

Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools

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My job is not to keep teenagers from having sex. . . . Our job should be to tell kids the truth! . . . I don't care if it works, because at the end of the day I'm not answering to you, I'm answering to God!

Pam Stenzel, abstinence educator¹

INTRODUCTION

The movement for sex education in the United States began in 1914 with the founding of the American Social Hygiene Association (ASHA).² The Progressive Era, much like the sexual revolution of the 1960s, was a time of increased sex outside of marriage, declining marriage rates, and rising divorce rates.³ In response to these perceived social ills, the founders of the first sex education movement set out to attack the manifestations of this social and cultural change, such as prostitution, the spread of venereal diseases, and the sexual exploitation of women.⁴ The social hygienists' solution was to educate Americans about "wholesome sex within marriage."⁵ For the first forty years of sex education, then, the focus was on supporting marriage and family, broadly construed.⁶ But with the sexual revolution of the 1960s, sex education changed.

The second sex education movement started in 1964 with the founding of the Sexuality Education and Information Council of the United States (SIECUS). The goal of this new movement was not to discourage sex outside of marriage, but to protect sexual rights and to make sex safer and healthier.⁷ This version of sex education did not receive the widespread support that the social hygiene movement did. Across the country concerned parents and conservative (often religious) organizations banded together to protest sex education in the schools.⁸ The anti-sex education movement quickly stirred up public sentiment with allegations that in sex education classes students had intercourse in front of the class, that a teacher had removed her clothes to show students the female body,⁹ and that sex education was a Communist plot to overthrow America.¹⁰

1. MICHELLE GOLDBERG, KINGDOM COMING 135-36 (2006).

2. KRISTIN LUKER, WHEN SEX GOES TO SCHOOL 38 (2006); *see also* American Social Health Association, ASHA Milestones, http://www.ashastd.org/about/about_milestones.cfm (last visited Aug. 30, 2007).

3. LUKER, *supra* note 2, at 46-52.

4. *See id.* at 41-44.

5. *Id.* at 53.

6. *Id.* at 60-62.

7. *See* LUKER, *supra* note 2, at 84-85; SIECUS, About Us, <http://www.siecus.org/about/index.html> (last visited Aug. 30, 2007).

8. *See* WILLIAM MARTIN, WITH GOD ON OUR SIDE 100-43 (1996) (looking at sex education fights in Anaheim, California and textbooks and culture wars in West Virginia and Texas).

9. *Id.* at 110-11.

10. CLYDE WILCOX, GOD'S WARRIORS 9-10 (1992).

In the late 1970s and early 1980s the anti-sex education movement moved away from fighting against sex education in the schools, and instead developed its own alternative: abstinence-only education. As the name indicates, abstinence-only education teaches that abstinence outside of marriage is the only acceptable behavioral option for all people, and does not teach students about contraception. It first came to national attention in 1981, when Senator Jeremiah Denton advocated for a law that would fund the teaching of abstinence in schools and community programs.¹¹ This so-called “chastity bill”¹² legitimized the abstinence education movement, and marked the beginning of a new era in the struggle over adolescent sexuality.

The continuing debate over sex education is currently being played out in school districts, state legislatures, and the federal government. Critics of abstinence education argue that it is ineffective in preventing teens from having sex,¹³ that it teaches students inaccurate scientific and medical information,¹⁴ and that it promotes homophobia and harmful gender stereotypes.¹⁵ In addition, other critics have argued that some abstinence-only programs violate the Establishment Clause of the First Amendment. This Comment will demonstrate the broader constitutional problem with abstinence education: it is not merely, as previous scholars and litigators have argued, that certain curricula contain overtly religious teachings or that religious groups use abstinence funds to proselytize to students. Rather, the ideological nature of abstinence-only education pervades even the federal statute defining funding eligibility. The federal definition of abstinence, which all states and groups who receive funding must teach, offers a unique view of “permissible” sex that is, itself, a religious view of human sexuality. Unlike authors who have argued that the religious terminology of certain curricula may violate the Establishment Clause,¹⁶ I argue that the very foundation of abstinence-only policy is unconstitutional, and that it can only be remedied by a complete overhaul of the federal abstinence-only education system.

Part I of this Comment gives an overview of the history of Establishment Clause jurisprudence and the cases that have challenged school curricula and abstinence education as violating the Establishment Clause. Part II offers a

11. *See infra* Subsection II.A.1.

12. JUDITH LEVINE, HARMFUL TO MINORS 90 (2002).

13. *See infra* Subsection III.A.1.

14. *Id.*

15. Legal Momentum, Abstinence-Only Programs: Harmful to Women and Girls, http://legalmomentum.org/legalmomentum/programs/sexualityandfamilyrights/abstinenceonly_program_s_harmful_to_women_girls/ (last visited Aug. 30, 2007).

16. *See, e.g.*, Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 WOMEN’S RTS. L. REP. 27, 32-33 (2002) (stating that abstinence programs may constitute official endorsement of religion if they contain specific religious teaching); Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment’s Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN’S STUD. 265, 284 (2000) (claiming that abstinence-only programs are rooted in religious doctrine).

description of abstinence-only education, the current federal laws funding it, and empirical studies of its effectiveness. Part III analyzes the constitutionality of abstinence-only education, focusing on two factors that have been largely ignored in challenges to abstinence-only education under the Establishment Clause: the lack of a secular purpose to these programs, and the religious nature of the very message of abstinence itself.¹⁷

I. ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause is one of the shortest yet most contentious clauses in the Bill of Rights, stating simply that “Congress shall make no law respecting an establishment of religion.”¹⁸ The Supreme Court’s Establishment Clause jurisprudence dates from 1940, but for half a century the Supreme Court has struggled to develop a single, clear test for the interpretation of the clause. This confusion has led some scholars to argue that “[t]he Supreme Court’s test for deciding whether a law oversteps the bounds of the First Amendment[] . . . has been in a considerable state of flux”¹⁹ and caused one federal judge to call the current Establishment Clause jurisprudence “a vast, perplexing desert.”²⁰ Although scholars disagree as to the current state of Establishment Clause

17. The Supreme Court recently addressed the question of who has standing to sue the federal government for Establishment Clause violations in *Hein v. Freedom from Religion Foundation*, 127 S. Ct. 2553 (2007). While the question of standing to sue the government for funding abstinence-only programs is beyond the scope of this Comment, the Court’s decision in *Hein* does not preclude challenges to abstinence-only education. In *Hein* the Court revisited its decision in *Flast v. Cohen*, 392 U.S. 83 (1968), which held that a plaintiff has standing to challenge a law authorizing the use of federal funds in a way that violates the Establishment Clause. In *Hein* the Court emphasized that it was the link between a specific congressional act and the allegedly unconstitutional use of government funds that gave the plaintiffs in *Flast* standing to sue, a link that did not exist in *Hein* where the funds came from general executive branch appropriations. 127 S. Ct. at 2566. As will be illustrated below, funding of abstinence-only education occurs pursuant to congressional legislation and congressional appropriations, and thus remains open to challenge after *Hein*. Indeed, in *Hein* the Court noted that challenges to abstinence education funding have been brought against the Adolescent Family Life Act (AFLA), one of the three statutes authorizing funding for abstinence-only education. The Court stated that challenges to the AFLA fall under the *Flast* standing exemption because the AFLA is “‘at heart a program of disbursement of funds pursuant to Congress’ taxing and spending powers” *Hein*, 127 S. Ct. at 2567 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 619-20 (1988)).

18. U.S. CONST. amend. I.

19. Simson & Sussman, *supra* note 16, at 283; see also Adam M. Conrad, *Hanging the Ten Commandments on the Wall Separating Church and State: Toward a New Establishment Clause Jurisprudence*, 38 GA. L. REV. 1329, 1340 (2004) (“[T]he court has resorted to using *Lemon* almost haphazardly.”); 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, 1086 (2002) (“Supreme Court jurisprudence in this area could not be much more confusing and disjunctive than it already is.”); Christal L. Hoo, Comment, *Thou Shalt Not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 PENN. ST. L. REV. 683, 683 (2004) (“Current Establishment Clause jurisprudence provides little, if any, clear guidance for lower courts . . .”).

20. Helms v. Picard, 151 F.3d 347, 350 (5th Cir. 1998).

jurisprudence, the Court continues to use variations of the multipart test established in *Lemon v. Kurtzman* in 1971.²¹

A. The History of the Establishment Clause in the Supreme Court

Despite the well-established idea of a separation between church and state in American law, the Supreme Court has only decided seventy cases on Establishment Clause grounds.²² Few cases were decided under the Establishment Clause before the First Amendment was made applicable to states through the Fourteenth Amendment in 1940.²³ The first modern Establishment Clause case, *Everson v. Board of Education of Ewing Township*, held that the Establishment Clause meant that “[n]either [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”²⁴ In deciding whether New Jersey could use taxpayer money to provide school busing for children attending Catholic schools, the Court weighed the Establishment Clause and Free Exercise Clause in a balancing test.²⁵ The Court found that the Establishment Clause requires states to be neutral in their treatment of religious and non-religious groups: because New Jersey provided busing services to all schools, the policy did not violate the Establishment Clause.²⁶

The Supreme Court provided the foundation for its current Establishment Clause jurisprudence in *Lemon v. Kurtzman*,²⁷ which addressed whether a state could fund church-related schools to teach non-religious subjects. The *Lemon* Court built upon its decision in *Walz v. Tax Commission*,²⁸ where it stated that the “three main evils against which the Establishment Clause was intended to afford protection [are]: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”²⁹ In *Lemon*, the Court for the first time enunciated a multifactor test for determining whether a law conforms with the Establishment Clause: the law must have a secular purpose, its primary effect must not be to advance or inhibit religion, and it must not foster an excessive entanglement between government and religion.³⁰ In applying the test to the facts of the case, the Court found that the two statutes in question fostered excessive entanglement between church and state—both by giving aid directly

21. 403 U.S. 602, 612-13 (1971).

22. Mark David Hall, *Disentangling Church and State: Have the Courts Done Enough?*, 85 OR. L. REV. 563, 565-66 (2006).

23. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

24. 330 U.S. 1, 15 (1947).

25. *Id.* at 16.

26. *Id.* at 17-18.

27. 403 U.S. 602 (1971).

28. 397 U.S. 664 (1970).

29. 403 U.S. at 612 (quoting *Walz*, 397 U.S. at 668).

30. *Id.* at 612-13.

to schools with strictly religious purposes, and because the state would have to monitor teachers to ensure that their instruction was purely secular.³¹ While later Justices have criticized the test and offered their own Establishment Clause tests, the *Lemon* test remains the primary method of determining the constitutionality of government acts that may involve religion.

In a 1984 concurring opinion, Justice O'Connor advocated a different approach to the *Lemon* test. She advocated focusing on governmental "endorsement" of religion.³² The endorsement test asks the court to determine "what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows . . . the history of the community and the broader social and historical context in which the policy arose."³³ This test was adopted by the majority five years later in *County of Allegheny v. ACLU*.³⁴ The ACLU had challenged the display of a crèche in the Allegheny County Courthouse and a menorah outside the City-County Building in Pittsburgh, arguing that the displays constituted an endorsement of religious beliefs. The Court found that the display of the crèche did constitute a governmental endorsement of Christian beliefs because the crèche contained a sign that stated "Glory to God in the Highest!" and because it stood alone, not as a part of a more secularized holiday display.³⁵ The display that contained the menorah, however, was deemed not to constitute an endorsement of religion because it also had a Christmas tree. The Court found the tree to be a symbol of the secular aspects of Christmas, and thus chose to interpret the menorah to represent the secular, rather than the religious, aspects of Chanukah.³⁶ This case validated the endorsement test as a legitimate alternative to, or interpretation of, the *Lemon* test.

Almost a decade later, in *Agostini v. Felton*,³⁷ the Court overturned *Aguilar v. Felton*,³⁸ which had barred New York from sending public school teachers into parochial schools to provide remedial education for students. The Court explained that two key assumptions in the *Aguilar* decision had since been abandoned—the presumption that placing state employees in parochial schools necessarily constitutes indoctrination or excessive entanglement, and the idea

31. *Id.* at 617-19.

32. *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) ("Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device."); see also *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) ("The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into the legislative purpose and effect.")

33. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714-15 (M.D. Pa. 2005).

34. 492 U.S. 573, 592 (1989) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.")

35. *Id.* at 601-02.

36. *Id.* at 617-20.

37. 521 U.S. 203, 222-23 (1997).

38. 473 U.S. 402 (1985).

that all government aid to parochial schools is impermissible. Writing for the Court, Justice O'Connor explicitly stated that the third prong of the *Lemon* test (whether the statute fostered excessive entanglement between church and state) should be seen as simply a component of the second prong—an inquiry into the effects of the statute.³⁹ Under this modified version of the *Lemon* test, a governmental act is impermissible if its purpose is to advance or inhibit religion, or if it has an impermissible effect.

In *McCreary County v. ACLU of Kentucky*, the Court expressly declined to abolish the *Lemon* test, finding that when a county erected a Ten Commandments statute with the purpose of advancing religion, its actions violated the Establishment Clause.⁴⁰ The Court emphasized the importance of *Lemon's* inquiry into purpose, noting that it is both a “staple of statutory inquiry” and plays a practical role when the “objective emerges from readily discoverable fact.”⁴¹

The court has found the *Lemon* test inapplicable in limited situations when longstanding historical practices—and the absence of any expression of preference for one religion over another—have sanctioned a practice. In *Marsh v. Chambers*,⁴² the Court ignored the *Lemon* test and instead used a historical analysis to determine whether opening legislative sessions with prayer violated the Establishment Clause. The Court found that, because legislative prayer has become an integral part of our society, and because the founding fathers did not view legislative prayers as violating the Establishment Clause, the practice was not a threat to the separation of church and state.⁴³ In *Van Orden v. Perry*,⁴⁴ the Court solidified its adoption of the endorsement test in a case challenging Texas's placement of a monument of the Ten Commandments on the grounds of the state capitol. The Court held that the *Lemon* test was not useful in addressing the “passive monument” that Texas had erected.⁴⁵ The Court found that the Ten Commandments have a historical and legal significance in addition to their religious connotation, and therefore, that the monument did not violate the First Amendment. While *Van Orden* seems to take the opposite position from *McCreary* on the continued usefulness of the *Lemon* test, in both cases the Court found that the context in which the allegedly prohibited action occurred was crucial in determining whether the action or statute had a secular purpose.⁴⁶

39. 521 U.S. at 233 (“Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect.”).

40. 545 U.S. 844, 861-67 (2005).

41. *Id.* at 861-62.

42. 463 U.S. 783 (1983).

43. *Id.* at 792.

44. 545 U.S. 677 (2005).

45. *Id.* at 686.

46. *Id.* at 691 (considering the context in which the Ten Commandments monument appeared and stating, “Texas has treated its Capitol grounds monuments as representing the several strands in the

All of the Court's new "tests" still address the core concerns of the *Lemon* Court, and can be seen as reinterpretations of the three prongs of the *Lemon* test. While the Court has criticized the *Lemon* test, it has yet to enunciate a single new test, and it continues to use the *Lemon* criteria as the foundation of its various analyses. Thus, while the Court may sometimes state that it is not relying on the *Lemon* test, Supreme Court Establishment Clause jurisprudence still relies on the basic questions of what the purpose of the statute is and what its effects are.

B. The Establishment Clause and School Curricula Cases

Although there have been few Establishment Clause cases challenging abstinence-only education, for the past forty years the courts have been addressing Establishment Clause challenges to school curricula in the context of the teaching of evolution. The similarities between the evolution issue and abstinence are clear—both involve public school classes that have a factual scientific component in which there are competing curricula (one based on scientific fact, and another based at least in part on religious, moral, or ethical beliefs).

The Court has always been particularly strict with potential Establishment Clause violations in the schools, explicitly stating that otherwise permissible actions may violate the First Amendment if they are conducted in a classroom. For example, in *Van Orden v. Perry*, the Court noted that while it was constitutional for Texas to erect a statue of the Ten Commandments on the grounds of the capitol, it had previously held that states could not post the Ten Commandments in the classroom.⁴⁷ Similarly, the Court has allowed prayer in the state legislature⁴⁸ but prohibited it in school contexts.⁴⁹ In the Court's own words, "[We have] been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."⁵⁰ For this reason, the intelligent design cases provide a useful template for addressing Establishment Clause questions relating to abstinence education.

State's political and legal history"); *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 870 (2005) (discussing the resolutions the county was required to produce in order to explain the purpose of the display in question, and finding that "[t]ogether, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose").

47. 545 U.S. at 691.

48. *Marsh v. Chambers*, 463 U.S. 783 (1983).

49. *Lee v. Weisman*, 505 U.S. 577 (1992).

50. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

1. *The Creationism and Intelligent Design Cases*

In *Epperson v. Arkansas*,⁵¹ the Supreme Court invalidated an Arkansas statute that prohibited the teaching of evolution in public schools, relying on its previous cases addressing school curricula. The Court held that the Arkansas law was based on a desire to uphold a particular religious view of the origins of human life and that the First Amendment does not allow states to require that teaching be “tailored to the principles or prohibitions of any religious sect or dogma.”⁵² The Court further stated that the Arkansas law was not neutral with respect to religion, because it did not seek to excise all discussions of the origins of humankind from school curricula but merely to prohibit the teaching of one theory that conflicted with the Biblical account of the origins of man.⁵³

In *Edwards v. Aguillard*,⁵⁴ the Supreme Court found unconstitutional a Louisiana statute that required schools to give equal treatment to creationism and evolution. The statute did not require that either subject be taught, but if one was taught, the other was also required. The district court held that there was no valid secular reason for prohibiting the teaching of evolution, and that the teaching of creationism was “‘tailored to the principles’ of a particular religious sect.”⁵⁵ The Court affirmed the decisions of the district and appellate courts, finding that the statute violated the first prong of the *Lemon* test because it lacked a secular purpose. In finding no secular purpose, the Court also recognized the historic antagonism between certain religious teachings and the teaching of evolution. The Court concluded that the intent of the Louisiana Legislature had been to advance the religious view that a supernatural force created humankind, as stated in the Bible.⁵⁶

Recently, two district court cases have extended the reasoning used in the creationism cases to instances in which evolution has been portrayed as only one of various theories of creation. In *Kitzmiller v. Dover Area School District*,⁵⁷ the district court struck down a school board resolution requiring students to be made aware of “gaps” in Darwin’s theory of evolution and to be taught other theories of evolution, including intelligent design. After reviewing the history of the intelligent design movement, the *Kitzmiller* court, relying on the endorsement test, found that a reasonable observer would understand that a discussion of intelligent design and gaps in Darwinian theory were religious ideas that emerged from creationist ideas.⁵⁸ The court also found that an objective student would view the discussion of intelligent design as an official

51. 393 U.S. 97 (1968).

52. *Id.* at 106.

53. *Id.* at 109.

54. 482 U.S. 578 (1987).

55. *Aguillard v. Treen*, 634 F. Supp. 426, 427 (E.D. La. 1985).

56. 482 U.S. at 591.

57. 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

58. *Id.* at 716-23.

endorsement of religion. Lastly, the court found that intelligent design was not science, and thus should not be posited as a scientific alternative to Darwinian theory in high school biology classes.⁵⁹ In addition to its endorsement inquiry, the court examined whether the school board policy violated the *Lemon* test, and found that the board had adopted the resolution with a religious objective, and that the only effect of the policy was to advance religion.⁶⁰

That same year, another court held that a sticker placed in science textbooks, which stated that evolution is a theory that should be critically considered, violated the Establishment Clause.⁶¹ The court found that the sticker did have a secular purpose—to encourage critical thinking—but that it still failed the *Lemon* test because it sent a message that favored members of religious communities who oppose the theory of evolution.⁶² In applying the *Lemon* effects test, the judge found that a reasonable observer would interpret the sticker as an endorsement of certain fundamentalist ideas, given the history of debates within school boards on the teaching of creationism and evolution.⁶³

Even though intelligent design is not as explicitly religious as creationism, courts have still found that, given the historical connection between certain conservative religious groups and the intelligent design movement, a state or school endorsement of intelligent design indicates its desire to promote a religious viewpoint. As discussed below, this same relationship is at play in the battles over abstinence-only and comprehensive sexuality education. States and school boards who promote abstinence-only education are aligning themselves with certain conservative Christian groups, and thus are promoting religion.

2. *Establishment Clause Challenges to Abstinence-Only Education*

There have been relatively few cases challenging abstinence-only education programs under the Establishment Clause. In 1983, a group of clergy represented by the ACLU sued the Secretary of Health and Human Services, asserting that, as administered, the Adolescent Family Life Act (AFLA)⁶⁴ violated the Establishment Clause.⁶⁵ The plaintiffs also claimed that, because the AFLA allowed religious organizations to use government money for the purpose of counseling and education services, the statute was unconstitutional on its face. The district court found that although the AFLA had a secular

59. *Id.* at 745-46.

60. *Id.* at 763-64 (“To assert a secular purpose against this backdrop is ludicrous.”).

61. *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated and remanded for additional evidentiary inquiry*, 449 F.3d 1320 (11th Cir. 2006).

62. 390 F. Supp. 2d at 1306.

63. *Id.* at 1307-08.

64. 42 U.S.C. §§ 300z. The AFLA is the oldest federal funding stream for abstinence education. *See infra* Subsection III.A.1.

65. *Bowen v. Kendrick*, 657 F. Supp. 1547 (D.D.C. 1987), *vacated*, 487 U.S. 589 (1988).

purpose, it had the effect of advancing religion and engendering excessive entanglement between church and state.⁶⁶

The Supreme Court reversed this decision, finding that the AFLA did not, on its face, violate the First Amendment.⁶⁷ The Court found that the AFLA had a valid secular purpose—"the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood."⁶⁸ The Court also found that the AFLA did not have the primary effect of advancing religion, even though its approach to dealing with adolescent pregnancy "may coincide with the approach taken by certain religions."⁶⁹ Lastly, the Court found that the AFLA did not foster excessive government entanglement by allowing religious groups to participate in the program.⁷⁰ The Court then looked into the contention that the specific application of the AFLA violated the Establishment Clause and remanded the case, ordering the district court to consider whether AFLA aid was being given to "pervasively sectarian religious institutions," and whether AFLA aid had been used to fund religious activities in secular settings.⁷¹ In 1993, the parties reached a settlement establishing that AFLA-funded programs had to work to eliminate religious messages from their curricula, as well as to provide medically accurate information.⁷²

In 1994, parents in Shreveport, Louisiana sued the local school board, claiming that the use of the *Sex Respect* and *Facing Reality* sex education curricula violated Louisiana law by disseminating religious ideas.⁷³ At trial, the court found that various passages of the curricula violated a Louisiana sex education statute endorsing abstinence education but prohibiting the teaching of religious, moral, and ethical beliefs.⁷⁴ The appellate court upheld much of the trial court's decision to strike passages that discussed spirituality and imparted moral judgment on various sexual acts.⁷⁵

66. *Id.* at 1570.

67. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

68. *Id.* at 602.

69. *Id.* at 605.

70. *Id.* at 608-11.

71. *Id.* at 621.

72. Rebekah Saul, *Whatever Happened to the Adolescent Family Life Act?*, GUTTMACHER REP. ON PUB. POL'Y, Apr. 1998, at 5, 10, available at <http://www.guttmacher.org/pubs/tgr/01/2/gr010205.pdf>.

73. *Coleman v. Caddo Parish Sch. Bd.*, 635 So. 2d 1238 (La. Ct. App. 1994).

74. The statute states,

It is the intent of the legislature that 'sex education' shall not include religious beliefs, practices in human sexuality, nor the subjective moral and ethical judgments of the instructor or other persons. Students shall not be tested, quizzed, or surveyed about their personal or family beliefs or practices in sex, morality, or religion.

La. Rev. Stat. Ann. § 17:281(2) (1987).

75. 635 So. 2d at 1267-71 (striking passages that included statements such as: "[N]o one can deny that nature is making some kind of a comment on sexual behavior through . . . AIDS," "If pre-marital sex came in a bottle, it would probably have to carry a Surgeon-General's [sic] warning," and "[s]piritual values are an important aspect of human sexuality"). Despite this case, *Sex Respect* and other curricula continue to use this type of language, stating, "If premarital sex came in a bottle, it would probably have to carry a Surgeon General's warning, something like the one on a package of cigarettes,"

In 2002, the ACLU of Louisiana challenged the Governor's Program on Abstinence (GPA), claiming that the program violated the Supreme Court's 1988 decision in *Bowen v. Kendrick*.⁷⁶ The GPA received its funding, roughly \$1.6 million per year, through Title V of the Social Security Act [hereinafter Title V]. The GPA would then grant money to community organizations and individuals to implement abstinence-only programs. According to the ACLU, some of the organizations funded by the GPA used explicitly religious messages to promote abstinence,⁷⁷ and the GPA program materials themselves stated "it's time to restore our Judeo-Christian heritage in America."⁷⁸ Applying the *Lemon* test, the federal district court found that some provisions of the GPA had a valid secular purpose, but that by funding pervasively sectarian institutions, the statute had the effect of promoting religion.⁷⁹ The judge granted the ACLU a preliminary injunction, ordered the program officers to stop funding organizations that conveyed religious messages, and required the GPA to create an oversight program to monitor the issue.⁸⁰

In 2005, the ACLU sued the U.S. Department of Health and Human Services for its funding of the Silver Ring Thing, an abstinence-only education group that the ACLU claimed evangelized while promoting abstinence.⁸¹ The case settled in February 2006, when the Department of Health and Human Services agreed to stop using taxpayer money to fund the Silver Ring Thing.⁸² The settlement agreement stated that the Silver Ring Thing may not have included adequate measures to separate religious activity from federally-funded activity, and that if the Silver Ring Thing were to apply for federal funding again, it would have to demonstrate compliance with regulations put forth by the Administration on Children, Youth, and Families.⁸³

and "There's no way to have premarital sex without hurting someone." COLEEN KELLY MAST, SEX RESPECT, STUDENT WORKBOOK: THE OPTION OF TRUE SEXUAL FREEDOM 47 (2001).

76. *ACLU v. Foster*, No. 02-1440, 2002 U.S. Dist. LEXIS 13778 (E.D. La. July 24, 2002).

77. For example, a theater group called "Just say 'Whoa'" used skits that included the following lines: "As Christians, our bodies belong to the Lord, not to us. God wants more for you than a one-night stand. We belong to Him and He has plans for us that go beyond Saturday night," and "Even if you've made a mistake . . . Jesus can make it right." *Id.* at *16-*17.

78. Press Release, ACLU, ACLU Asks Court To Stop Taxpayer Financing of Religion in Abstinence-Only Programs (May 9, 2002), available at <http://www.aclu.org/reproductiverights/sexed/16419prs20020509.html>.

79. *Foster*, 2002 U.S. Dist. LEXIS 13778, at *17.

80. *Id.* at *18-*19. The case settled six months later. *ACLU v. Foster*, No. 02-1440, 2003 U.S. Dist. LEXIS 3818 (E.D. La. Mar. 10, 2003).

81. *ACLU v. Leavitt*, Civ. A. No. 05-11000 (D. Mass. filed May 16, 2005) was filed in the federal district court of Massachusetts. The complaint is available at <http://www.aclu.org/reproductive rights/sexed/126031gl20050516.html> (last visited Oct. 17, 2007). See also Ervin Dyer, *Opinions Vary on Funding Cut-Off for Faith-Based Abstinence Program*, PITTS. POST-GAZETTE, Aug. 24, 2005, available at <http://www.post-gazette.com/pg/05236/558937.stm>.

82. Press Release, ACLU, ACLU Announces Settlement in Challenge to Government-Funded Religion in the Abstinence-Only-Until-Marriage Program the "Silver Ring Thing" (Feb. 23, 2006), available at <http://www.aclu.org/reproductiverights/sexed/24246prs20060223.html>.

83. Settlement Agreement at 2-3, *ACLU v. Leavitt*, Civ. A. No. 05-11000 (D. Mass. Feb. 22, 2006), available at <http://www.aclu.org/pdfs/srtsettlementagreement.pdf>.

II. ABSTINENCE-ONLY SEXUALITY EDUCATION

There are two types of sexuality education used in U.S. public schools. Comprehensive sexuality education programs, often called “abstinence-plus” programs, teach that abstinence is the best choice for avoiding pregnancy and sexually transmitted infections (STIs), but also discuss alternative forms of contraception.⁸⁴ Comprehensive programs provide factually accurate information on topics such as masturbation, STIs, abortion, and homosexuality.⁸⁵ In 1991, SIECUS convened a national task force to develop guidelines for comprehensive sexuality education programs; the guidelines have since been updated in 1996 and 2004 to reflect new information and developments in sexuality education. The 2004 Guidelines state that the purpose of sexuality education is to provide students with “a positive view of sexuality, provide them with information they need to take care of their sexual health, and help them acquire skills to make decisions now and in the future.”⁸⁶ The Guidelines emphasize six key concepts that comprehensive sexuality education programs should address: human development, relationships, personal skills, sexual behavior, sexual health, and society and culture.⁸⁷ Included in the Guidelines’ statement of values are statements such as: “Sexuality is a natural and healthy part of living;” “In a pluralistic society, people should respect and accept the diversity of values and beliefs about sexuality that exist in a community;” and “All persons have the right and obligation to make responsible sexual choices.”⁸⁸ These general principles for sexuality education are also endorsed by the Society for Adolescent Medicine.⁸⁹ The basic goals of comprehensive sexuality education are to provide a picture of sexuality that takes into account diverse views of human sexuality and to teach students how to make decisions regarding their sexuality. There is currently no federal funding directed specifically at comprehensive sexuality education.⁹⁰

84. NAOMI FARBER, *ADOLESCENT PREGNANCY* 79 (2003).

85. Advocates for Youth, *Sex Education Programs: Definitions & Point-by-Point Comparison*, <http://www.advocatesforyouth.org/rrr/definitions.pdf> (last visited Sept. 18, 2007).

86. NATIONAL GUIDELINES TASK FORCE, *GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION: KINDERGARTEN-12TH GRADE* 19 (3d ed. 2004), available at <http://www.siecus.org/pubs/guidelines/guidelines.pdf>.

87. *Id.* at 15.

88. *Id.* at 20.

89. See Society for Adolescent Medicine, *Abstinence-Only Education Policies and Programs: A Position Paper of the Society for Adolescent Medicine*, 38 *J. ADOLESCENT HEALTH* 83, 86 (2006) (supporting sexuality education programs that “provide adolescents with complete and accurate information about sexual health, including information about concepts of healthy sexuality, sexual orientation and tolerance, personal responsibility, risks of HIV and other STIs and unwanted pregnancy, access to reproductive health care, and benefits and risks of condoms and other contraceptive methods”).

90. In March 2007, however, the Responsible Education About Life (REAL) Act was introduced into Congress. This Act would create federal funding, administered by the Department for Health and Human Services, for comprehensive sexuality education that would stress abstinence but also educate

Abstinence-only education programs, on the other hand, teach that abstinence from sexual relationships outside of marriage is expected of all people, and that it is the only reliable way to prevent pregnancy and STIs. The federal definition of “abstinence” prohibits educators from discussing the benefits of contraceptives, leading some teachers not to mention them at all, while others mention them only in order to highlight their failure rates. These programs advance the idea that the expected standard of human sexuality is within a “mutually faithful monogamous relationship in the context of marriage,”⁹¹ and that sex before marriage is likely to have significant harmful consequences.⁹² Most abstinence-only programs also reinforce traditional gender stereotypes with descriptions of how men and women differ physically, psychologically, and emotionally.⁹³ All either ignore or condemn homosexuality.⁹⁴

Abstinence-only programs, most of which are funded by the federal government, must also conform their teaching to the federal definition of abstinence-only education. The federal definition of abstinence-only education, as set forth in Title V, includes eight criteria. By definition, abstinence-only education “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”; “teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects”; and “teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society.”⁹⁵ Proponents of

adolescents about contraception. *See* Advocates for Youth, Responsible Education About Life (REAL) Act, <http://www.advocatesforyouth.org/publications/factsheet/fsreal.pdf> (last visited Sept. 18, 2007).

91. 42 U.S.C. § 710(b)(2)(D) (1996).

92. Advocates for Youth, *supra* note 90.

93. *See* MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REPRESENTATIVES, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS 16-18 (2004), available at <http://www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf> [hereinafter WAXMAN REPORT]; KRIS FRANIE, WHY KNOW ABSTINENCE EDUCATION PROGRAMS: CURRICULUM FOR SIXTH GRADE THROUGH HIGH SCHOOL 4 (Marcia Sweavingen & Pam Susler eds., 2002) (“Explain to the students that some activities may be done by both parents, but ask which parent is more likely to cut grass, wash clothes, decorate the home, etc.”).

94. *See infra* note 229.

95. 42 U.S.C. § 710(b)(2)(C),(E),(F) (1996). The full text regarding the criteria for abstinence-only programs reads:

For purposes of this section, the term “abstinence education” means an educational or motivational program which—

(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;

abstinence-only education assert that telling teenagers that abstinence is the best way to avoid pregnancy and STI transmission, while at the same time providing information about condoms and contraceptives, sends a mixed message. Other supporters of abstinence-only education argue that discussing sex and contraceptive methods actually encourages young people to have sex.⁹⁶ Thus, abstinence-only enthusiasts claim that the only way to achieve the desired goals of preventing risky teenage sexual activity is to send a clear message that any sex outside of marriage is unacceptable. As one author argues, students will “achieve at higher levels when standards are set at levels that are realistic, but high.”⁹⁷

The main difference between comprehensive sex education and abstinence-only sex education is that the former is more concerned with practices, while the latter is more concerned with values. Comprehensive sex education attempts to teach teenagers different ways to avoid unwanted pregnancies, STIs, or unwanted sexual contact, but generally does not teach students that they should engage in or refrain from any particular acts. Abstinence-only education, meanwhile, provides very little practical information on the “how” and focuses instead on instilling sexual values associated with certain conservative religious groups. One researcher who spent time doing fieldwork and interviews in evangelical communities sees the difference as “whether the emphasis is on saving kids’ bodies or saving their souls.”⁹⁸

A. Federal Funding for Abstinence-Only Education Programs

There is no federal policy dictating whether schools must provide sexuality education or, if they do, what that education must consist of. Twenty states currently require schools to teach sex education, while thirty-five require STI and HIV education.⁹⁹ Of those that require sex education, fifteen require that schools cover or stress abstinence, and eight require that the schools cover contraception.¹⁰⁰ Seven of the states that mandate the teaching of abstinence do

(F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society;

(G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and

(H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

42 U.S.C. § 710(b)(2) (1996).

96. See, e.g., Joseph Collison, *Sex Education Programs Promote Teen Promiscuity*, in *TEENAGE SEXUALITY: OPPOSING VIEWPOINTS* 153 (Tamara L. Roleff ed., 2001). There is no evidence that teaching students about contraception is correlated with increased sexual activity among the students. See *infra* Part III.C.

97. Joe S. McIlhaney Jr., *Abstinence-Only Programs Reduce Teen Sexual Activity*, in *TEENAGE SEXUALITY: OPPOSING VIEWPOINTS*, *supra* note 96, at 138.

98. GOLDBERG, *supra* note 1, at 146.

99. ALAN GUTTMACHER INSTITUTE, *STATE POLICIES IN BRIEF: SEX AND STI/HIV EDUCATION* (2007), available at http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf.

100. *Id.*

not require any mention of contraception.¹⁰¹ Of those that do not require sexuality education, eleven states mandate that if school districts adopt sexuality education programs, they must cover or stress abstinence, but not contraception.¹⁰² Despite the lack of federal or state requirements, the majority of school districts in the nation do have sexuality education policies. Of the policies that exist, 65% support comprehensive education and 35% support abstinence-only education.¹⁰³

Although there is no federal educational policy on what kind of sexuality education school districts should teach, and curricular decisions are usually determined locally, there is significant federal funding for abstinence-only programs. The legislation granting this funding to abstinence-only programs was conceived of, pushed through Congress, and has been continually supported by religious lobbying groups and responsive lawmakers.

As the sex education movement grew in the 1970s and 1980s,¹⁰⁴ so did the political presence of the New Right, with its strong evangelical Christian base.¹⁰⁵ One focus of this newly energized religious group was “pro-family” politics, which included anti-abortion, anti-homosexuality, and anti-sex education movements.¹⁰⁶ At first, the Christian Right opposed all sexuality education, at least in part because it was seen as part of a Communist plot that involved secularizing the United States.¹⁰⁷ Later, in order to counter the sex education movement that groups such as SIECUS were promoting, the Christian Right came up with its own “alternative sexuality industry,”¹⁰⁸ which moved Evangelicals away from the denial of all sexuality, and instead condoned, and even celebrated “divinely approved sex.”¹⁰⁹ The focus of this alternative sexuality industry is sex within heterosexual marriage—all other sex is strongly condemned.

1. Federal Funding Statutes

In 1981, Congress passed the Adolescent Family Life Act (AFLA),¹¹⁰ which authorized the Secretary of Health and Human Services to make grants

101. *Id.*

102. *Id.*

103. FARBER, *supra* note 84, at 105; *See also* ALAN GUTTMACHER INSTITUTE, SEX EDUCATION: NEEDS, PROGRAMS AND POLICIES 23 (2005), available at http://www.guttmacher.org/presentations/sex_ed.pdf (illustrating the use of abstinence-only and comprehensive sex education programs by region).

104. LUKER, *supra* note 2, at 84-87.

105. Diane di Mauro & Carole Joffe, *The Religious Right and the Reshaping of Sexual Policy: An Examination of Reproductive Rights and Sexuality Education*, 4 SEXUALITY RES. & SOC. POL'Y 67, 79 (2007).

106. JANICE M. IRVINE, TALK ABOUT SEX 66 (2002).

107. WILCOX, *supra* note 10, at 9-10.

108. IRVINE, *supra* note 106, at 82.

109. *Id.* at 83.

110. Pub. L. No. 97-35, § 955(a), 95 Stat. 582 (1981).

to projects that offer teenage sexuality, pregnancy, and parenthood services.¹¹¹ The statute authorized appropriations of thirty million dollars per year, at least two-thirds of which was to be used for demonstration projects.¹¹² These grants are restricted to service providers who do not provide abortions, abortion counseling, or referrals to abortion services.¹¹³ Abstinence programs within the AFLA have been granted thirteen million dollars each year since its inception.¹¹⁴

The origins of the AFLA illustrate the ways in which abstinence education has been tied to the Christian Right from its very beginnings. The AFLA was cosponsored by Senators Orrin Hatch and Jeremiah Denton, a one-term senator who was backed by the Moral Majority, had consulted for the Christian Broadcasting Network, and founded the Coalition for Decency.¹¹⁵ Indeed, two decades after the passage of the AFLA, Senator Denton still “says America’s ‘top priority should be to recover our most fundamental founding belief that our national objectives, policies, and laws should reflect obedience to the will of Almighty God.’”¹¹⁶ It is thus not surprising that the “AFLA, from its inception, sought to further the Christian Right’s cultural and political goals.”¹¹⁷ Accordingly, the AFLA originally required that groups seeking funding involve religious groups in their implementation of the abstinence-only programs.¹¹⁸ Even though these provisions of the AFLA were challenged in *Bowen v. Kendrick*, and many of the most overtly religious provisions and applications were struck, it is clear that the “AFLA amplified the conservative religious pro-sex movement.”¹¹⁹

In 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act (commonly known as “welfare reform”), which contains a provision allotting funds for abstinence-only education to the states.¹²⁰ Title V earmarked fifty million dollars per year for the first five years after its passage. Under Title V, states apply for the funding themselves, then distribute the money as grants to various organizations, including public schools, faith-based organizations, and community-based health organizations.¹²¹ States must match the federal grant at seventy-five percent.¹²²

111. 42 U.S.C. § 300z-2(a) (1994).

112. 42 U.S.C. §§ 300z-9(a), (b) (1994).

113. 42 U.S.C. § 300z-10(a) (1994).

114. SIECUS, Fiscal Year 2007 Appropriations Completed as Fiscal Year 2008 Budget Released, <http://www.siecus.org/policy/PUupdates/pdate0307.html> (last visited July 29, 2007).

115. IRVINE, *supra* note 106, at 90.

116. MARTY KLEIN, AMERICA’S WAR ON SEX 8 (2006).

117. IRVINE, *supra* note 106, at 90.

118. *Id.* at 93.

119. *Id.* at 94.

120. 42 U.S.C. § 710 (1996).

121. Jones, *supra* note 19, at 1082.

122. See U.S. Dep’t of Health & Human Servs. Maternal and Child Health Bureau, <http://mchb.hrsa.gov/about/overview.htm> (last visited Aug. 27, 2007).

President Bush has requested to maintain the fifty million dollars for Title V for fiscal year 2008.¹²³ Like the AFLA, religiously-affiliated organizations were behind the passage of Title V.¹²⁴ In 1995 Senators Lauch Faircloth¹²⁵ and Rick Santorum¹²⁶ introduced an abstinence-only education program whose language was developed by the Heritage Foundation, a conservative Christian lobbying group.¹²⁷ While this legislation ultimately was not passed, it was the precursor to Title V, which was passed shortly thereafter.

Most recently, in 2000, the Special Projects of Regional and National Significance-Community Based Abstinence Education (SPRANS-CBAE) [hereinafter CBAE] was established. This program allows the federal government to give grants to private and public entities for abstinence-only education. Notably, unlike Title V, which until Fiscal Year 2007 only required that recipients not use messages inconsistent with the federal definition of abstinence-only education,¹²⁸ CBAE recipients have always been required to explicitly adhere to and promote all eight of the government's criteria.¹²⁹ CBAE recipients must also agree not to provide "any other education regarding sexual conduct in the same setting."¹³⁰ Since 2001, CBAE has quickly become

123. SIECUS, *supra* note 114.

124. IRVINE, *supra* note 106, at 102.

125. Faircloth was a one-term senator from North Carolina from 1993 to 1999. Biographical Directory of the United States Congress, Duncan McLaughlin Faircloth, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000437> (last visited Oct. 17, 2007).

126. Santorum served in the Senate from 1995 to 2007. Known for his conservative views on issues such as abortion and homosexuality, Santorum is also a Senior Fellow at the Ethics and Public Policy Center, an organization "dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy." See Ethics and Public Policy Center, Rick Santorum, <http://www.eppc.org/scholars/scholarID.88/scholar.asp> (last visited Oct. 17, 2007); Ethics and Public Policy Center, About, <http://www.eppc.org/about/> (last visited Oct. 17, 2007). He also proposed adding language to the No Child Left Behind Act to encourage the teaching of intelligent design in schools. Peter Slevin, *Battle Over Teaching Evolution Intensifies Across U.S.*, WASH. POST, Mar. 14, 2005, at A1.

127. ESTHER KAPLAN, WITH GOD ON THEIR SIDE: GEORGE W. BUSH AND THE CHRISTIAN RIGHT 209 (2005); Jones, *supra* note 19, at 1092; Daniel Daley, *Exclusive Purpose: Abstinence-Only Proponents Create Federal Entitlement in Welfare Reform*, in 25 SIECUS REPORT, Apr.-May 1997, at 4, available at <http://www.siecus.org/siecusreport/volume25/25-4.pdf>.

128. U.S. DEP'T OF HEALTH & HUM. SERVS. ADMIN. FOR CHILDREN & FAMILIES, FY 2006 PROGRAM ANNOUNCEMENT: SECTION 510 ABSTINENCE EDUCATION 9 (2005). In Fiscal Year 2007 the Department of Health and Human Services changed the rules for grant applicants, requiring that in programs funded by Title V "each element [of the Title V definition of abstinence education] should be meaningfully represented." U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, FY 2007 PROGRAM ANNOUNCEMENT: SECTION 510 ABSTINENCE EDUCATION 24-25 (2006), available at <http://www.acf.hhs.gov/grants/pdf/ACYF-FYSB-AE-01-06updated.pdf>

129. Maternal and Child Health Federal Set-Aside Program; Special Projects of Regional and National Significance; Community-Based Abstinence Education Project Grants, 68 Fed. Reg. 68632-03, 68634 (Dec. 9, 2003) ("Curriculum developed or selected for implementation in the SPRANS Community-Based Abstinence Education Grants Program must address all eight elements of the Section 510 abstinence education definition and may not be inconsistent with any aspect of that definition.").

130. *Id.* at 68635.

the most heavily funded of the three programs, with Congress raising funding to 141 million dollars in 2007.¹³¹

Many CBAE recipients are religious organizations.¹³² President Bush, in a 2003 speech about faith-based organizations, noted that millions of federal dollars had been given to faith-based abstinence education programs and told the audience, “Our society must not fear the use of faith to solve life’s problems.”¹³³ Because CBAE grants are given directly to private groups, not only can CBAE bypass states’ efforts to reject abstinence education by rejecting the federal funds, but the money often flows to faith-based groups that have little or no experience conducting sexuality education.¹³⁴

2. *Recipients of Abstinence-Only Funding*

Conservative Christian groups have not only been instrumental in passing abstinence-only education funding legislation, they are also the recipients of much of that funding. While funding recipients generally no longer overtly promote religion, as they once did,¹³⁵ faith-based groups receive a significant amount of all abstinence-only funding. For example, 21.5% of the CBAE funding currently goes to faith-based groups, of which 93% (twenty-eight out of thirty organizations) are Christian.¹³⁶ Prior to 2005, seven million dollars in CBAE money had gone to “overtly Christian organizations,” while none had gone to Jewish, Hindu, Muslim, Buddhist, or other non-Christian religious groups.¹³⁷ Jim Towey, the director of the White House’s Faith-Based and Community Initiatives office, even said he would not give equal consideration to pagan applicants for funds in areas such as abstinence education, because they “lacked the necessary ‘loving hearts.’”¹³⁸ Abstinence-only funds have also been granted to over a dozen crisis pregnancy centers and other explicitly pro-life groups, revealing that federal funding for abstinence expressly endorses religious views of sex and reproduction beyond abstinence.¹³⁹ Similarly, the CBAE grant review panels in the past have included numerous representatives

131. Cheryl Wetzstein, *Congress Extends Funding for Abstinence Education*, WASH. TIMES, July 15, 2007, at A2. Although it appeared in June 2007 that Congress might reduce or eliminate some abstinence-only funding, as of November 2007, it has continued to renew the funding every three months. See Cheryl Wetzstein, *Foes Hit Continued Abstinence Funding*, WASH. TIMES, Sept. 30, 2007, at A2; SIECUS, *Mixed Bag on Funding Decisions from House and Senate* (June 2007), <http://www.siecus.org/policy/PUupdates/pdate0332.html>.

132. See *infra* Part III.A.2.

133. President George W. Bush, Remarks at the Power Center 10th Anniversary Celebration (Sept. 12, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030912-14.html>.

134. See LEGAL MOMENTUM, AN OVERVIEW OF FEDERAL ABSTINENCE-ONLY FUNDING 9-10 (2007), <http://www.legalmomentum.org/legalmomentum/publications/OverviewofAbs.pdf>.

135. LEGAL MOMENTUM, *supra* note 134; see also *supra* Part II.C.

136. LEGAL MOMENTUM, *supra* note 134, at 10.

137. KAPLAN, *supra* note 127, at 214.

138. *Id.* at 45.

139. *Id.* at 52.

of Christian evangelical groups and Christian lobbying groups but no representatives of other religious groups.¹⁴⁰

In addition to the three major sources of funding, other federal funds are granted to religiously-affiliated abstinence-only programs. In Fiscal Year 2006, over \$200,000 was earmarked for the Medical Institute of Sexual Health (MISH) (recently renamed The Medical Institute) to develop a sexual health curriculum for medical schools, under the supervision of Dr. W. David Hager.¹⁴¹ MISH follows the abstinence-only model, relying on inaccurate facts about contraception, and emphasizing supposed psychological harm that comes from extra-marital sex.¹⁴² Dr. Hager, whose appointment to the FDA Advisory Committee for Reproductive Health was opposed by those who disagreed with Hager's faith-based approach to curing reproductive health diseases, is best known for being the author of Christian guides to reproductive health issues.¹⁴³ Even the most extremist Christian groups have benefited from this government funding. For example, the Reverend Sun Myung Moon's Unification Church has received almost \$500,000 per year to run an abstinence-education program in New Jersey.¹⁴⁴ The program, Free Teens USA, is run by a group of Unificationist directors, and the president of Moon's Family Federation for World Peace and Unification has hailed the program's alumni as "on the frontline for the relief of God's third headache, the decline of youth morality and the family."¹⁴⁵

B. Abstinence-Only Curricula

With the assistance of these federal policies, numerous abstinence-only programs have emerged. Some of the most popular programs are *Sex Respect*, *Choosing the Best*, and *Why kNOw*. According to its website, *Sex Respect* is used in schools in all fifty states as well as in twenty-three countries.¹⁴⁶ Its critics assert that the *Sex Respect* program is a thinly veiled version of its

140. *Id.* at 214-15.

141. LEGAL MOMENTUM, *supra* note 134, at 11.

142. KAPLAN, *supra* note 127, at 214.

143. *Id.* at 114-15. One of Dr. Hager's beliefs that received significant media attention was his claim that prayer could cure pre-menstrual syndrome. *See, e.g.*, Karen Tumulty, *Jesus and the FDA*, TIME, Oct. 14, 2002, at 26. An obstetrician and gynecologist, Hager has written various books addressing reproductive health from a religious perspective. *See, e.g.*, W. DAVID HAGER, AS JESUS CARED FOR WOMEN: RESTORING WOMEN THEN AND NOW (1998); THE REPRODUCTIVE REVOLUTION: A CHRISTIAN APPRAISAL OF SEXUALITY, REPRODUCTIVE TECHNOLOGIES, AND THE FAMILY (John Frederic Kilner, Paige C. Conniugham & W. David Hager eds., 2000); *see also* Ayelish McGarvey, *Dr. Hager's Family Values*, NATION, May 30, 2005 (profiling Hager's career and family life).

144. LEGAL MOMENTUM, SEX, LIES & STEREOTYPES: PROFILES OF FEDERALLY-FUNDED ABSTINENCE-ONLY GRANT RECIPIENTS 6 (2006); John Gorenfeld, *Bad Moon on the Rise*, SALON, Sept. 24, 2003, <http://dir.salon.com/story/news/feature/2003/09/24/moon/index.html>.

145. *Id.*

146. *Sex Respect*, How Did the Sex Respect Program Originate?, <http://www.sexrespect.com/ProgramOrig2.html> (last visited Oct. 17, 2007).

creator's popular *Love & Life* program, a Christian program for chastity.¹⁴⁷ *Why kNOw* was founded to respond to the number of teenage pregnancies and STIs in northwest Georgia. *Why kNOw* offers a public school program, numerous groups and clubs, and a faith-based program that can be implemented by churches and private schools.¹⁴⁸ According to the *Waxman Report*, *Why kNOw* is one of the most widely used programs by recipients of CBAE funding,¹⁴⁹ and receives almost \$500,000 a year in federal money.¹⁵⁰ A third popular program is *Choosing the Best*, which has different programs tailored to different grade levels. Over 1.5 million students have been through the *Choosing the Best* program, and as of 2004, it had received over \$800,000 in federal grants per year.¹⁵¹ Its program for eighth grade students, *Choosing the Best Life*, offers students the opportunity to pledge abstinence until marriage.¹⁵² All three programs comply with the federal requirements by supporting the Title V definition of abstinence.

Most of the popular programs contain factual inaccuracies as well as specific moralistic statements. Some of the factually incorrect statements that the programs use to scare students about sex and contraception include: "Condoms provide no proven reduction in protection against Chlamydia, the most common bacterial STD," and "the virus [HIV] may be in your body a long time (from a few months to as long as 10 years or more) before it can be detected, either by a test or by physical symptoms."¹⁵³ The value-laden messages the programs advance include the idea that "marriage is the only

147. Simson & Sussman, *supra* note 16, at 284.

148. The faith-based program educates children on God's plan of saving sex for marriage. See *Why kNOw Abstinence Education Programs*, Online Store, <http://whyknow.org/www/products/117.4> (last visited Oct. 17, 2007).

149. WAXMAN REPORT, *supra* note 93, at 6.

150. LEGAL MOMENTUM, *supra* note 144, at 26.

151. *Id.* at 2.

152. *Choosing the Best*, *Choosing the Best Curriculum*, <http://www.choosingthebest.org/curricula/index.html> (last visited Oct. 30, 2007).

153. SIECUS, IN THEIR OWN WORDS: WHAT ABSTINENCE-ONLY UNTIL MARRIAGE PROGRAMS SAY 1-2 (2005), available at http://www.siecus.org/policy/in_their_own_words.pdf. Scientific evidence shows that when used correctly, condoms reduce the risk of STIs including chlamydia. CENTERS FOR DISEASE CONTROL & PREVENTION, FACT SHEET FOR PUBLIC HEALTH PERSONNEL: MALE LATEX CONDOMS AND SEXUALLY TRANSMITTED DISEASES 4, available at <http://www.cdc.gov/condomeffectiveness/condoms.pdf> (last visited Nov. 8, 2007). Since 1987, the Centers for Disease Control and Prevention has reported that in most people, HIV will be detected within three months of contraction. Centers for Disease Control & Prevention, *Perspectives in Disease Prevention and Health Promotion Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and Aids*, 36(31) MORBIDITY & MORTALITY WKLY. REP. 598 (1987). For a further discussion of the scientific inaccuracies of abstinence-only education programs, see WAXMAN REPORT, *supra* note 93, at 8-12, noting that several abstinence-only programs rely on a discredited scientific study of the effectiveness of condoms that greatly underestimated their efficacy in preventing the transmission of HIV, and many others significantly overestimate the failure rate of contraceptives, and *id.* at 21, quoting *Why kNOw* program as stating that each human being receives twenty-four chromosomes from each of its parents, when the actual number is twenty-three.

relationship that can secure [the] meaning” of sexual love,¹⁵⁴ that premarital sex “leads to unhappiness, divorce, extramarital affairs, and dissatisfaction,”¹⁵⁵ and that “when compared to sex in a strong marriage relationship, [sex outside of marriage] is worthless.”¹⁵⁶ According to a large-scale survey of abstinence-only programs published in the *Journal of Adolescent Health*, “One study of abstinence-only program directors, instructors, and youth found that all groups defined abstinence in moral terms, such as ‘making a commitment’ and ‘being responsible,’ as well as in more behavioral terms.”¹⁵⁷ Thus in abstinence-only classes, abstinence is taught as a moral value, as it is put forth in the funding statute, whereas in comprehensive sex-education classes, abstinence is taught as a behavioral method for avoiding unwanted consequences from sex.

Although the challenges to religious teachings in abstinence-only curricula have forced some recipients of federal abstinence-only funds to alter their curricula, many curricula still subtly promote religious views of sexuality and marriage. One of the most obvious examples is *Why kNOw*, which offers students a biblical passage in its lesson on what “real love” is. According to the teacher’s manual, real love: “Is patient. Is kind. Does not envy. Does not boast. Is not proud. Is not rude. Is not self-seeking. Is not easily angered. Keeps no record of wrongs. Does not delight in evil. Rejoices with the truth. Always protects. Always trusts. Always hopes. Always lasts. Never fails.”¹⁵⁸ This definition of love is identical to that in Corinthians 1:13:

Love is patient, love is kind. It does not envy, it does not boast, it is not proud. It is not rude, it is not self-seeking, it is not easily angered, it keeps no record of wrongs. Love does not delight in evil, but rejoices with the truth. It always protects, always trusts, always hopes, always perseveres. Love never fails.¹⁵⁹

In a less overt way, other curricula teach students to expect a wedding that conforms only to Christian tradition. For example, *Heritage Keepers* tells boys to imagine their wedding day, beginning with “[y]ou are standing at the front of the church.”¹⁶⁰ It goes on to describe a traditional Christian wedding with attendants and a bride clad in white being escorted down an aisle by her

154. Sex Respect, Questions from Students, <http://www.sexrespect.com/StudentQ.html> (last visited Oct. 17, 2007).

155. *Id.*

156. FRAINIE, *supra* note 93, at 128.

157. John Santelli et al., *Abstinence and Abstinence-only Education: A Review of U.S. Policies and Programs*, 38 J. ADOLESCENT HEALTH 72, 73 (2006).

158. FRAINIE, *supra* note 93, at 118.

159. 1 *Corinthians* 13: 4-8 (New International).

160. ANNE M. BADGLEY, CARRIE MUSSELMANN & TRACEY CASALE, HERITAGE COMMUNITY SERVICES, HERITAGE KEEPERS: ABSTINENCE EDUCATION TEACHER MANUAL I, at 73 (2004).

father.¹⁶¹ *Why kNOw* also uses language with biblical connotations when discussing various types of love.¹⁶²

Even those curricula that do not promote specific religious teachings still promote religion generally or adopt religious doctrine on abortion or marriage. For example, the *Clue* curriculum “states that ‘[i]t is not always easy, but the most encouraging success rates [for secondary virginity] are when this new commitment is rooted in religious conviction’. . . and that ‘[r]eligions vary, but every religious scripture has a clearly worded warning about the dangers of misusing sex.’”¹⁶³ Most abstinence-only curricula also adopt religious teachings that define life as beginning at conception, and refer to fetuses in utero as babies.¹⁶⁴ *Me, My World, My Future* explicitly addresses the abortion debate, stating that “[p]ro-life advocates point to the biological fact that human life begins at conception and that abortion takes the life of an innocent unborn child.”¹⁶⁵ *Clue* invites students to take a virginity pledge in which they pledge before God not to have sex until after marriage.¹⁶⁶ In these ways, as scholars have previously noted, many individual abstinence curricula themselves still promote religion in violation of the Establishment Clause.

C. Impact and Outcomes of Abstinence Education

Whether or not students agree with the ideological messages about sex found in abstinence-only education, the programs simply do not work to alter their students’ sexual behavior. Numerous studies have shown that students who are given accurate information about contraception are less likely to encounter unwanted pregnancies or STIs than students who do not receive this

161. *Id.*

162. SIECUS, Curriculum Review: Why kNOw: A Fear-Based Abstinence-Only-Until-Marriage Curriculum for Students in Grades 6-12 (2007), <http://www.communityactionkit.org/reviews/WhyKnow.html>. SIECUS notes:

Although it does not identify it as such, *Why kNOw* also uses religious language. In an activity on love, the curriculum uses several Greek words to define different types of love. The ultimate type of love, which the curriculum calls unconditional love, is referred to as Agape. While this does have its roots in ancient Greece, today the word is more commonly associated with Christianity where it means “love as revealed in Jesus, seen as spiritual and selfless.”

Id.

163. PURE LOVE ALLIANCE, CLUE 2000: A CHARACTER AND ABSTINENCE EDUCATION CURRICULUM FOR THE NEW MILLENIUM ch. 2 at 3, & ch. 3 at 3-4 (2000).

164. Virtually all abstinence-only curricula adhere to the conservative Christian idea that life begins at conception. See, e.g., SIECUS, *supra* note 162 (“It teaches that life begins at conception, referring consistently to the ‘new life’ or ‘baby’ and never teaching the term ‘fetus.’”); BADGLEY, MUSSELMANN & CASALE, *supra* note 160, at 34-35 (“The implanted egg develops into a fetus, which is a developing baby inside the mother’s womb.”).

165. TEEN-AID, ME, MY WORLD, MY FUTURE 206 (1987).

166. PURE LOVE ALLIANCE, *supra* note 163, at 4. The pledge contains a footnote justifying its inclusion of “God” by noting that the Pledge of Allegiance and U.S. currency also include the word “God.” *Id.* at 4 n.1. Of course, the reference to God in the Pledge of Allegiance has also been challenged as unconstitutional in recent years, although not yet successfully. See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Myers v. Loudoun County Pub. Sch., 418 F.3d 395 (4th Cir. 2005).

information. One such study found that girls who received family planning counseling and contraception significantly postponed the onset of intercourse.¹⁶⁷ A review of programs to reduce teenage pregnancy found that some comprehensive programs delayed the onset of sex, reduced the frequency of sex, and reduced the number of partners a teen might have.¹⁶⁸ Another sex education researcher notes that all successful programs “provide basic, accurate information about the risks of teen sexual activities and about ways to avoid intercourse or use methods of protection against pregnancy and STDs” and “[d]eliver and consistently reinforce a clear message about abstaining from sexual activity and/or using condoms or other forms of contraception.”¹⁶⁹ These findings corroborate a 1997 study by UNAIDS, which, based on twenty-two reports from around the world, found that comprehensive sexual health and HIV/AIDS education “delayed the onset of sexual activity, reduced the number of sexual partners, or reduced unplanned pregnancy and STD rates.”¹⁷⁰

Studies of abstinence-only education programs demonstrate that they are ineffective in altering adolescent sexual activity or protecting against pregnancy and STIs.¹⁷¹ In the case of young adolescents who take virginity pledges in small groups the pledges can delay sexual initiation by up to eighteen months.¹⁷² However, up to 88% of teenagers who take virginity

167. MICHELLE FINE & LOIS WEIS, SILENCED VOICES AND EXTRAORDINARY CONVERSATIONS: RE-IMAGINING SCHOOLS 58 (2003).

168. DOUGLAS KIRBY, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY (SUMMARY) 10, 18, (2001), available at <http://www.teenpregnancy.org/resources/data/pdf/emersanswsum.pdf> (reviewing 250 sex education programs and finding that the most successful ones emphasize abstinence as well as contraception, and that studies of abstinence education have shown no effect on sexual behavior or contraceptive use).

169. *Id.* at 10; see also PROFESSIONAL DATA ANALYSTS, INC. & PROFESSIONAL EVALUATION SERVICES, MINNESOTA EDUCATION NOW AND BABIES LATER EVALUATION REPORT 1998-2002, at 9-11 (2002), available at <http://www.saynotyet.com/pdfs/eval-report/enabl-report-doc.pdf> (finding that a Minnesota abstinence-only program had no effect on students' intentions to remain abstinent or on their sexual activity).

170. UNAIDS, IMPACT OF HIV AND SEXUAL HEALTH EDUCATION ON THE SEXUAL BEHAVIOUR OF YOUNG PEOPLE: A REVIEW UPDATE (2006), available at http://data.unaids.org/Publications/IRC-pub01/jc010-impactyoungpeople_en.pdf.

171. DOUGLAS KIRBY, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, DO ABSTINENCE-ONLY PROGRAMS DELAY THE INITIATION OF SEX AMONG YOUNG PEOPLE AND REDUCE TEEN PREGNANCY? (2002), available at http://www.teenpregnancy.org/resources/data/abstinence_eval.pdf (reviewing studies that claim abstinence programs are effective and finding that most did not provide credible evidence to support this assertion); CHRISTOPHER TRENHOLM ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., MATHEMATICA POLICY RESEARCH, IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS (2002), available at http://mpr.com/publications/redirect_pubsubdb.asp?strSite=PDFs/impactabstinence.pdf (concluding that students in federally-funded abstinence-only programs are no more likely to remain abstinent or use contraception than other students); Kristen Underhill, Paul Montgomery & Don Operario, *Sexual Abstinence Only Programmes to Prevent HIV Infection in High Income Countries: Systematic Review*, BRIT. MED. J., Jul. 26, 2007, at 1, available at <http://www.bmj.com/cgi/content/full/bmj.39245.446586.BEv1> (finding that none of the studied abstinence programs “affected incidence of unprotected sex, number of partners, condom use, or sexual initiation”).

172. Peter Bearman & Hannah Bruckner, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. ADOLESCENT HEALTH 271, 275 (2005) [hereinafter *After the Promise*]; see also

pledges do end up having premarital sex.¹⁷³ And, even those who do not have intercourse engage in oral and anal sex at higher rates than students who do not engage in intercourse but have not taken virginity pledges.¹⁷⁴ Students who take virginity pledges also tend to have similar rates of STIs as their non-pledging peers, but are less aware of their infections and are less likely to get tested for STIs.¹⁷⁵ Most alarmingly, those students who have had abstinence-only programs are less likely than their peers to use condoms or other forms of contraception when they do have sex.¹⁷⁶ Indeed, even the drafters of Title V recognized as early as 1996 that there was no empirical evidence to support abstinence-only education as a means of preventing either teenage or extra-marital births. In defending the legislation, the Congressional staff members who worked on it stated:

[T]here is little direct evidence, beyond the New Jersey study just cited, that any particular policy or program reduces the frequency of nonmarital births. Even so, recent history contains many examples of federal policies, including highly controversial and expensive policies, that enjoyed little empirical support at the time of introduction.¹⁷⁷

International and domestic public health organizations and experts have also recognized the benefits of comprehensive sexuality education rather than abstinence-only programs. The World Health Organization (WHO) explicitly states that comprehensive sexuality education programs should be used in the education context to promote sexual health.¹⁷⁸ The World Association for Sexual Health, in its *Declaration of Sexual Rights*, states that sexual health is a fundamental human right which requires the recognition of the right to make free and responsible reproductive choices, the right to sexual information based upon scientific inquiry, and the right to comprehensive sexuality education.¹⁷⁹ In 2001, then-Surgeon General David Satcher attempted to release a report indicating that abstinence-only education had not been proven to have any positive effects, and recommending that schools teach comprehensive sexuality education, but he received significant opposition from both the Clinton and

Peter Bearman & Hannah Bruckner, *Promising the Future: Virginity Pledges and First Intercourse*, 106 AM. J. SOC. 859 (2001) [hereinafter *Promising the Future*].

173. *After the Promise*, *supra* note 172, at 275.

174. *Id.* at 277.

175. *Id.*

176. DEBORAH HAUSER, FIVE YEARS OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION: ASSESSING THE IMPACT, ADVOCATES FOR YOUTH (2004), <http://www.advocatesforyouth.org/publications/stateevaluations.pdf>; *Promising the Future*, *supra* note 172, at 899-900 (finding that students who took abstinence pledges are one-third less likely than their peers to use contraception when they have sex).

177. Ron Haskins & Carol Statuto Bevan, Abstinence Education Under Welfare Reform, <http://www.welfareacademy.org/conf/past/haskins2.shtml> (last visited Aug. 26, 2007).

178. WORLD HEALTH ORGANIZATION, 67 PROGRESS IN REPRODUCTIVE HEALTH RESEARCH 4 (2004), <http://www.who.int/reproductive-health/hrp/progress/67.pdf>.

179. World Ass'n for Sexual Health, Declaration of Sexual Rights (Aug. 26, 1999), http://www.worldsexology.org/about_sexualrights.asp.

Bush administrations.¹⁸⁰ Despite the eventual release of this report, and the government's knowledge that there is no scientific basis for supporting abstinence education, funding for these programs continues to grow.

III. THE CONSTITUTIONALITY OF ABSTINENCE-ONLY PROGRAMS

Thus far, abstinence-only education programs have been challenged in court when the programs were either administered by religious groups, or contained explicitly religious statements in their course materials. However, it is likewise clear that abstinence-only education itself violates the Establishment Clause.

First, there is no secular purpose to the current abstinence-only education scheme. As Justice Blackmun stated in his dissent in *Bowers v. Hardwick*, "The legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine."¹⁸¹ These programs fail the first prong of the *Lemon* test because the means they employ are not designed to achieve their stated secular goals. The fact that the government continues to allocate money to abstinence-only education programs when those programs have been proven neither to increase premarital abstinence nor to reduce teenage pregnancy and STI transmission indicates that the purpose of the statute is not actually to address issues of teenage sexual health.

Second, it is not clear that even if these programs worked in making adolescents abstinent that they would be constitutional. The abstinence-only programs and federal statutes promote a religious idea of abstinence. The values conveyed about sex and its appropriate place in society (namely, in lifelong, monogamous, heterosexual marriages) come from the sexual morals of certain conservative Christian groups, rather than from any secular source. All abstinence-only statutes, state laws, and programs violate both the endorsement test and the second prong of the *Lemon* test by teaching religious values in public schools—and ignoring methods that are based in science, public health, and sociological research.

A. There is No Secular Purpose to Abstinence-Only Education

In *Edwards v. Aguillard*, the Supreme Court did a thorough analysis of the Louisiana law that gave equal treatment to creationism and evolution, and found that it violated the first prong of the *Lemon* test.¹⁸² The Court found that

180. Committee on Oversight and Government Reform, *The Surgeon General's Vital Mission: Challenges for the Future* (Jul. 10, 2007), <http://oversight.house.gov/story.asp?ID=1398>.

181. 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting).

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

the Louisiana law had no valid secular purpose, even though there was one stated: promoting academic freedom. Writing for the Court, Justice Brennan stated, “The Court of Appeals, however, correctly concluded that the Act was not designed to further that goal.”¹⁸³ The Court noted that in previous cases, it had also held acts unconstitutional when they were not designed to meet their stated secular goals.¹⁸⁴ In *Wallace v. Jaffree*, a parent in Mobile County, Alabama sued the governor and school board for allowing teachers to lead religious prayers in public schools.¹⁸⁵ The statute in question stated that teachers could implement a minute of silence for meditation or voluntary prayer each day in their classrooms. The statute modified an earlier statute that said teachers *should* have a moment for meditation (saying nothing about voluntary prayer).¹⁸⁶ Because the changes to the statute did not in any way enhance the ability of the schools to accommodate religion, the Court concluded that the only purpose of the revisions to the statute were to promote religion.¹⁸⁷

In terms of abstinence-only education, the exact purpose of the federal support is debatable. In addition to the promotion of abstinence in and of itself, these statutes and programs also discuss abstinence in the context of teenage pregnancy rates and STIs. Title V states that the statute’s purpose is to enable states to provide abstinence-only education, but that the focus of the programs should be on groups that are most likely to have children out-of-wedlock. In addition, the definition of abstinence-only education illustrates that pregnancy and STI transmission are concerns.¹⁸⁸ The AFLA also discusses teenage pregnancy in defining the programs that are eligible to receive funding.¹⁸⁹ The website of the Administration for Children and Families states that “choosing to abstain from sexual activities until marriage, marrying someone who has also abstained, and maintaining a mutually monogamous relationship offer youth 100 percent protection from pre-marital pregnancy and from acquiring an STD”¹⁹⁰ in its background information on CBAE grants.

If abstinence-only education’s purpose is to reduce premarital pregnancy and STIs, then its methods are not effectively related to the achievement of those goals and cannot meet the Supreme Court’s standard for “secular purpose” as articulated in *Edwards* and *Wallace*. On the other hand, if the program’s purpose is simply the promotion of abstinence as an inherent good,

183. *Id.* at 586.

184. *Id.* at 587.

185. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

186. *Id.* at 40.

187. *Id.* at 59-60.

188. See 42 U.S.C. § 710(b)(2) (1996).

189. 42 U.S.C. § 300z-5 (1994).

190. U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, COMMUNITY BASED ABSTINENCE EDUCATION PROGRAM (2007), available at <http://www.acf.hhs.gov/grants/open/HHS-2007-ACF-ACYF-AE-0099.html>.

without regard to the positive or negative health consequences of the programs, then they are putting forth a moral position that is religiously based.

1. Abstinence Education Does Not Affect Adolescents' Sexual Practices

With these assertions about the consequences of premarital sex, it is important to separate premarital abstinence from adolescent abstinence. Although unsupported by research,¹⁹¹ many people believe that teenagers are not prepared for the physical and emotional consequences of sex and should thus abstain. Many people also believe that teenagers tend to engage in riskier sex than older people by failing to use condoms or contraception and thus are more likely to encounter negative health consequences. Whether this is true or not, abstinence-only education does not address this concern, as it focuses solely on marital status and not on age. Abstinence-only education does *not* specifically promote adolescent abstinence, since it recognizes that married adolescents will have sex.¹⁹² While the Department of Health and Human Services states that abstinence-only education is intended for twelve to twenty-nine-year-olds,¹⁹³ Title V defines abstinence as refraining from all sex outside of marriage.¹⁹⁴ The curricula also promote this extreme view of abstinence for any unmarried person, regardless of age or prior marital status. The negative repercussions that can arise from adolescent sex are thus not the driving force behind abstinence-only education; rather, the reification of marriage and the promotion of a religious view of sex as intrinsically related to marriage is behind the abstinence education movement.

More importantly, the programs are not designed to achieve their supposedly secular goals. The stated goal of most sexuality education programs is to give children and teenagers the information they need to understand sex and avoid unwanted pregnancies, STI infection, and HIV/AIDS. If abstinence-only education were to increase abstinence among teenagers, and thus to decrease the rates of unwanted pregnancies and STIs, it would indeed have a secular purpose that most people would likely support. There is, however, significant evidence that abstinence-only education is designed in a way that

191. Ann M. Meier, *Adolescent First Sex and Subsequent Mental Health*, 112 AM. J. SOC. 1811 (2007) (finding that in general sex had no negative impact on the mental health of teens). Despite the absence of evidence demonstrating that sex has negative consequences for teens, Title V requires abstinence-only programs to emphasize "that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects." 42 U.S.C. § 710(b)(2)(E) (1996). This is only one of many scientific and factual inaccuracies typical of abstinence education programs. *See supra* note 153 and accompanying text.

192. Indeed, at least some people believe that schools should be encouraging teen marriage for pregnant and parenting teenagers as a way to resolve the so called "teen pregnancy crisis." *See, e.g.,* Maggie Gallagher, *Unwed Teen Parents Should Be Encouraged to Marry*, in *TEENAGE SEXUALITY*, *supra* note 96, at 122.

193. *See di Mauro & Joffe, supra* note 105, at 70.

194. *See* 42 U.S.C. § 710(b)(2) (1996).

fails to accomplish these secular goals. In *Bowen v. Kendrick*, the Supreme Court found that the AFLA did have a legitimate secular purpose, and that the statute furthered the government's interest in preventing teenage pregnancy.¹⁹⁵ However, in the twenty-five years since *Bowen* was decided, research studies have consistently shown that abstinence-only programs do not have an effect on teenage sexual practices, whereas comprehensive sexuality education programs do help teens delay sex and protect themselves from unwanted pregnancies and STIs.¹⁹⁶ The fact that each year since 1981 the government has chosen to continue funding the AFLA and has also created Title V and CBAE, regardless of the fact that abstinence-only education has not been proven effective, demonstrates that the actual purpose of these statutes is not the secular one stated.¹⁹⁷ The data clearly suggests that our "public health policy concerning sexuality education appears to be ideologically motivated rather than empirically driven."¹⁹⁸ Under the Supreme Court's standard from *Aguillard*, the abstinence education funding statutes have no "secular purpose."

2. *Abstinence-Only Education Is the Product of a Christian Political Movement*

As the Court in *Epperson v. Arkansas* noted, the history of legislation is relevant in determining its purpose. In *Epperson*, the Court took into account that the anti-evolution laws in question were a product of an "upsurge of 'fundamentalist' religious fervor" in the 1920s.¹⁹⁹ The Court noted that the only purpose of the law was to favor a specific religious sect, stating, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."²⁰⁰ The history of the development of controversial legislation is an indication of what the purpose of the law might be, and what the legislature's intent was in passing it. Just as a fundamentalist upsurge was responsible for the laws forbidding the teaching of evolution, an upsurge of the Christian Right in the 1970s and 1980s was responsible for the abstinence-only movement and the federal legislation and abstinence-only education programs that came out of it. The close ties between conservative religious groups and the sponsors of the legislation raise a red flag as to the purpose of the legislation.

195. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("As we see it, it is clear from the face of the statute that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood.").

196. *See supra* Part II.C.

197. *Cf. Jones, supra* note 19, at 1099 (arguing that while the AFLA was found to have a valid secular purpose, no such purpose can be found in Title V as it is wholly motivated by religious ideology and does not contain the safeguards against religious endorsement that the AFLA includes).

198. LEVINE, *supra* note 12, at ix.

199. *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968).

200. *Id.* at 107-08.

These federal abstinence-only statutes were not created solely to respond to the issues of teenage pregnancy and AIDS that became prominent social issues in the 1970s and 1980s, but also to respond in a specifically religiously-influenced manner in order to counterbalance the secular, science-based programs that nonpartisan groups were putting forth at that time. As one former abstinence educator explained, "The abstinence-only message is deeply linked with evangelical Christianity You're really hoping everyone will come to Christ and wait till marriage for sex."²⁰¹ Since the creation of the abstinence education movement, it has been driven by the Christian Right, the same group behind the creationism and intelligent design education movements that have already been found to violate the Establishment Clause. The history of abstinence education legislation, as described in Part III, shows it to be the outgrowth of a religious movement.

B. Premarital Abstinence Itself Is a Specific Religious Value

The second prong of the *Lemon* test requires that governmental acts not have the primary effect of advancing or inhibiting religion. As the court in *Kitzmiller* described this prong, "government . . . may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general."²⁰² Abstinence-only programs are unquestionably ideological programs, seeking to shape students' morals and to provide normative responses to adolescent sexual behavior in accordance with religious tenets, rather than simply to change the behavior itself. Indeed, that is one of the biggest draws of the programs at a time when many people in the United States seem to feel that the morality of our culture is unclear. Of course, the Establishment Clause does not prohibit legislation based on specific ideas of morality.²⁰³ The reason why federally-funded abstinence-only education programs violate the Establishment Clause is because they were tailored to promote the moral views of a particular religious group, rather than being tailored to meet general secular purposes.

201. KAPLAN, *supra* note 127, at 205.

202. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 763 (M.D. Pa. 2005).

203. While the Establishment Clause clearly prohibits governmental endorsement of religion, it does not prohibit legislation based on moral or ethical values. However, in light of some of the Court's decisions dealing with sexual and reproductive liberties there is some question of how far morality-based legislation can go. In *Planned Parenthood of Southern Pennsylvania v. Casey*, the Court stated that the Government's "obligation is to define the liberty of all, not to mandate its own moral code." 505 U.S. 833, 850 (1992). The Court reiterated this statement in *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). For discussions of whether morality legislation can still stand after *Lawrence*, see Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447 (2005-06); Suzanne B. Goldberg, *Morals-Based Justification for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004); and Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837 (2006).

Like most values in our multicultural, multi-religious society, it is hard to say where the idea of premarital abstinence comes from. Most religions today endorse abstinence prior to marriage, and indeed, the idea that people, or at least women, should abstain from sex before marriage has been a fairly widely held value in American society.²⁰⁴ That valuation of premarital abstinence, however, has never translated into a widespread practice among Americans. A recent study shows that 95% of Americans have premarital sex and 70% of adolescent women have sex by age nineteen.²⁰⁵ This is not a new phenomenon: among women who turned fifteen in the mid-1950s, 88% had engaged in premarital sex by the time they were forty-four years old.²⁰⁶ In fact, as many as one-third of pilgrim women in the seventeenth century were pregnant on their wedding day.²⁰⁷ It was only during the sexual revolution of the 1970s that American attitudes towards premarital sex began to align with Americans' actions regarding premarital sex. Today, only 35% of American adults believe that premarital sex is always or almost always wrong.²⁰⁸

Not only do two-thirds of the American people believe that there is nothing inherently wrong with premarital sex, but an overwhelming majority believe that, regardless of their personal views on abstinence, students should be given comprehensive sex education. A recent poll by the Pew Forum on Religion and Public Life found that 78% of people are in favor of students learning about contraception, while 76% are in favor of students learning about abstinence.²⁰⁹ A 2000 Kaiser Family Foundation study found that 90% of parents wanted school sexuality education programs to cover birth control, 85% wanted the programs to include condom use, and 84% wanted the programs to

204. While abstinence education promotes premarital abstinence for all people, in American culture there has always been a double standard when it comes to sexuality. Even in times of strict sexual codes, men have always been granted the liberty to engage in premarital sex, while women's chastity has been carefully guarded and monitored. The earliest sex educators were responding to this double standard in attempting to enforce a single sexual morality—that which had previously been applied to women—on both sexes. LUKER, *supra* note 2, at 55-56. A half-century later, America's second sexual revolution again attempted to level the playing field, this time with women adopting the more permissive sexuality that men had long enjoyed. *Id.* at 73. The law, too, has generally treated women's and men's sexuality differently. Until recently statutory rape was a crime that could only be committed against a female victim; adolescent male chastity was not protected. See, e.g., Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 120 (2004). Thus, when proponents of abstinence-only sex education hearken back to "traditional" values that our society supposedly endorsed at one time, they ignore that these values only existed with regard to women; men have never been expected to remain chaste until marriage.

205. Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954-2003*, 122 PUB. HEALTH REP. 73, 73-74 (2007).

206. *Id.* at 73.

207. Jones, *supra* note 19, at 1091.

208. Finer, *supra* note 205, at 74.

209. Pew Forum on Religion & Public Life, *Abortion and Rights of Terror Suspects Top Court Issues*, Aug. 3, 2005, <http://pewforum.org/docs/index.php?DocID=91>. Notably, when broken down by religion, secular respondents were most in favor of birth control being taught in the classroom (93%) and white evangelicals were least in favor (66%). *Id.*

cover the use and obtaining of other forms of contraception.²¹⁰ Various other studies corroborate these findings.²¹¹ A majority of Americans believe that there is nothing wrong with premarital sex, an even greater majority want their children to learn about sexuality and contraception in school, and nearly all Americans engage in premarital sex. Not only is it a discrete minority of Americans whose views align with those promoted by abstinence education, it is a religious minority that created and promoted an education policy that conforms to their particular religious views.

1. *Individual Curricula Continue To Promote Religion*

As noted in Part II, many individual curricula retain their religious teachings even after removing explicit references to Jesus, Christianity, or God. In *Kitzmiller v. Dover Area School District*,²¹² the intelligent design textbook in use, *Of Pandas and People*, had originally been written as a creationist text.²¹³ After the Supreme Court decided *Edwards v. Aguillard*, the authors of the textbook re-phrased the references to creationism and God to make them appear less religiously based.²¹⁴ It was relevant to the court that the textbook in question, as well as the intelligent design movement in general, had its roots in the religious creationist movement. Abstinence-only curricula have gone through a similar sanitization process. Curricula that used to be explicitly religious have now removed direct references to God, Jesus, and Christianity.²¹⁵ The *Sex Respect* program is the abstinence movement's *Of Pandas and People*. *Sex Respect*, written by Coleen Mast, is simply a re-working of her *Love & Life* curriculum with the overtly religious references removed.²¹⁶ Despite toning down the religious content in the curriculum, the *Sex Respect* website remains replete with religious messages—advertisements for Catholic radio stations, citations to scripture, and links to the overtly religious *Love & Life* series.²¹⁷ Like the intelligent design movement, the abstinence education movement has responded to critiques of its religious nature by obscuring the religion that it promotes. Yet, like the intelligent design

210. KAISER FAMILY FOUNDATION, SEX EDUCATION IN AMERICA 4 (2000), available at <http://www.kff.org/youthhivstds/3048-index.cfm>.

211. See, e.g., FINE & WEIS, *supra* note 167, at 57; Hickman-Brown Research, Inc., Public Opinion Research Survey, Question 7 (Mar. 1999), available at <http://www.siecus.org/parent/pare0003.html>.

212. 400 F. Supp. 2d 707 (M.D. Pa. 2005).

213. See Expert Witness Report of Barbara Forrest, *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005)(No. 4:04-CV-02688), 2005 WL 3415853; see also BARBARA FORREST, SUPPLEMENT TO EXPERT WITNESS REPORT: KITZMILLER V. DOVER AREA SCHOOL DISTRICT (2005), http://www2.ncseweb.org/kvd/experts/Forrest_supplemental_report.pdf.

214. *Kitzmiller*, 400 F. Supp. 2d at 721.

215. See *supra* Section II.B.

216. Simson & Sussman, *supra* note 16, at 284.

217. Sex Respect, Abstinence Education Program for Teens, <http://www.sexrespect.com> (last visited Oct. 17, 2007).

textbooks, the abstinence-only curricula remain firmly connected to their religious roots.

2. *Extramarital Abstinence Is Itself a Religious Value*

The First Amendment not only protects against the privileging of one religion over another, but it also protects against a preference for religion in general over secular beliefs or values.²¹⁸ Abstinence-only education promotes a specific religious view of sexuality and marriage by teaching that sex is only acceptable within the confines of a lifelong, heterosexual, monogamous marriage.²¹⁹ While marriage and the regulation of sexuality are important elements of many religions, the particular view of human sexuality that abstinence education promotes is not supported by all religions, much less by secular society.

The views of members of the Christian Right on sexuality are fairly clear—the Bible prohibits any sex outside of marriage, including homosexual sex, but permits and perhaps even celebrates it within marriage.²²⁰ Supporting marriage and the “traditional family” (presumably meaning a married heterosexual couple and their biological children) has been one of the key rallying points for the Christian Right.²²¹ Indeed, fear of the destruction of the traditional family is often raised in debates on any number of political issues.²²²

218. See *supra* note 24 and accompanying text.

219. Title V, which defines the components of abstinence-only education, states that “a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity.” 42 U.S.C. § 710(b)(2) (2003). *Choosing the Best* teaches “the expected standard for sexual activity is within the context of a mutually monogamous marriage relationship between a man and woman,” and that “healthy human sexuality involves enduring fidelity, love and commitment.” CHOOSING THE BEST, HOW CHOOSING THE BEST CURRICULA MEETS 2006 CBAE THEMES (2006), available at http://www.choosingthebest.org/docs/CTB_2006_CBAE_Themes.pdf. This program explicitly states that marriage involves one man and one woman, and implies that divorce is unacceptable by emphasizing “enduring fidelity” and “commitment.” The guidelines for CBAE grant proposals also emphasize monogamy and life-long marriages, noting that students should be taught “the physical and emotional benefits that they may find by having one lifelong sexual partner within marriage.” U.S. DEP’T OF HEALTH & HUM. SERVS., FY 2006 PROGRAM ANNOUNCEMENT, *supra* note 128. Joe S. McIlhane Jr., abstinence-only sex education advocate and founder of The Medical Institute, is more blunt in stating the message of abstinence-only programs: “It is time for an honest and open-minded look at a new sexual revolution: abstinence until a committed, lifelong, mutually monogamous relationship. Most people call it marriage.” McIlhane, *supra* note 97, at 132-33.

220. See, e.g., TIM LAHAYE & BEVERLY LAHAYE, *THE ACT OF MARRIAGE* 14-21 (1976) (discussing Bible passages relating to sex and marriage in a self-help guide to Christian marriage).

221. As one author sees it:

If there is anything genuinely ‘new’ about the current right wing in the United States, it is its tendency to locate sexual, reproductive, and family issues at the center of its political program The politics of the family, sexuality, and reproduction . . . became a primary vehicle through which right-wing politicians achieved their ascent to state power in the late 1970s and the 1980 elections.

Rosalind Pollack Petchesky, *Antiabortion, Antifeminism, and the Rise of the New Right*, in *THE NEW CHRISTIAN RIGHT* 394, 395 (Melvin I. Urofsky & Martha May eds., 1996).

222. MARTIN, *supra* note 8, at 177-78 (discussing the Christian Right’s pro-family politics in the late 1970s, which included anti-abortion, anti-ERA, anti-pornography, and anti-gay rights elements).

Tim LaHaye, minister, author, and founder of the American Coalition for Traditional Values, once argued that secular humanists are “anti-God, anti-moral, anti-self-restraint, and anti-American” and are “determined to destroy the family.”²²³ Although the Christian Right’s pro-family movement’s overarching goal is to return American society to a patriarchal, religious, nuclear family structure,²²⁴ a large focus of the movement has been on sexuality, not only in the debates over sex education, but also in drives to rid the media of sexual content,²²⁵ campaigns against abortion and contraception,²²⁶ and the movement against gay rights.²²⁷ A driving ideology of the Christian right is thus that sex has a very specific relationship to the traditional family and should not occur outside of heterosexual marriage.

Abstinence-only education teaches that sex can properly occur only between a man and a woman within the confines of marriage; it condemns homosexual sex of any kind, since gays and lesbians currently can marry in only one state. The government website dedicated to CBAE proposals makes clear that only heterosexual sex is permissible:

Throughout the entire curriculum, the term ‘marriage’ must be defined as ‘only a legal union between one man and one woman as a husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife’ (consistent with Federal law).²²⁸

While all federally funded abstinence programs must condemn sex outside of marriage, which includes almost all homosexual sex, the CBAE

223. Michael Lienesch, *Family in The New Christian Right*, in *THE NEW CHRISTIAN RIGHT*, *supra* note 221, at 326.

224. Leaders of the Christian Right urge men to take the lead in their relationships and urge women to submit to their husbands. *See generally id.* at 297-321. Although it is beyond the scope of this Comment to fully explore this issue, abstinence-only education supports ideas of gender difference and gender roles that are accepted as fact in much of the pro-family movement. For example, many curricula teach students that men care about sex while women care about emotions and love. *See, e.g.*, COLEEN KELLY MAST, *SEX RESPECT, TEACHER’S MANUAL 20* (2001) (“Testosterone, a male hormone, leads men to interest in the desire for sexual release and pleasureThe estrogen in females tends to focus them primarily on nurturing, warmth, closeness and security.”); WAIT TRAINING, *WAIT TRAINING 199* (2d ed. 2003) (“Women will give sex to get love, while men will give love to get sex.”). Some curricula also teach that men and women should have different roles within the family. *See, e.g.*, MAST, *supra* note 75, at 4 (asking students to identify which parent is more likely to do certain household tasks, including mowing the lawn, doing laundry, and decorating the house).

225. Groups like Morality in Media, Parents’ Music Resource Center, and the American Family Association have been formed to protest “indecency in media.” James Davison Hunter, *Media and the Arts*, in *THE NEW CHRISTIAN RIGHT*, *supra* note 221, at 258. Tim LaHaye has blamed pornography for “two-thirds of sexual problems in marriage today.” Lienesch, *supra* note 223, at 328.

226. *See* Petchesky, *supra* note 221, for a discussion of the religious roots of the “right to life” movement.

227. Christian Right leaders like James Robison, Anita Bryant, Jerry Falwell, and Tim LaHaye have condemned homosexuality as against God, nature, and the Bible, using the threat of homosexuality harming children as a way to draw support for their cause. Lienesch, *supra* note 223, at 328-29; *see also* JEAN HARDISTY, *MOBILIZING RESENTMENT 100* (1999) (discussing Bryant’s Protect America’s Children organization and her involvement in the 1978 “California Defend Our Children Initiative”).

228. U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, FAMILY & YOUTH SERVS. BUREAU, *GUIDANCE REGARDING CURRICULUM CONTENT 2007*, <http://www.acf.hhs.gov/programs/fysb/content/abstinence/cbaeguidance.htm>.

requirements explicitly emphasize that only heterosexual unions are to be promoted in abstinence education. Abstinence-only education, in general, does not cover homosexuality, but begins from the assumption that all sex is heterosexual.²²⁹ Condemnation of homosexuality, however, is a religious issue, and one that is hotly contested among many major religions today.²³⁰ The Supreme Court has stated that moral condemnation of homosexual behavior is a product of religious belief,²³¹ and it is this same religious view of human sexuality that abstinence education promotes by condemning sex outside of heterosexual marriage.

In addition, marriage, which the abstinence-only programs promote to the exclusion of all other forms of sexual partnership, is itself inextricably tied to religion in the United States.²³² And yet today, religions have widely varying views on what constitutes marriage. As one scholar notes, “Religious notions of ‘marriage’ vary widely and depend both upon the creed of the religious institution and upon particular adherents [M]odern permutations of ‘religious marriage’ range from two-party marriage (including same-sex marriage) to polygamy.”²³³ In particular, abstinence education emphasizes life-long, monogamous marriages, implicitly condemning divorce and polygamy, elements of marriage that other religions condone. Historically, nearly all of the major world religions except for Christianity allowed

229. SIECUS, LESBIAN, GAY, BISEXUAL & TRANSGENDERED YOUTH ISSUES 3 (2001), available at http://www.siecus.org/pubs/fact/FS_lgbt_youth_issues.pdf; see also Danielle LeClair, Comment, *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, 308 (2006) (quoting *Sex Respect*: “Homosexual activity involves an especially high risk for AIDS infection [because] body openings are used in ways for which they are not designed. During such unnatural behaviors, additional damage is done to blood vessels and other body parts.”). While *Sex Respect* has edited this section, it still refers to anal intercourse as an “unnatural behavior” and an “unnatural act.” MAST, *supra* note 75, at 63.

230. See, e.g., Brief of the Alliance of Baptists et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152331, at *9-*11 (2003) (listing numerous religions that accept homosexuality and support the rights of gays and lesbians, and arguing that, “[d]espite this diversity of religious opinion, the Texas court invoked the moral and religious views of certain faiths, in contravention of the principle that ‘[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968))).

231. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

232. See Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 307-08 (1984) (“More troubling from a first amendment viewpoint is the courts’ explicit reliance upon a certain strain of Judeo-Christian dogma to support their chosen definition of marriage. Virtually without exception, the courts cite Scripture and canon law in support of their position. It is beyond dispute that the American legal concept of marriage derives historically from the canon law of the Roman Catholic Church.”); see also Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL’Y 561, 579 (2007) (“American society and governments have historically—and in the past few years, deliberately—conflated civil marriage with religious marriage.”).

233. Wilson, *supra* note 232, at 580.

polygamy; monogamy was an innovation of Christianity, not the norm.²³⁴ Christianity again differed from other major world religions such as Judaism and Islam in its prohibition of divorce.²³⁵ When abstinence education programs promote a lifelong, monogamous, heterosexual view of marriage, they ignore that most religious traditions do not support these specific requirements for marriage.

While all religions (as well as all secular cultures and societies) regulate sexual conduct in various ways—from prohibitions against incest, to prohibitions against homosexual conduct, to prohibitions on having sex during certain times of the year—there is no uniformity as to how they do so. Yet all federally-funded abstinence-only education classes have to conform their message to Title V's very specific and restrictive view of when sex is permissible. Under *Lemon*'s second prong, the government cannot promote this idea that sex should only be had in the context of lifelong, monogamous, heterosexual marriages, because this position promotes a conservative Christian view of human sexuality. When abstinence-only education classes are implemented in public schools, the government is not only endorsing these values, but is also placing its coercive authority behind viewpoints derived from Christianity and the Christian Right that students are taught as the only acceptable beliefs regarding human sexuality and marriage. Taken together, abstinence-only education fails both of the main prongs of the *Lemon* test—and consequently the other variations of the test that the Court has put forth—and is thus unconstitutional under the First Amendment.

CONCLUSION

While some abstinence-only education programs have been held unconstitutional because of their overtly religious messages, the religious element of abstinence education goes far beyond individual programs. The legislation granting funding to abstinence education itself impermissibly endorses a religious view of sexuality, and thus violates the Establishment Clause. The absence of a secular purpose, the particularity of the view of permissible sex promoted, and the clear historical ties between the abstinence education movement and the Christian Right demonstrate that the federal government is endorsing a religious view of sexuality through its legislation. Even if morality-based legislation could be constitutionally valid despite its failure to achieve any of its secular goals, when a law lacks a secular goal and is coupled with a religious message, that law is unconstitutional.

234. See, e.g., GEOFFREY PARRINDER, *SEXUAL MORALITY IN THE WORLD'S RELIGIONS* 55, 193 (1996) (discussing polygamy in Buddhism and Judaism).

235. See *Luke* 16:18 (New International Version) ("Anyone who divorces his wife and marries another woman commits adultery against her."); see also *Mark* 10:11; *Matthew* 5:32.

Abstinence education is not the only area in which the Christian Right has been working to inject certain religious values into politics and law. Its emphasis on supporting the traditional family extends beyond ideas of when and with whom sex is appropriate, into other areas where science and religious conviction clash, such as stem cell research, abortion, and contraception. On all of these fronts, religious groups have pushed an agenda that privileges religious teachings over scientific evidence—an agenda the government has adopted wholeheartedly. At a congressional hearing in July 2007, three former Surgeons General testified that presidential administrations since the 1980s have blocked, undermined, or silenced reports or statements based on scientific evidence that conflicts with the conservative “family values” agenda the Christian Right has put forth.²³⁶ Yet nowhere is the government’s embrace of religious teachings more evident than in the abstinence-education context, where the President and Congress continue to increase federal funding for the promotion of this message. Attacking abstinence-only education offers a clear way to stem the growing religiosity of the American government. Congress must eliminate funding to abstinence-only programs, and remove itself from the business of promoting religion in the public schools. In the interim, courts should follow the precedent they have laid down in the intelligent design cases and find abstinence education programs that promote religious views of sexuality unconstitutional.

236. Former Surgeon General Richard Carmona stated:

In my opinion, there’s a political driver, there’s preconceived political agendas that are already there that sometimes fly in the face of good science, and therefore politicians don’t want people like the three surgeon generals here to speak out honestly on the science because it’s going to complicate their life in trying to move a certain agenda. But there are also ideological and theological drivers in abstinence, in abortion, in Plan B, in stem cells, that drive a particular theological construct that leads somebody to a policy.

Committee on Oversight and Government Reform, *supra* note 180.

