain the power
to “make reasonable regulations for all schools.”[62]. Thus parental rights under Meyer are not broad rights to challenge school policies, but are rather limits on any arbitrary or unreasonable exercise of state or school power. Later courts deciding parental rights claims have chosen to focus on the reasonableness of the school policy, rather than further expanding or even defining the parental right.

- The second case to recognize the parental right, Pierce v. Society of Sisters, was a case in which an Oregon initiative resulted in the enactment of a statute that prohibited parents from sending their children to private schools, and thus essentially forced parents and their children to choose public school education.[63]. Two private schools, one secular and one religious, challenged the statute, claiming infringement of property rights.[64]. The Supreme Court recognized that the law would infringe upon the private schools’ ability to conduct business, as well as parents’ and students’ right to a choice of schools.[65]. This latter right was famously articulated in the court’s opinion in which the court held that “the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”[66]. Thus Pierce reiterated the parental right as a limit on state power to restrict educational choice.

- In a less well-known case, Farrington v. Tokushige, the Supreme Court again invalidated a law that restricted curricula.[67]. In Farrington, the (then) Territory of Hawaii passed an act that regulated foreign language schools in Hawaii. Children attended these mostly Korean, Japanese and Chinese schools in addition to attending public or private schools, usually in order to learn the language and culture of their families. Unlike the statute at issue in Meyer, which prohibited foreign language instruction below the eighth grade, the Hawaiian Act allowed these schools to operate, but with heavy regulations.[68]. The government argued that because the Act merely regulated these schools and did not prohibit them, it was distinguishable from the statute in Meyer.[69]. The Supreme Court disagreed, and held that the entire Act was unconstitutional, again reasoning that the regulations would both infringe on the property interest
of the schools by destroying their ability to do business, and that the parent had the right to “direct the education of his own child without unreasonable restrictions.”\footnote{170} Farrington thus slightly expands the parental right recognized in Meyer, limiting schools’ ability to excessively regulate as well as prohibit, curriculum. Again, the school’s restriction will be upheld if it is “reasonable”.

- Thus, in Meyer, Pierce, and Farrington, the state sought to restrict available educational choices, either by prohibiting or over-regulating curricula, or by prohibiting school choice. In each decision the parental right acted as a limit on the state’s power to restrict educational choice. In each case, the Court affirmed that the state could reasonably restrict education, but that to do so unreasonably would violate the rights of the parents to direct the education of their children. Since these cases were decided, many parents have challenged school policies, seeking to bring their challenge under the umbrella of Meyer and Pierce parental rights. But, these challenges are rarely successful. What then, is an “unreasonable” state restriction on parental rights that triggers Meyer and Pierce parental rights doctrine? And can abstinence-only sex education programs be challenged successfully under Meyer and Pierce?

- The context in which Meyer, Pierce and Farrington were decided provides some clues. Both post-World War I “Americanism,” and the relative paucity of educational choice played roles in the enactment of the statutes at issue in each case. The states were seeking to restrict perceived threats that foreign languages and religious schools presented to Americanism, and the Supreme Court ostensibly acted to protect individual choice against this majoritarian trend. Similarly, educational choice was considerably more limited then than it is today, with the result that states and schools today can rarely be accused of limiting curriculum as they did in Meyer, Pierce, and Farrington. Later courts thus struggle to apply the parental rights doctrine to claims brought today in the context of education, because very few recent parental rights challenges look like those brought in the above cases. Additionally, since Meyer, Pierce and Farrington were decided before the Supreme Court’s current “tiered” levels of scrutiny jurisprudence, most courts deciding these challenges today read the
“reasonableness” restriction of Meyer, Pierce, and Farrington as requiring no more than rational basis review for school policies, especially curriculum, despite the fact that parental rights were among the first of the “fundamental” rights recognized by the Court; and therefore, supposedly require heightened scrutiny. Although the Ninth Circuit stated in Hooks v. Clark County Sch. Dist., “[n]othing here is meant to suggest that the Pierce parental right warrants only rational-basis review,”,[71] most parental rights school policy cases where courts have used heightened scrutiny involve other constitutional claims as well.[72] Intuitively, this is understandable. Schools could not operate if their curriculum choices were easily challenged as fundamental rights infringements. Courts therefore are careful to limit Meyer and Pierce type challenges. In cases where they use rational basis review; courts tend to find that parents challenging curriculum do not fall within the ambit of the constitutional protection recognized in Meyer and Pierce, thus forestalling any need to apply heightened scrutiny to an infringement of a “fundamental” right. As the Second Circuit stated in Leebaert v. Harrington, “The Meyer and Pierce cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program”, and do not cover challenges to curriculum.[73]

- Further, most recent parental challenges to curriculum differ from the challenges in Meyer and Pierce in that they seek to restrict or remove school subjects, and not to challenge a state’s restrictive policy. When a state unreasonably restricts curriculum choice, it is subject to challenge under Meyer and Pierce. When parents seek to restrict the curriculum available to their children, courts decline to find that their rights as parents have been infringed. Often, the “party who seeks to ‘contract the spectrum of knowledge’ or restrain the full expanse of human understanding and inquiry, will be rebuffed by the courts.”[74]. In most parental rights challenges to curriculum, especially sex education curriculum, it is the parent who wants to “contract the spectrum” of available knowledge, not the school.

- For example, in Brown v. Hot, Sexy and Safer Productions, parents and their children opposed a mandatory AIDS and sex education program that the children were compelled to attend.[75]. The First Circuit asserted that the rights under Meyer and Pierce did not
“encompass a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.”[76]. Further, the court stated that

“it is fundamentally different for the state to say to a parent, ‘You can’t teach your child German or send him to a parochial school,’ than for the parent to say to the state, ‘You can’t teach my child subjects that are morally offensive to me.’ The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children.”[77](emphasis added).

The First Circuit went on to state that allowing parents to dictate a school’s curriculum would impose a burden on state educational systems that they do not read the Constitution to impose, by in effect forcing the schools to “cater a curriculum” to each parent who disagreed with the school’s choice. Further, the court characterized the parents’ asserted right as one that sought to “restrict the flow of information in the public schools,” and thus that the parental right did not fall under *Meyer* and *Pierce*.[78]. The First Circuit thus implicitly recognized that the parents were seeking to limit education, not the school.

Similarly, in *Leebaert v. Harrington*, Turk Leebaert sought to exempt his son from a public school requirement that 7th grade students take a quarter long health and hygiene course.[79]. Although parents could opt-out of the small portion of the course (approximately six days) that discussed sexual health issues, the rest was mandatory. Leebaert challenged the entire requirement as an infringement of parental rights and the First Amendment Free Exercise clause, and demanded strict scrutiny.[80]. The Second Circuit found that Leebaert had no fundamental right to challenge the course requirement, and distinguished *Meyer* and *Pierce* by asserting that the parental right recognized in those cases was the right to choose a “specific educational program,” and not the right to “dictate public school curricula.”[81] They thus applied rational basis review, and found that the requirement had the legitimate
end of promoting the health and welfare of children, and that the means – a health class – was reasonable.

- In Leebaert, as in Brown, the parents sought to either have their children exempted from a school course, or to remove the course altogether. In essence, the courts saw these parents as trying to “customize” public school curricula by restricting the teaching of subjects that were offensive to them. These asserted parental rights thus almost flip Meyer and Pierce rights, in that a parent who objects to certain subjects being taught to their child is either demanding a separate curriculum for their child, or demanding that the school teach nothing that they find objectionable, while in Meyer, Pierce and Farrington, the parents wanted schools to expand the educational choices offered.

Therefore, in the above cases, the right recognized in Meyer and Pierce to “direct the education” of one’s children can more properly be characterized as a right to ensure that the state does not unreasonably restrict that education, not the right of parents themselves to restrict access to knowledge or control curriculum. Put in this way, it is easier to draw the line between constitutional protection of the right on one hand, and the state’s authority on the other. States and school boards have the institutional competence and the authority to manage curriculum and promulgate policies, even to the point of “inculcat[ing] community values in schools,” but in inculcating these values they are restricted from unreasonably “contracting the spectrum of knowledge.” The parental right is the right to ensure that schools and states do not “standardize” children or restrict knowledge unreasonably. Thus, when a parent seeks to restrict the knowledge available to students (even their own children) they are generally outside of the scope of parental rights recognized in Meyer and Pierce.
Applying this “anti-restrictive” generalization to challenges to abstinence-only curricula may offer parents a way to reframe their parental rights challenges to abstinence-only education to fall under Meyer and Pierce. If the school’s use of abstinence-only curricula is itself an unreasonable restriction on sex education, a parent may be able to use parental rights to challenge it. The claim would be that the school, by providing nothing more than abstinence-only sex education, is unreasonably restricting the student’s access to necessary comprehensive sex education curriculum. This type of claim would depend on asserting that abstinence-only courses differ from other school courses, because instead of disseminating information that the parent doesn’t want their child to have, they actually withhold necessary information from students. Thus, one way to challenge abstinence-only sex education would be to characterize it as unreasonably restrictive of necessary information. Of course, restrictions in themselves are not enough, as most school classes have to have some limitations, but, if the school’s limit on knowledge is unreasonable, then it may run afoul of the parental right to direct the upbringing of children. If abstinence-only education arguably harms students by withholding information that is necessary to their health, which restriction results in greater sexual risk taking by students, then abstinence-only education can be characterized as an unreasonable restriction on education.

This argument would be a difficult one for a parent to make. Abstinence-only education is, after all, a school curriculum choice, and the school is not ostensibly prohibiting sex education, as would be the case with a direct Meyer analogy. Further, prohibiting information about contraception is not readily analogized to prohibiting the teaching of German or Japanese, in part because information about contraceptives is only one aspect of sex education, not a whole course.

2. Troxel and the Constitutional Presumption
Is the parental rights doctrine of *Meyer* and *Pierce* anachronistic? *Meyer* and *Pierce* assumed a traditional, heterosexual, nuclear family where parents inculcated their children in religion and morality, and where these rights needed protection from unreasonable state restrictions on education. Families have changed radically since the time of *Meyer* and *Pierce*, as has education, and the right recognized in these cases may have little relevance for families that do not fit into this traditional structure. However, doctrinally at least, *Meyer* and *Pierce* remain valid. In 2000, in *Troxel v. Granville*, the Supreme Court reaffirmed the parental right recognized in *Meyer* and *Pierce* as a “fundamental” constitutional right. In *Troxel*, a fragmented Supreme Court upheld a challenge to a broad Washington State child visitation statute, holding that, as applied, the statute infringed the rights of the parent to the “care, custody and control” of their children. While Justice O’Connor’s plurality opinion explicitly reaffirmed that parents have a “fundamental” liberty interest in their children’s upbringing, it did not define the scope of the right, nor did it apply strict scrutiny to the statute at issue, arguably required by a fundamental rights infringement. Instead, the Court held that the statute, as applied, “directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child,” citing *Parham v. J.R.*, a case that held that a minor’s liberty interest in not being confined unnecessarily in a mental institution was overridden by the parent’s “traditional interests in and responsibility for the upbringing of the child.”

It is unclear whether *Troxel* strengthens parental rights in all contexts, or whether it applies only narrowly to visitation or custody claims. *Troxel’s* reaffirmation of the “constitutional presumption” recognized in *Parham* that parents act in the best interest of their children, unless they are unfit—certainly has relevance for parents’ continued ability to make health care decisions for their child, as well as deciding visitation rights, but arguably has little relevance in disputes between schools and parents where schools’ authority as *parens patrie* has traditionally restricted parental control.
However, Professor Ira Bloom has argued that Justice O’Connor’s *Troxel v. Granville* opinion *does* strengthen parental rights challenges to education by emphasizing language in *Pierce* that directly relates to parental rights in the context of the education of their children and has little to do with the visitation statute at issue.

“Two years later, in *Pierce v. Society of Sisters*, we again held that the liberty of parents and guardians includes the right to direct the upbringing and education of children under their control. We explained in *Pierce* that the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”[^91]

- Bloom argues that this emphasis on the upbringing and *education* of the child not only reaffirms *Meyer* and *Pierce*, which “preserve[d] some arena of choice for parents in where the parent decides to send the child, but [which] choice is really in the interest of preserving heterogeneity in education, not preserving parental choice in all cases,”[^92] but takes *Meyer* and *Pierce* further, and allows parents stronger challenges to school/state actions such as assigning their child to a poorly performing school, or refusal to subsidize home schooling. Thus, O’Connor’s opinion reads *Pierce* to create an “individual entitlement” for parents to direct their children’s education[^93], and therefore allows parents to demand some minimum *quality* of education for their children.[^94] Bloom argues that this result follows from *Troxel*’s revitalized fundamental right combined with social changes which have made education much more important than it was in the 1920s, and with increased school choice in the form of charter schools, vouchers, and home schooling.

Assuming that *Troxel* allows parents stronger challenges to school assignment, does this strengthen parental rights to challenge the quality or content of curricula or other school policies? If *Troxel* strengthens the “right, coupled with the high duty to recognize and prepare [the child] for additional obligations,”[^95] and if the social context in which teen pregnancy, HIV/AIDS and STD infection have become huge...
public health concerns has increased the need for comprehensive, accurate sex education on the part of schools, then could parents argue that *Troxel’s* reaffirmation of parental rights allows them to demand comprehensive sex education?

- Sex education can be analogized to health care more easily than other school curricula. *Troxel’s* combined reaffirmation of the fundamental right and the constitutional presumption may strengthen parents’ rights to challenge inadequate sex education, in the form of abstinence-only curricula. Schools that implement abstinence-only curriculum are not acting in the best interests of the students because of the increased risk of teen sexual risk taking, pregnancy, and STDs incurred by students who receive this education. Thus, parents’ right to health care decisions is arguably infringed by these curricula, and their efforts to act in the best interests of their children by giving them accurate pregnancy and STD prevention information will be undermined by the state. Relatedly, although *Meyer* and *Pierce* recognized parental rights as a “reasonableness” limitation on school authority, *Troxel*, by closely aligning parental and student interests, may weaken state/school authority, especially if the school acts *against* the child’s best interests by denying them adequate sex education.

Further, the right in *Troxel* “does not rest upon the presence of a religious element in the parental decision making.”[96] *Troxel* thus strengthens the secular fundamental parental right. This is in direct contrast to *Wisconsin v. Yoder*, which seemed to imply that a strong parental rights challenge could only be brought in situations where there also existed a strong religious rights claim.[97] Successful challenges under *Yoder* are rare, and limited by the Supreme Court to those cases in which the challenger can prove a religious infringement. “A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”[98] Most parents challenging abstinence-
only education on religious grounds would have a hard time arguing that an emphasis on abstinence interferes with the free exercise of religion, since few religions require comprehensive and accurate sex education, and since many religions preach abstinence. Thus, *Troxel’s* secular reaffirmation could be helpful to parents seeking to challenge abstinence-only curricula.

However, despite the reaffirmation of parental rights as “fundamental,” despite the strengthened constitutional presumption that parents act in their children’s best interest, and despite the possibility that *Troxel* strengthens secular parental rights challenges, *Troxel* probably does not increase the possibility of a successful parental rights challenge to abstinence-only curricula. Theory aside, the bad news for parents is that parental challenges to school curricula after *Troxel* have fared no better than before it, even if *Troxel* marks a trend towards a more expansive view of parental rights in education. The Second Circuit in *Leebaert* explicitly stated:

“there is nothing in *Troxel* that would lead us to conclude from the Court’s recognition of a parental right in what the plurality called “the care, custody, and control” of a child with respect to visitation rights that parents have a fundamental right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach him or her.”

Thus, the grandparent visitation at issue in *Troxel* does not easily lend itself to the parent’s right to challenge school policies, even policies that arguably harm the child’s health.

**Part III: Problems with Parental Rights**

- While *Caddo Parish* demonstrated that parents can and will act in court to oppose inaccurate abstinence-only education, especially if there is a helpful state law, and while most parents oppose abstinence-only education, the constitutional parental right may not be a good
vehicle for legal challenges to it. As is set out above, parental rights challenges to school policies usually fail, especially curriculum challenges, notwithstanding the fact that the parental right to “direct the education” of their children is a “fundamental” right. Even after the reaffirmation of the right in Troxel, the parental right as understood in Meyer and Pierce remains a right to limit unreasonable state restriction. Even if parents reframe abstinence-only education as itself an unreasonable school restriction on their child’s education, most courts would still only apply rational basis review to a curriculum choice. Although empirically abstinence-only education may seem sufficiently “unreasonable” to fail rational basis review, there is little legal precedent to support this position. Indeed, there is no reason to think a court would treat challenges to abstinence-only education differently than any other parental rights challenges to curriculum.

- Additionally, parental rights doctrine may have an inherent religious component, and as such, may not lend itself to opposing abstinence-only curricula. Meyer and Pierce both invalidated state restrictions on religious schooling, and came at a time when promoting “Americanism” at the expense of immigrant religions and culture was a popular political goal. Originally the right tended to focus on parents’ interest in their children’s religious upbringing, because religious rights were in danger from the political trend towards American nativism. Additionally, the case most often cited as granting parents strong rights to control their children’s education, Wisconsin v. Yoder, was a case where the parents’ First Amendment free exercise claim augmented their parental rights claim. It is therefore unclear just how successful parental rights challenges are outside of any religious interest. Although Troxel arguably strengthened the secular parental right, many parents who bring parental rights cases seek either to articulate a separate religious claim or to characterize their parental rights claim as including an interest in the religious upbringing of their children.

- However, there is a trend both in the law, as evidenced by Troxel, and politically, as evidenced by parental rights organizations, to strengthen and expand parental rights. While strengthened parental rights could result in easier challenges to bad school policies such as
abstinence-only education, there are compelling reasons why they should not be strengthened, especially in the context of education.

First, even though the interests of parents and children may align in the context of abstinence-only education, it is just as likely that children may have completely different interests than their parents where sex education is concerned, and may not want or need more parental involvement in sex education. For example, two studies reported by the Alan Guttmacher Institute found that about one in five teenagers would have unsafe sex if their parents had to be notified when they got birth control at a family planning clinic. Further, the report found that “70% would stop coming to the clinic, and a quarter would continue to have sex but would either rely on withdrawal or not use any contraception. Only 1% of all teens surveyed said they would stop having sex.”[102]. Although these reports are about parental notification for contraception, they readily illustrate the split between the needs of teens and the interests of their parents, especially where sexual health information is concerned. Strengthening the parental right to police school sex education policies could infringe some students’ privacy rights, where the student wants or needs information about contraceptives and disease prevention without their parent’s knowledge. Further, as is evidenced by cases such as Brown v. Hot, Sexy and Safer Productions, Parents United for Better Schools, Inc. v. Sch. Dist of Phila. Board of Educ., and Leebaert v. Harrington, it is the parents who are opposed to sex education who seem most likely to bring parental rights challenges to it in court.

Further, Troxel’s “constitutional presumption” that parents act in the best interest of their children implies that parents’ interests are “inextricably linked” with that of their children.[103]. Thus, where parents’ interests align with that of their children, the presumption strengthens their argument. But where parental interests
are different than those of their children, strengthening this presumption results in weakening the interests and rights of the children. With regard to abstinence-only education, parents and children’s interests may align, but they may also collide, and insisting that challenges to ineffective sex education programs rest with parents may further penalize students who cannot get good information from either the schools or their parents, and may further marginalize students who are sexually active against their parent’s wishes, or LBGT youth whose parents do not know about or approve of their orientation.

If strengthening the presumption towards parents results in an increased parental right to challenge sex education curricula, in situations where parents want their child to receive accurate, comprehensive information, this presumption allows them to challenge abstinence-only curricula. Conversely, this presumption weakens the student’s right to demand accurate, comprehensive sex education where their parents oppose it. Indeed, the constitutional presumption is a double-edged sword where students are concerned. When parents and their children are constitutionally presumed to have the same interests, and where the parent is presumably the one who gets to legally articulate those interests, the danger is that the child’s voice will not be heard. The constitutional presumption thus reduces situations in which there are three interests (parent, child and state) to one in which there are two (parent and state). For infant children of loving families this presumption may work well, parents do for the most part act in the child’s best interests, assuming they know what those are, and the state steps in when parents are unfit, neglectful or abusive.\[104\]. The law has not really addressed situations where the parent is not unfit, and where the older child’s best interests are different than the parental notion of the child’s best interests. Justice Douglas famously articulated this disconnect in his dissent in Yoder,
“The Court’s analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.…

If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents’ notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.”[105]

Justice Douglas’ dissent recognizes that there may be situations, especially with high school age students, where the parental and child interests bifurcate, and in these situations it infringes on the child’s rights not to take them into consideration.[106].

Although the Supreme Court has recognized that minors have rights in the school setting, it has not directly faced a situation where students and their parents articulate different interests. In Tinker v. Des Moines, the Court held that children have constitutional rights, and that students don’t “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”[107] and in Board of Education v. Pico, the Supreme Court recognized that students have “the right to receive ideas” as a predicate to their expression of their rights of free speech.[108]. However, in the school context, the Supreme Court has also stated that minors’ rights are not “automatically coextensive with the rights of adults in other settings.”[109]. Therefore, the presumption that parents act for their children weakens a student’s right claim if the student and parents have different interests. Professor Ralph Mawdsley argues that separating the rights of parents and children may be a “slippery slope” that may “fracture the family structure,”[110] but others, such as Roger Levesque and Marjorie Heins, argue for increased minors’ rights, especially in the context of sex education information and reproductive rights.[111]

In Parents United for Better Schools, Inc. v. Sch. Dist of Phila. Board of Educ., a parental rights claim was in direct opposition to the interests of the
students. In *Parents United*, the Third Circuit upheld a condom distribution program in Philadelphia public schools. Students of the schools could request and receive condoms, after first being counseled on abstinence. Many students submitted affidavits stating that they utilized the condom program, and that most of them would not ask their parents to sign a consent form. The lower district court opinion analogized requiring parental consent for the condom program to “blanket parental consent requirements for abortions”, and said access to contraceptives was just as important as access to abortion, thus tying the condom program to the minors’ rights to privacy. The Third Circuit affirmed, but did not reach the privacy issue, holding that the program “lack[ed] any degree of coercion...in violation of plaintiff”s parental liberties...”

In this case, as the District Court recognized, the parental interest in requiring consent, or in getting rid of the program was directly opposed to the students’ interests in having the ability to request the condoms without parental interference. If the parents had been able to bring a strengthened parental rights claim, the students’ interests may have suffered in the decision.

Further, many parents simply do not know that their child is sexually active, and many parents oppose sex education and contraceptive services for their children, preferring to give them sex education information at home. Strengthening the right to challenge sex education policies does not just strengthen the right to challenge abstinence-only education, it also strengthens the right to challenge all curricula, and it would not be possible to limit the right sufficiently to get at the problems with abstinence-only education. Additionally, stronger parental rights in the education context would upset the balance between parents and schools, and chill a school’s ability to implement any program remotely controversial. As stated above, today, most parental rights claims that oppose sex education and related policies fail. For example, California courts have held that held that parents have no “exclusive constitutional right, under
the Federal or the California Constitutions, to teach their children about family life and sexual matters in their own homes.”[115] Similarly, in *Fields v. Palmdale Sch. Dist*, a school distributed psychological surveys to first, third, and fifth graders as part of a study to establish a baseline to measure children’s exposure to early trauma.[116] The school sent out letters and accompanying consent forms warning that the some of the questions may make the children uncomfortable, but did not disclose that many of the questions were sexual in nature.[117] The parents sued the school, asserting that their parental liberty had been violated, and the California District Court dismissed the parent’s suit for failure to state a claim.[118] The court concluded that the parental right did not include introducing children to matters of and relating to sex, and therefore, that their right was not fundamental.[119] In its opinion, the California District Court relied in part on the First Circuit’s opinion in *Brown*, that parents cannot “restrict the flow of information in the public schools.”[120]

As both *Fields* and *Parents United* illustrate, stronger parental rights would upset the balance of power between parents and schools, and compromise schools’ ability to implement controversial programs at all. Increased parental rights challenges would burden already financially strapped schools with heavy litigation costs. Additionally schools have more institutional competence than parents in curriculum matters, and “Schools have valid interests in limiting the parental presence, as indeed, do children, who in our society are not supposed to be the slaves of their parents.”[121] Further, most parents “only have eyes” for their own children, so their ability to judge school policies from the point of view of what works best for most students would be flawed. Lastly, parents already have a say in school curricula choices, if they care to get involved with school boards.
The current trend to strengthen parental rights is not confined to the legal sphere. Recent political initiatives to add parental rights amendments to state constitutions and enact them as part of state or federal legislation are another example of this trend. Much the same problems would be posed by these amendments as are posed by an expanded judicial doctrine, in fact many of the proposed amendments actually track language from *Pierce.*[122] People for the American Way, an advocacy group for “pluralism, individuality, freedom of thought, expression and religion,” founded by Norman Lear, states that

“parental rights initiatives would, by amending state constitutions, provide individuals with a vastly stronger legal weapon to challenge public school curricula and child abuse protection laws on political and sectarian grounds. …It would wreak havoc on public school curriculum by providing the means for individuals to block sexuality and AIDS education programs and other curricula they find objectionable not simply for their own children, but for other parents' children as well.”[123]

- Further, these amendments would have distressing implications far beyond schools, for state child abuse and neglect laws, health care consent, and library collection censorship.[124] Additionally, political movements towards parental rights initiatives are often promoted and supported by Religious Right organizations.[125] A close alignment between parental rights and religion has political as well as legal implications, and argues against the doctrine’s usefulness as a challenge to abstinence-only education.

**Conclusion:**

Stronger parental rights to contest school policies do more harm than good, and although many parents oppose abstinence-only education, their best recourse may be to the legislature, not the courts. Parents could lobby at the local school board level to directly involve themselves in sex education curriculum decisions, at the state level for statutes that mandate standards for sex education, and at the federal level to
press for standards in funding sex education. SIECUS states in its “Community Action Kit”, that most decisions about sex education are made at the school board level, and suggests that any lobbying start there. However, because of the current controversies over sex education, state and federal policymakers are becoming increasingly involved in sex education policy, and thus parents can and should lobby at both the state and federal levels. Although the political process has not tended to slow the funding of abstinence-only education, nor has it chilled providers from dispensing inaccurate information, Rep. Henry Waxman’s much publicized report on the inaccuracies of and problems with many abstinence-only curricula gives lobbyists new fuel in any attacks on federal spending for these programs, and should be utilized to the fullest in demanding, at the very least, federal standards for these curricula.

Further, although parents’ opinions as voters tend to carry more weight with policymakers, student lobbying has not gone unnoticed. To the contrary, students have “become the most outspoken advocates for the need to expand sexuality education.” Both SIECUS and Advocates for Youth recognize that students are the ones directly affected by school policies and school board decisions, and that they have “consistently shown their desire for more information about STDs, HIV/AIDS, and other sexuality-related topics.” Students have created, or participated in the creation of websites such as www.sexetc.org, which give minors factual, wide ranging and positive information about sexuality, including reproductive and sexual health, LBGT issues, abortion, adoption, body image issues and more.

While a political process solution therefore may be preferable to strengthened parental rights to challenge abstinence-only education, there still should be some recourse to the courts to challenge these curricula. Logically then, students themselves should be able to bring successful challenges to abstinence-only curricula.
in court. However, since minors still do not enjoy the “full-strength” constitutional rights of adults, especially in the school setting, such challenges may not get very far. Minors wanting to bring challenges to abstinence-only education could argue that their right to privacy is infringed by sex education that withholds information about contraceptives. In *Eisenstadt v. Baird*, the Supreme Court extended the right to privacy in contraceptive decisions (initially recognized in *Griswold v. Connecticut*—which granted this right to married couples) to unmarried adults. *Carey v. Population Services International* then held unconstitutional a New York law that banned the distribution or sale of contraceptives to minors under the age of 16, thus bringing minors under the right to privacy recognized in *Griswold*. The *Carey* Court famously stated, “[t]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.” Since arguably, minors cannot make “decisions affecting procreation” without adequate information, their right to privacy should include a right to information about reproductive alternatives. This may be a difficult argument to make, because it seems to mandate contraceptive information even in schools that provide *no* sex education, and courts may be reluctant to go that far. While expanding this argument is beyond the scope of this paper, it is sufficient to note that expanding minors’ rights to privacy would also run counter to the current legal trend to expand parental rights, which contracts minors’ rights, and therefore may have an even harder time succeeding.

Minors or their parents could also assert equal protection challenges to abstinence-only education that promotes damaging gender stereotypes. Classifications by gender are subject to heightened scrutiny, and therefore must serve important governmental objectives and must be substantially related to achievement of those objectives. In *Craig v. Boren*, the Supreme Court
invalidated an Oklahoma law that set out a higher drinking age for males than for females, in part because it perpetuated

“a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket… But that sort of stereotyped reaction may have no rational relationship -- other than pure prejudicial discrimination -- to the stated purpose for which the classification is being made.”,[134]

Abstinence-only curricula perpetuates stereotypes about boys and girls in much the same way that the statute invalidated in *Craig v. Boren* did: boys are reckless and aggressive, girls are responsible and passive, and these stereotypes arguably have no relationship to abstinence-only curriculum’s stated purpose: “promoting abstinence”. The counterargument would be that in sexual matters, the fact that girls can get pregnant and boys cannot justifies a certain amount of gender classification. This argument may have some weight where teen pregnancy is concerned, but does not hold for STD infection.

Lastly, Debra Surgin argues that *Board of Education v. Pico*, can be read to grant students a first amendment right to *receive* accurate sex education.[135] “*Pico* could be applied to a challenge of a restriction to sex education by discussing how a restriction on sex curriculum is not based on educational concerns, but is instead based on the political, religious, and partisan viewpoints of the school board and is therefore an unconstitutional restriction on free speech.”[136] The argument would have to focus on the school board’s restriction of sex education based on improper viewpoints, but would be grounded in the students’ first amendment rights.

In sum, parents who oppose abstinence-only education should advocate politically against federal funding for it, or seek to have state laws put in place that mandate accurate, comprehensive sexuality education. Students should also lobby politically against abstinence-only education, but can also seek to bring challenges in court under
the right to privacy, or equal protection doctrines. The parents’ right to direct the education of their children is not a good vehicle for lasting challenges to abstinence-only sex education.


[26] Kenny & Sternberg, supra. n.3 at 29.


[31] Programs under section 510 must promote one of the following messages:

“(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.


[34] H.R. Rpt., *supra.* n. 21.

[35] American Family Life Act (AFLA), passed by Congress in 1981, funded educational programs to “promote self-discipline and other prudent approaches” to adolescent sex, or “chastity education”; Section 510 of Title V of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) was created with the “exclusive purpose” of funding abstinence; and grantees under the Special Programs of Regional and National Significance – Community- Based Abstinence Education (SPRANS) must emphasize all eight messages set out in Section 510 of the PRWORA, one of which states that the curricula must have as its “exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity.” Planned Parenthood, *Abstinence-Only “Sex” Education, supra.* n. 11.


[40] A virginity pledge is a *public* pledge to remain a virgin until marriage.

[41] For example, Pennsylvania’s evaluation of abstinence-only curricula found that “taken as a whole, this initiative [abstinence-only curricula] was largely ineffective in reducing sexual onset and promoting attitudes and skills consistent with sexual abstinence”, and Arizona’s final report, released in 2003, recognizes that “abstinence-only programs work best for sexually inexperienced youth” and that “intent to pursue abstinence…showed significant decline from post-test to follow-up”. SIECUS, Policy and Advocacy Section, *Sexuality Education and Abstinence-Only-Until-Marriage Programs in the States: An Overview (2005)*, (visited April 1, 2005) http://www.SIECUS.org/policy/states/2004/analysis.html.


Planned Parenthood, Abstinence-Only “Sex” Education, supra. n. 11.

SignOnSanDiego.com, California reduces teen birth rate through sex education, supra. n. 47.

Kenny & Sternberg, supra. n.3 at 27-28.

The Alan Guttmacher Institute, Sex Education: Needs, Programs and Policies, supra. n. 18 at 2.

Planned Parenthood, Abstinence-Only “Sex” Education, supra. n. 11.


On February 10, 2005, Representative Barbara Lee (D.CA) and Senator Frank Lautenberg (D.NJ) introduced the Responsible Education About Life (REAL) Act. This Act would reform Section 510 of the Welfare Reform Act to allow states to receive federal funds for programs that teach about both abstinence and contraception. If this bill passes, it would be the first federal funding stream for comprehensive sexuality education.


Pierce, 268 U.S. 510; Meyer 262 U.S. 390.

Meyer, 262 U.S. at 399.


Note that the Bill of Rights had not yet been “incorporated” into the Fourteenth Amendment. This type of challenge would be more likely to be brought today under a First Amendment free speech claim.

Lochner v. New York, 198 U.S. 45 (1905). In Lochner, the Supreme Court invalidated a labor law that restricted the hours that bakers could work as an infringement of the Fourteenth Amendment’s liberty protections, in that it restricted the bakers’ “freedom to contract”. Lochner’s economic due process jurisprudence has since been discredited. While Meyer and Pierce were both decided on similar substantive due process grounds, they are also often cited as early recognitions of the Supreme Court’s fundamental human liberty jurisprudence which led to recognition of rights such as the right to marry, the right to raise children, and the right to privacy.

Meyer, 262 U.S. at 400.

Meyer, 262 U.S. at 402.

Pierce, 268 U.S. 510.

Id.

Id. at 531.

Pierce, 530 U.S. at 535.
The schools had to pay a fee to get a permit to operate, their hours of operation were restricted, textbooks had to be approved by the government, etc.

Farrington, 273 U.S. at 293.

Id. at 298.

Hooks v. Clark County Sch. Dist., 228 F.3d 1036, 1043 (9th Cir. 2000)

For example, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court applied heightened scrutiny to find that Amish parents had a right to remove their children from mandatory public high school education. The parents had asserted First Amendment free exercise claims as well as parental rights claims, and the Court was explicit in limiting Yoder type claims to religious groups who, like the Amish, could assert particularly strong religious claims.

Leebaert v. Harrington, 332 F.3d 134, 141-142 (2d Cir. 2003).


Brown v. Hot, Sexy and Safer Prod. 68 F.3d 525 (1st Cir. 1995).

Brown, 68 F.3d at 533-34.

Id. at 534.

Id.

Leebaert, 332 F.3d 134.

Id.

Id.


Even in Yoder, a case that stands for the parental right to remove their children even from compulsory public education, the parents were seeking an exemption for their own children, not challenging the curriculum of the school.

Troxel, 530 U.S. 57.

Troxel, 530 U.S. at 65

Troxel, 530 U.S. at 69.

Abstinence-only education is of course subject to challenges based on religion, specifically Establishment Clause challenges, as many abstinence-only curricula mix religion with fact and promote religious messages. Establishment clause challenges to abstinence-only curricula are beyond the scope of this article, but for a treatment of this type of challenge, as well as challenges based on the “unconstitutional conditions” doctrine, see, James McGrath, Abstinence-Only Education: Ineffective, Unpopular and Unconstitutional, 38 U.S.F.L. Rev. 665 (2004); and 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).

Leebaert, 332 F.3d at 141-142.

The statute in Meyer was aimed primarily at German Lutherans, in Pierce the statute prohibited parents from sending their children to non-public schools. The Pierce statute was challenged by two private schools, one Catholic and one secular.

Alan Guttmacher Institute, New Studies Signal Dangers Of Limiting Teen Access To Birth Control Information And Services, supra. n. 43.

Parham, 442 U.S. at 600.

However, even loving parents can act against their child’s best interests, for example in cases where the parent withholds necessary medical care from the child because of religious beliefs. A number of states have exemptions for parents whose religion precludes medical care. In these states, the child’s voice is effectively lost. For a treatment of health care exemption statutes for religious parents, see, Janna C. Merrick, Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System, 29 Am. J. L. and Med. 269 (2003).

Yoder, 406 U.S. at 241.

Id.


[113] *Id.* at 277.


[117] *Id.*

[118] *Id.* at 1223.


[120] *Id.* (quoting *Brown*, 68 F.3d at 534.)


[123] *Parental Rights, the Trojan Horse of the Religious Right’s Attack on Public Education*, *supra* n. 122.

[124] *Parental Rights, the Trojan Horse of the Religious Right’s Attack on Public Education*, *supra* n. 122.

[125] People for the American Way, *Parental Rights, the Trojan Horse of the Religious Right’s Attack on Public Education*, *supra* n. 122.


[127] SIECUS, *Community Action Kit, Getting Ready to Advocate, Controversies over Sexuality Education*, *supra* n. 55.
SIECUS, Community Action Kit, Getting Ready to Advocate, *Controversies over Sexuality Education*, supra. n. 55.


[Griswold v. Connecticut, 381 U.S. 479 (1965).]


[Id. at 693.]

[Craig v. Boren, 429 U.S. 190, 197 (1976).]

[Craig, 429 U.S. at 465.]


[Surgin, *Sexuality, Gender and Curricula*, supra. n. 134.]