

# STATES' RIGHTS OR STATES' WRONGS? THE CONSTITUTIONAL ARGUMENT FOR MEDICALLY ACCURATE AND COMPREHENSIVE SEX EDUCATION

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*Almost all states have some form of legislation governing sex education in public schools, but only 29 states and the District of Columbia mandate that sex education be taught, and only 17 of those 29 states require that the sex or HIV education provided be medically accurate. Furthermore, 29 states require that abstinence-only approaches to sex education are stressed, while only 20 states and the District of Columbia require sex education to include information about contraception. While this legislation is undoubtedly passed with the intent of protecting the morals of states' younger citizens, this Note posits that permitting abstinence-only and medically inaccurate or incomplete sex education in public schools is harmful to the health and safety of those receiving this information. Regardless of the quality—or quantity—of sex education provided, statistics show that, on average, individuals in the United States have sex for the first time at the age of 18. This Note not only argues for the necessity of comprehensive, medically accurate sex education, but also proposes such education falls within the penumbra of unenumerated fundamental rights under the Fifth and Fourteenth Amendments. This Note will frame this argument within Justice Kennedy's Obergefell v. Hodges opinion by discussing what unenumerated right is being proposed; the history and tradition in this area; the concept of liberty; and the prior unenumerated rights granted by the Court that support the expansion into the area of sex-education legislation. Finally, this Note will discuss the feasibility of such an argument and potential next steps to ensure the provision of accurate and complete sex education.*

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## INTRODUCTION

In 2011, Mississippi passed an amendment to legislation that permitted the discussion of condoms and contraceptives in sex education courses but only if that discussion was a “factual presentation of the risks and failure rates of those contraceptives.”<sup>1</sup> Additionally, the law prohibited any demonstrations of how to apply condoms,<sup>2</sup> ruling out examples such as putting a condom on a banana or even showing the class what a condom looks like. This law led to the viral video of Sanford Johnson, an education advocate and sex education provider in Mississippi, using a demonstration of how to put on a sock as an alternative to the demonstrations Mississippi now banned in sex-education classes.<sup>3</sup> Creative solutions like Johnson’s video are an excellent way for educators to comply with state sex-education legislation while still conveying necessary information to their students. However, Johnson’s video also begs the question: should educators be forced to resort to comical, satirical measures just to teach sex education?

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1. MISS. CODE ANN. § 37-13-171(2)(d) (West, Westlaw current with laws from 2020 Reg. Sess.).

2. *Id.*

3. Ali Velez, *A Teacher Had a Brilliant Way of Getting Around Mississippi’s Ban of Using Condoms for Sex Ed*, BUZZFEED (Jan. 26, 2015, 5:05 PM), <https://www.buzzfeed.com/alivelez/meet-the-brilliant-mississippi-teacher-who-used-a-sock-to-te>.

Current state legislation diminishes the amount and quality of sex education public school students receive.<sup>4</sup> For example, about half of the states in the United States do not require public schools to teach sex education.<sup>5</sup> Furthermore, a majority of states do not require that sex education taught in public schools be medically accurate.<sup>6</sup> Restricting what may be taught in sex-education courses and allowing inaccurate information to be provided to students by educators is more than just a flaw in education. Providing students with inaccurate or incomplete information about sex, sexually transmitted infections (“STIs”), pregnancy, and contraceptives can have life-long, harmful consequences.

State legislation, like in Mississippi, is enacted with the intent to protect the health, safety, and morals of that state’s youth. Yet despite these sex-education laws, adolescents and young adults still make up half of the individuals contracting preventable STIs in the United States every year.<sup>7</sup> And despite the intent to protect the health, safety, and morals of youth through abstinence-only education, the United States still has one of the highest teen pregnancy rates among developed countries in the world.<sup>8</sup> This evidence illustrates that denying students access to accurate and complete sex education is *not* protecting their health, safety, or morals. In fact, these laws can harm the youth they are intended to protect.

This Note will explore the liberty interests intertwined with accurate sex-education legislation. In Part I, this Note will discuss current sex-education legislation and why this legislation is problematic, and propose reasons why states are hesitant to adopt comprehensive sex-education legislation. Part II will make the legal argument that state-run public schools, which deny students medically accurate and complete sex education, are violating students’ Due Process and reproductive rights.<sup>9</sup> This argument is formulated under a four-factor framework adapted from Justice Kennedy’s majority opinion in *Obergefell v. Hodges*. Part II will also address the various counterarguments to the proposed fundamental right. Part III will analyze whether the new fundamental right proposed in this Note is feasible or likely to come to fruition. Finally, this Note concludes that, while the

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4. See *infra* Section I.A (explaining how states are regulating sex education in such a way as to restrict what information students are receiving).

5. *State Policies on Sex Education in Schools*, NCSL (Mar. 21, 2019), <http://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx> (only 24 states and the District of Columbia require sex education to be taught in public schools).

6. *Id.* (only 20 states require that sex and/or HIV education must be “medically, factually or technically accurate”).

7. *Adolescent Sexual and Reproductive Health in the United States*, GUTTMACHER INST. (Sept. 2017), <https://www.guttmacher.org/fact-sheet/american-teens-sexual-and-reproductive-health> [hereinafter *Adolescent Sexual & Reproductive Health*] (referencing a report by the CDC stating that individuals between the ages of 15 and 24 make up half of the 20 million new STI cases that occur in the United States annually).

8. *Teen Pregnancy*, GUTTMACHER INST. (Sept. 2017), <https://www.guttmacher.org/united-states/teens/teen-pregnancy>.

9. This Note’s argument does not address the issues of what age or grade level sex education should be taught or what age-appropriate sex education should include. While these are important questions regarding sex education, they are beyond the scope of this Note.

argument made in this Note may not gain traction in the courts, it should nevertheless be considered as an avenue to protect the health, safety, and welfare of youth in this country.

## I. SEX-EDUCATION LEGISLATION IN THE UNITED STATES

### A. Current Sex-Education Legislation

The current landscape of sex-education legislation in the United States varies greatly between states. Almost every state has some form of legislation regulating sex education in public schools.<sup>10</sup> Of the states that do have legislation on sex education, 29 of them and the District of Columbia mandate that sex education be taught.<sup>11</sup> Out of those 29 states, only 17 states require that the sex or HIV education programs be medically accurate.<sup>12</sup> The 17 states requiring medical accuracy struggle to consistently define the requirement—almost all have varying definitions of the term “medically accurate.”<sup>13</sup> For example, Hawaii has defined “medically accurate” as “verified or supported by research conducted in compliance with accepted scientific methods and recognized as accurate and objective by professional organizations and agencies with expertise in the relevant field . . . .”<sup>14</sup> Conversely, some states do not even provide a definition of “medically accurate.”<sup>15</sup>

Further, 39 states and the District of Columbia require that abstinence information be provided in sex and HIV education programs, with 29 of those states requiring that abstinence be “stressed” in these programs.<sup>16</sup> Only 20 states and the District of Columbia require information be given about contraception in sex education programs.<sup>17</sup> Interestingly, only three states (California, Colorado, and Louisiana) specifically prohibit sex education programs from promoting religious beliefs.<sup>18</sup> Even with this provision however, Louisiana also requires sex-

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10. Arkansas, Kansas, Nebraska, South Dakota, and Wyoming do not appear to have a specific statute or provision regulating sex education in public schools.

11. *Sex and HIV Education*, GUTTMACHER INST. (Mar. 1, 2020), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [hereinafter *Sex and HIV Education*].

12. *Id.* Only California, Hawaii, Illinois, Iowa, Louisiana, Maine, Missouri, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Utah, Virginia, and Washington have provisions requiring sex education to be medically accurate. *Id.* Arizona and Oklahoma only require that HIV education be medically accurate. *Id.*

13. *State Policies on Sex Education in Schools*, *supra* note 5.

14. HAW. REV. STAT. ANN. § 321-11.1(b) (West, Westlaw current through end of 2019 Reg. Sess.).

15. *See* MO. REV. STAT. § 170.015 (Westlaw current through end of 2019 Reg. Sess. and First Extraordinary Sess. of 100th Gen. Ass.).

16. *Sex and HIV Education*, *supra* note 11.

17. *Id.* As discussed in the introduction, some states impose regulations on how information regarding contraception should be taught.

18. *Id.*; CAL. EDUC. CODE § 51933(i) (West, Westlaw current with urgency legislation through Ch. 3 of 2020 Reg. Sess.) (“Instruction and materials may not teach or promote religious doctrine.”); LA. STAT. ANN. § 17.281(A)(2) (Westlaw current through

education courses (if taught) to discuss the importance of only having sex within marriage.<sup>19</sup> However, the value of sex only within marriage is rooted in religious beliefs,<sup>20</sup> so requiring sex-education courses to implement this value when Louisiana also prohibits the promotion of religious beliefs appears contradictory. The fact that a vast majority of states require sex education to have an abstinence-only emphasis, and very few require sex education to be medically accurate or complete, suggests that the theory behind this legislative approach is that less information provided on sex will dissuade adolescents from engaging in sexual activities. Perhaps there is the fear that providing more information about sex will be interpreted as encouragement to engage in sexual activities.

Most states also require parental involvement in sex and HIV education, with 36 states and the District of Columbia allowing parents to remove their children from education programs.<sup>21</sup> These parental opt-out provisions may serve as another facet of sex-education legislation that inhibits the quality and quantity of sex education that minors receive.<sup>22</sup> Current sex-education legislation is problematic because legislation that promotes abstinence-only sex education while simultaneously *not* requiring medical accuracy or instruction on other methods of practicing safe sex, like contraception, is harmful to minors. Generally speaking, state legislation is intended to promote the health, safety, and morals of its citizens<sup>23</sup> and sex-education legislation is no exception.<sup>24</sup> However, statistics show that individuals are made neither healthier nor safer from sex-education legislation that does not require medical accuracy and emphasizes abstinence-only teachings.<sup>25</sup> For example, while the teen pregnancy rate in the United States has

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2019 Reg. Sess.) (“[S]ex education’ shall not include religious beliefs . . . nor the subjective moral and ethical judgments of the instructor or other persons.”).

19. *Sex and HIV Education, supra* note 11. Even though the idea of saving sex until marriage is a societal norm, it is a norm that has been largely influenced by religious practices.

20. *See, e.g., Hebrews 13:4* (New International Version) (“Marriage should be honored by all, and the marriage bed kept pure, for God will judge the adulterer and the sexually immoral.”). While the value of abstaining from sex until marriage is not exclusively religious, it still has strong religious roots and continued importance within religions worldwide.

21. *Sex and HIV Education, supra* note 11.

22. *See Rachel Rubenstein, Sex Education: Funding Facts, Not Fear*, 27 HEALTH MATRIX: J. L. & MED. 525, 549–550 (2017) (discussing problems with current state legislation regarding parental opt-out policies, and the solution to these problems).

23. This general intent of state legislation has been observed by the Supreme Court in a variety of cases, analyzing a variety of state laws. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (holding an Indiana law prohibiting full nude dancing as entertainment did not violate the First Amendment and stating, “[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals”).

24. Whether the state statute promotes the abstinence-only method to sex education or a more comprehensive approach, it is clear the motives are to promote good morals in minors, keep minors safe from STIs and other diseases, and generally preserve their health and well-being.

25. *See Adolescent Sexual & Reproductive Health, supra* note 7.

declined in recent years, it is still significantly higher than in other developed countries.<sup>26</sup> Pregnancy takes a toll on a woman's body and can subject the woman to countless health complications during the pregnancy and later in life.<sup>27</sup> Additionally, in 2008, adolescents and young adults<sup>28</sup> made up about half of the new cases of STIs in the United States that year.<sup>29</sup> Eight years later, individuals aged 13–24 made up 21% of the new HIV diagnoses in the United States.<sup>30</sup>

Statistics show that, on average, 65% of individuals in the United States have sex for the first time by the age of 18.<sup>31</sup> While there is nothing wrong with encouraging youth to abstain from sex until they are older or in a committed relationship, they should still be informed of the proper forms of protection in sex-education courses, especially given their vulnerabilities to STIs. Current statistics indicate that promoting the abstinence-only approach to sex without supplementing it with any other medically accurate sex education is harming adolescents in our country. For example, Mississippi, a state that currently does not require medically accurate sex education and instead focuses on abstinence-only approaches,<sup>32</sup> has one of the highest teen pregnancy rates in the country.<sup>33</sup>

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26. *Teen Pregnancy*, *supra* note 8. In the United States, 57 of every 1,000 women ages 15–19 will become pregnant; in France, that number is only 25 of every 1,000 women and, in Sweden, 29 per 1,000 women. Gilda Sedgh et. al, *Adolescent Pregnancy, Birth, and Abortion Rates Across Countries: Levels and Recent Trends*, 56 J. ADOLESCENT HEALTH 223, 226 (2015).

27. The Centers for Disease Control and Prevention, (“CDC”), lists the following as common health problems women experience during pregnancy: anemia, urinary tract infections, mental health conditions, hypertension, diabetes, obesity and weight gain, infections, infections with HIV, viral hepatitis, STIs, TB, and Hyperemesis Gravidarum. *Reproductive Health: Pregnancy Complications*, CTR. FOR DISEASE CONTROL & PREVENTION (CDC), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html> (last updated Oct. 23, 2018). Most of these health problems can also put the baby's health at risk if not addressed. *Id.*

28. Individuals were adolescent or young adult if between the ages of 15–24. *Adolescent Sexual & Reproductive Health*, *supra* note 7.

29. *Id.*

30. *Id.* This occurred in 2015 and does not include other STIs. *Id.* Furthermore, of that 21%, young black and Hispanic gay and bisexual males were disproportionately affected. *Id.*

31. *Id.* Furthermore, by the age of 25, 93% of individuals have had sexual intercourse. *Id.*

32. MISS. CODE ANN. § 37-13-171 (West, Westlaw current with laws from 2020 Reg. Sess.) (proposed legislation). While the proposed amendments to this statute include adding a provision requiring medically accurate sex education, those amendments have not been accepted yet. Additionally, the proposed legislation leaves intact the provision that any sex education offered must include abstinence-only or abstinence-plus education. *Id.* § 37-13-171(4).

33. *Trends in Teen Pregnancy and Childbearing*, U.S. DEP'T OF HEALTH & HUM. SERV., <https://www.hhs.gov/ash/oah/adolescent-development/reproductive-health-and-teen-pregnancy/teen-pregnancy-and-childbearing/trends/index.html> (last updated May 30, 2019). In 2017, Mississippi had a rate of between 26.6 and 32.8 teen births per 1,000 teen women. *Id.*

Mississippi is also one of the states with the highest prevalence of certain STIs among adolescents and young adults, both male and female.<sup>34</sup> Although correlation does not necessarily prove causation, the data is clear that states that do not mandate medically accurate sex education, but instead promote abstinence-only approaches, have the highest rates of teen pregnancy and teen STI prevalence. This is not to say that abstinence-only sex education is not medically accurate, but when it is taught as the only method to prevent pregnancy and STIs, it is detrimentally incomplete. At a minimum, the failure to provide a range of information to sexually active youth is evidence of educational neglect because information that may enable minors, adolescents, and young adults to better protect themselves is not being provided. It is comparable to allowing minors to drive cars when they are 16 but either refusing to provide them with relevant information about the rules of the road or the perils of reckless or impaired driving, or merely assuming they will accept the advice to not drive at all until they are 18.

Furthermore, even though the U.S. Supreme Court has recognized that minors have the right to access contraception,<sup>35</sup> only 20 states and the District of Columbia require sex-education courses to include information on contraception.<sup>36</sup> While not requiring (or outright banning) information on contraception does not necessarily equate to prohibition on access, it does suggest that those states may not want minors to learn about contraception, fearing it will encourage premarital sex.<sup>37</sup> If states are not educating minors on their right to access contraception, the risk of minors contracting an STI or getting pregnant drastically increases.<sup>38</sup> There are also internal tensions between state regulations. For example, many states permit minors to consent to contraceptive services such as intrauterine devices (“IUDs”) and birth control pills.<sup>39</sup> However, if public schools are not teaching their

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34. See *Sexually Transmitted Disease Surveillance 2017: STDs in Adolescents and Young Adults*, CTR. FOR DISEASE CONTROL & PREVENTION (CDC), <https://www.cdc.gov/std/stats17/adolescents.htm> (last updated July 24, 2018). Figures O, P, Q, and R indicate Mississippi was one of the states with the highest prevalence of Chlamydia and Gonorrhea among males and females ages 16–24. *Id.*

35. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 691–92, 700 (1977) (holding that a New York law incriminating distribution of contraceptives to minors under the age of 16 was unconstitutional).

36. *Sex and HIV Education*, *supra* note 11.

37. See *Carey*, 431 U.S. at 694–95. In *Carey*, the appellants argued that the significant state interest being protected by the law prohibiting contraceptives being distributed to minors under 16 was to discourage sexual activity among the young. *Id.* at 694. The Court found there was no reason to believe limiting access to contraception would discourage sexual behavior. *Id.* at 695.

38. See John S. Santelli et al., *Abstinence-Only-Until-Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. ADOLESCENT HEALTH 273, 276 (2017) (stating that many adolescents who intend to be abstinent fail, and when they do have sex, many of them do not use condoms or contraception). While abstinence from sex until marriage is, theoretically, the most effective way to avoid STIs and unintended pregnancies, studies show that many adolescents who pledge abstinence fail to remain abstinent until marriage. *Id.*

39. See *Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Feb. 1, 2020), <https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive->

students what contraception is, nor how to access it,<sup>40</sup> students may have no idea what services are available to help ensure that, if they choose to have sex, they practice safe sex.<sup>41</sup> Regardless of the legislation states put in place to restrict sex education, minors will still engage in sexual activity if they choose to do so.<sup>42</sup> These laws simply lead minors to engage in unsafe sexual activity, which may lead to unwanted pregnancies, diseases, and infections.<sup>43</sup>

The problems caused by teaching solely abstinence-focused sex education without permitting or mandating supplemental, medically-accurate information on contraception are especially dangerous because the consequences can last far beyond an individual's adolescence. For example, some STIs are incurable, requiring individuals to cope with infections for the rest of their lives.<sup>44</sup> Pregnancy also typically imposes a life-long impact on individuals.<sup>45</sup> Regardless of whether a woman keeps the child or puts the child up for adoption, pregnancy and childbirth can also put a woman at risk for several health consequences that may last the rest of her life.<sup>46</sup> Furthermore, pregnancy in adolescence in particular has many

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services. Twenty-three states and the District of Columbia explicitly allow minors to consent to contraceptive services. *Id.* Twenty-four states permit minors to consent to contraceptive services in one of the following circumstances: a physician determines the minor faces a health hazard without contraception; the minor is married; the minor is a parent; the minor is or has been pregnant; or the minor meets other requirements like maturity, graduating high school, or receiving a referral from another professional. *Id.*

40. Research has shown that only about half of adolescents (57% of females and 43% of males) had formal instruction about contraception before having sex for the first time. *American Adolescents' Sources of Sexual Health Information*, GUTTMACHER INST., <https://www.guttmacher.org/fact-sheet/facts-american-teens-sources-information-about-sex> (last updated Dec. 2017) (citing Laura D. Lindberg et al., *Changes in Adolescents' Receipt of Sex Education, 2006-2013*, 58 J. ADOLESCENT HEALTH 621 (2016)). Furthermore, only 46% of females and 31% of males received instructions on where to get birth control. *Id.*

41. Having knowledge about what contraceptive services exist and how to access them is also critical for individuals to know at a young age to protect themselves should they be sexually assaulted. Even if an individual chooses to abstain from sex until they are older or married, they may need emergency contraception if something happens beyond their control.

42. See *Adolescent Sexual & Reproductive Health*, *supra* note 7 (on average, 65% of adolescents in the United States have sex for the first time by age 18). Again, minors may also be forced to engage in sexual activity against their will. Regardless, minors often can and do find themselves in circumstances requiring contraceptive services that they have a protected right under the Constitution to access. *Carey*, 431 U.S. at 694.

43. See *supra* notes 32–35 and accompanying text.

44. Even though their symptoms can be treated, STIs such as oral and genital herpes, HIV and AIDS have no cure. *STDs*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/stds-hiv-safer-sex> (last visited Oct. 11, 2018).

45. Of course, even if a woman chooses to have her baby, a woman could put her child up for adoption, which could mitigate the length of the impact of an unwanted pregnancy. However, only women who have done so can speak to how long the impact of putting a child up for adoption lasts.

46. *Reproductive Health: Pregnancy Complications*, *supra* note 27. Additionally, severe maternal morbidity, defined as severe physical and psychological conditions that result from or are aggravated by pregnancy and have an adverse effect on a

emotional and psychological impacts on the woman which can last for years.<sup>47</sup> The consequences of permitting incomplete—or, even worse, inaccurate-by-omission—sex education through legislatively required abstinence-only education are immense, and have the potential to affect individuals for the rest of their lives. States could potentially avoid these consequences, or at least mitigate them, by providing comprehensive sex education. Unfortunately, most states are not willing to enact such legislation.

### ***B. Why States Are Not Adopting Comprehensive Sex Education***

The current state of sex-education legislation in most states is abstinence-only oriented,<sup>48</sup> with the sole goal of reducing the rate of premarital sex.<sup>49</sup> The problem with this approach is that it ignores that, on average, 65% of individuals in the United States have sex for the first time at age 18.<sup>50</sup> A better approach to sex education would be comprehensive sex education,<sup>51</sup> the goals of which are to both reduce the negative impact of premarital sex and promote reproductive health and sexuality knowledge.<sup>52</sup> Comprehensive sex education teaches abstinence as an effective method of avoiding STIs and unplanned pregnancies, but it also includes information on condom use and contraceptive methods.<sup>53</sup> A host of research has indicated that comprehensive sex education, focusing on both abstinence and contraception, is a more effective form of sex education than abstinence-only approaches.<sup>54</sup> Despite this research, most states have not adopted this style of sex education for reasons including each state's political orientation and differential interpretations on best approaches to protecting its citizens, public schools'

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woman's health, affects over 50,000 women in the United States per year. *Id.* This number is rising. *Id.*

47. The prevalence of depression among pregnant adolescents has been reported to be between 16% and 44%. *See, e.g.,* Eva M. Szigethy & Pedro Ruiz, *Depression Among Pregnant Adolescents: An Integrated Treatment Approach*, 158 AM. J. PSYCHIATRY 22, 25 (2001).

48. *See* Sex and HIV Education, *supra* note 11.

49. Rubenstein, *supra* note 22, at 526, 536.

50. *See Adolescent Sexual & Reproductive Health*, *supra* note 7.

51. Comprehensive sex education is education about abstinence, contraception, sexuality, and other topics related to sexual activity. Rubenstein, *supra* note 22, at 526.

52. *Id.* at 526–27.

53. *Why Support Comprehensive Sexuality Education?: Comprehensive Sexuality Education*, PLANNED PARENTHOOD ARIZONA, INC. (2013), [https://www.plannedparenthood.org/files/6914/0080/0572/2013-04UpdatedWhyCompeSexEd\\_handout.pdf](https://www.plannedparenthood.org/files/6914/0080/0572/2013-04UpdatedWhyCompeSexEd_handout.pdf).

54. *See generally* UNITED NATIONS POPULATION FUND (UNFPA), EMERGING EVIDENCE, LESSONS AND PRACTICE IN COMPREHENSIVE SEXUALITY EDUCATION: A GLOBAL REVIEW (UNESCO 2015), [https://www.unfpa.org/sites/default/files/pub-pdf/CSE\\_Global\\_Review\\_2015.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/CSE_Global_Review_2015.pdf). Data shows that comprehensive sexuality education builds confidence, which is a “necessary skill for delaying the age that young people first engage in sexual intercourse, and for using contraception, including condoms.” *Id.* at 14. Additionally, an international review of controlled trials in Europe, the United States, Nigeria, and Mexico showed that comprehensive sex education is more likely to prevent unintended adolescent pregnancies. *Id.* at 14.

discretion in setting curriculum, and parental rights. This Section will address each of these reasons and, where appropriate, note the strongest counterarguments to these reasons.

The first and most simple explanation for why states may not be enacting comprehensive sex-education legislation is their political affiliation. Those states that have adopted comprehensive sex education are generally viewed as more liberal.<sup>55</sup> More conservative states, on the other hand, tend to have viewpoints more in line with abstinence-only sex education,<sup>56</sup> making it more difficult and less likely for those states to enact legislation in support of comprehensive sex education.

The second reason for the lack of comprehensive sex education is that this is an area where regulation is left to the states. States have broad powers to regulate those things that are vital to their interest, primarily those things which are necessary to protect the health, safety, and morals of their citizens.<sup>57</sup> In the case of sex education, states—both on the comprehensive and abstinence-only side of the debate—have a strong arguments that sex education is a vital state interest and therefore is for each state to decide. Regulating sex education is one way states can protect the health, safety, and morals of its youth. For example, those in support of abstinence-based sex education argue that “[s]chools and public health advocates owe it to parents and people of faith to support the young girl or boy who wants to delay sexual behavior. Marriage, and delaying sex until at least adulthood, are good goals.”<sup>58</sup>

While this may be a reasonable argument, it is not compelling enough to support the inaccurate, incomplete sex education being taught in public schools. If youth are not taught the medically accurate facts of sex, contraception, and reproductive health, they will be put at a higher risk for contracting preventable STIs, facing an unintended pregnancy, and living with life-long sexually related illnesses. As previously noted, the data suggests abstinence-only, nonmedically accurate, and incomplete sex education is more harmful than helpful to minors,<sup>59</sup>

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55. See, e.g., California Healthy Youth Act, CAL. EDUC. CODE § 51934 (Westlaw current with urgency legislation through Ch. 3 of 2020 Reg. Sess.).

56. See, e.g., *supra* note 32 and accompanying text.

57. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (holding an Indiana law prohibiting full nude dancing as entertainment did not violate the First Amendment and stating the “traditional police power of states includes providing for public health, safety, and morals . . . .”); see also *Roe v. Wade*, 410 U.S. 113, 154 (1973) (stating that, despite the privacy right involved in the decision to have an abortion, states have interests in “safeguarding health . . . and in protecting potential life.”).

58. Sarah McCammon, *Abstinence-Only Education is Ineffective and Unethical, Report Argues*, NPR (Aug. 23, 2017, 4:38 PM), <https://www.npr.org/sections/health-shots/2017/08/23/545289168/abstinence-education-is-ineffective-and-unethical-report-argues> (quoting Penny Nance, CEO of Concerned Women for America).

59. See, e.g., Kathrin F. Stranger-Hall & David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6:10 PLOS ONE 1, 6 (2011), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0024658> (stating that national data showed a positive correlation between the

thereby negating the assumption that abstinence-only education is in the best interest of minors and citizens as a whole.

The third reason states have not adopted comprehensive sex education is due to the broad discretion schools have been granted in setting their curricula.<sup>60</sup> Although states do have the right to dictate the content of education within their public schools, many districts have the discretion to set their own curricula. Under federal constitutional law, states have significant power to control the content of these lessons, but that power is not unlimited. Students have a limited First Amendment right to receive information that is not skewed or misleadingly biased, at least in certain contexts.<sup>61</sup> The curricula that is set cannot be based on entirely viewpoint-specific political or moral beliefs that violate this constitutional baseline.<sup>62</sup> Although public schools plainly can inculcate values, which may have a viewpoint-specific cast, this power is in tension with the First Amendment interest in assuring that children are raised to be autonomous and enlightened voters. Moreover, as Justice Jackson famously observed in *West Virginia State Board of Education v. Barnette*, schools “will not be partisan or [an] enemy of any class, creed, party, or faction.”<sup>63</sup> Nor do students shed their constitutional rights at the schoolhouse gate.<sup>64</sup> As a result, judicial respect for the state’s right to set its curricula does not, on its own, present a sufficiently strong argument against comprehensive sex education.

Finally, states may be hesitant to adopt comprehensive sex education because of parental opinions on the matter. Many parents and educators view sex education as a highly sensitive topic and many parents want their children to learn sex education from them, not their school.<sup>65</sup> Parents enjoy the constitutionally protected right to educate their children as they see fit.<sup>66</sup> States may be hesitant to infringe upon that right in the same way they may be hesitant to infringe upon schools’ right to set their curricula.<sup>67</sup> Many parents perceive sex as a very personal

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incidence of teenage pregnancy and strong emphasis of abstinence in sex education courses).

60. See *Meyer v. Nebraska*, 262 U.S. 390, 397, 403 (1923) (holding a state statute that prohibited schools from teaching languages other than English to be unconstitutional); see also *Epperson v. Arkansas*, 393 U.S. 97, 98–99, 109 (1968) (holding a state statute that prohibited schools from teaching evolution to be unconstitutional).

61. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (holding that the removal of certain books from a school library may be permissible if the motivations for the school board doing so are rational and not politically or morally motivated).

62. *Id.*

63. 319 U.S. 624, 637 (1943) (holding that a school cannot force a child to salute the American flag).

64. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

65. See, e.g., *Ten Good Reasons to Oppose Public School Sex Education*, CATHOLIC PARENTS ONLINE, <https://www.catholicparents.org/ten-good-reasons-oppose-public-school-sex-education/> (last visited Apr. 11, 2019).

66. See *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 530, 536 (1925) (holding a state law that required children to attend public school to be unconstitutional).

67. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982).

and private topic, one they may wish to teach their children in the privacy of their own homes and in their own ways.<sup>68</sup> Because schools have broad discretion over curricula,<sup>69</sup> states likely view abstinence-only sex education as a better approach to sex education because it is more deferential to parents. The failure to enforce comprehensive sex education could be viewed as the states' way of striking a balance between school curricula and parental constitutional rights.

## II. THE CASE FOR A FUNDAMENTAL RIGHT

Abstinence-only sex education is inaccurate by omission and is potentially harmful to minors and adolescents in several ways.<sup>70</sup> Further, states are hesitant, for a variety of reasons, to fully adopt comprehensive sex education.<sup>71</sup> While advocating for comprehensive sex education at the state level through legislators is one route to increase access to medically accurate information, the issue could also be approached through the federal courts. This latter approach is based on the proposition that public schools that elect to teach sex education but do *not* provide medically accurate, complete sex education are violating fundamental rights protected by the Fifth and Fourteenth Amendments.<sup>72</sup>

The Supreme Court has acknowledged that, regardless of a legitimate state interest, certain rights are so fundamental to our enjoyment of liberty that they cannot be burdened by the state absent a compelling reason to do so.<sup>73</sup> These rights are either enumerated in the Bill of Rights of the Constitution or they are unenumerated but are nevertheless recognized by the Supreme Court as fundamental. Those that are unenumerated are largely protected by the Due Process Clause of the Fourteenth Amendment.<sup>74</sup> Several of these unenumerated

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68. See, e.g., *Ten Good Reasons to Oppose Public School Sex Education*, *supra* note 65.

69. See, e.g., *Pico*, 457 U.S. at 875.

70. See *supra* Section I.A.

71. See *supra* Section I.B.

72. The right to privacy under the Fourteenth Amendment has been determined to encompass many rights that intersect with sex education, such as the right to marry, the right to sexual autonomy, the right to contraception, and the right to an abortion. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (extending the right to marry to same-sex couples); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (providing the right to sexual autonomy between consenting adults in the privacy of their home); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 691–92, 700 (1977) (providing that all individuals, married or unmarried, and minors, have the right to access contraception); *Roe v. Wade*, 410 U.S. 113, 165 (1973) (recognizing a woman's limited right to end her pregnancy within the first trimester of her pregnancy).

73. See, e.g., *Lawrence*, 539 U.S. at 578 (stating that a state may have a legitimate interest in regulating sexual conduct involving minors, public conduct, or prostitution, but there is no interest served in criminalizing private sexual conduct between two consenting adults of the same sex).

74. “[O]ne aspect of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment is ‘a right of personal privacy, or a guarantee of certain areas or zones of privacy.’” See *Carey*, 431 U.S. at 684 (quoting *Roe*, 410 U.S. at 152). This right of privacy has been found to protect individuals’ decisions regarding procreation, contraception, family relationships, raising children, and education. *Id.* at 684–85.

fundamental rights directly relate to sex education and are threatened by sex-education legislation that prohibits or discourages public schools from teaching minors medically complete sex education. Sex education encompasses topics such as contraception, abortion, sexual autonomy, marriage, and the general right to privacy. Understanding these rights begins with sex education. Regardless of how indirect the violation of these fundamental rights may be, state legislation that does not enforce medically accurate, complete sex education should be analyzed under some form of heightened scrutiny<sup>75</sup> because the legislation impedes individuals' ability to exercise certain fundamental rights such as access to contraception, sexual autonomy, and privacy.

The analysis that the Court provided in *Obergefell v. Hodges*<sup>76</sup> may be the most effective avenue to argue that accurate sex education should be a protected fundamental right. Writing for the majority, Justice Kennedy framed the fundamental right of marriage as an individual liberty.<sup>77</sup> The *Obergefell* analysis, when coupled with other fundamental rights case law, suggests that a four-factor framework governs the establishment of a new fundamental right or liberty: First, the fundamental liberty being sought must be clearly defined.<sup>78</sup> Second, there must be a discussion of history and tradition in the area of the liberty that supports its recognition.<sup>79</sup> Third, as Justice Kennedy did in *Obergefell*, the evolving definition of "liberty" must be evaluated and discussed within the context of the liberty at issue.<sup>80</sup> Finally, the argument for the new fundamental liberty requires a comparison between the new liberty being sought and prior unenumerated rights that the Supreme Court has deemed fundamental and thus constitutionally

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75. If a fundamental right is being infringed upon by the government, the government has the burden of proving it has a "compelling interest" being served by that infringement. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 954 (5th Ed. 2017). Even if there is a compelling government interest, the government must also show that the law is necessary to achieve that goal and that there is no other less restrictive alternative. *Id.*

76. 135 S. Ct. at 2584.

77. *Id.* at 2597–98. Justice Kennedy's opinion in *Obergefell* has been criticized for not adhering to any recognized level of scrutiny and not having any "basis in the Constitution or this Court's precedent." *Id.* at 2612 (Roberts, J., dissenting). The framework used in this opinion, however, provides the strongest support for the recognition of an unenumerated fundamental right which is why it is the structure followed in this Note.

"The fundamental liberties protected by [the Due Process Clause of the Fourteenth Amendment] include most of the rights enumerated in the Bill of Rights . . . these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Id.* at 2597.

78. *See id.* at 2593; *see also* *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (stating the Court has "a tradition of carefully formulating the interest at stake in substantive-due-process cases.").

79. *Obergefell*, 135 S. Ct. at 2593–97.

80. *Id.* at 2597–98. The discussion of liberty overlaps significantly with the history and tradition of the liberty being sought and the prior unenumerated rights that support the current liberty. Justice Kennedy addresses liberty's evolution between the first and third steps in the analysis, blending them together, but for purposes of the clarity of this Note, I will be treating it as an entirely separate step in the analysis.

protected.<sup>81</sup> The following Sections will address each of these steps from *Obergefell* in turn to argue that legislation that permits or encourages nonmedically accurate sex education is a violation of fundamental rights protected by the Constitution. Additionally, this Note will address counterarguments, such as the argument that because education is not a recognized fundamental right, it does not follow to make accurate and complete sex education a fundamental right.<sup>82</sup>

#### **A. The Unenumerated Fundamental Right**

The proposed fundamental right in this case is the right to receive medically and factually accurate sex education in public schools when the school undertakes to teach sex education. This does not mean all public schools should be mandated to provide sex education courses. In fact, mandating public schools to provide sex education is unlikely to succeed because of the broad discretion school boards have over setting school curriculum.<sup>83</sup> The critical issue here is not that students are not being taught sex education,<sup>84</sup> but rather that they are not always being taught entirely *accurate* sex education because some legislation requires or encourages the information taught to be incomplete. Indeed, a lack of any knowledge can be (relatively) easily rectified by providing resources people can use to obtain the information they were not taught. However, rectifying the impact of people being taught inaccurate information is far more difficult, and this endeavor to correct inaccurate knowledge is made considerably more difficult when the sources of the inaccurate information are authority figures. Teachers and professionals hired to teach sex education are authority figures to children and adolescents, and most students are quick to trust what they say. When taking on the responsibility of teaching children and adolescents, it is important that teachers are aware that students and their parents trust educators to provide adequate and accurate education. This expectation of accurate information should be no different for sex education than it is for a math course or any other commonly taught subject. For example, in Arizona, if a public school chooses to teach an environmental science course, the program is required to “[b]e based on current

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81. *Id.* at 2598–605.

82. In this Note, I intend to focus on counterarguments based on: the lack of a right to education; parents’ right to raise their children as they see fit; children enjoying different fundamental rights than adults; and the broad discretion school boards have been granted to set their own curriculum. I recognize there is an abundance of other arguments against the claim supported in this Note, but to allow for a more extensive discussion into what I believe are the most persuasive constitutional arguments, I will not attempt to address every counterargument available.

83. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”).

84. Of course, it is still a concern that many adolescents are not receiving sex education at all. One research study found 21% of female adolescents and 34% of male adolescents received no instruction about birth control methods from either their school or a parent. Laura Duberstein Lindberg, Isaac Maddow-Zimet & Heather Boonstra, *Changes in Adolescents’ Receipt of Sex Education, 2006–2013*, 58 J. ADOLESCENT HEALTH 621, 624 (2016). However, for purposes of this Note, I will focus on the lack of accurate sex education available to youth in our country.

and reliable scientific information” and “[i]nclude a discussion of economic and social implications.”<sup>85</sup> By that logic, it seems inconsistent to allow teaching impressionable students that abstinence until marriage is the only way to avoid STIs and pregnancy without also educating them on the forms of contraception available to them. The goal of accurate and complete sex education goes beyond providing students truthful information. It also encompasses teaching students the *whole* truth, including facts about contraception and other means to avoid pregnancy and STIs outside of strict abstinence. This Note argues for a fundamental right for everyone (including minors) to be taught *completely* accurate sex education in public schools when sex education is undertaken by a school.

### ***B. History and Tradition***

Sex education has a long history in America, especially abstinence-only sex education. As early as the 1800s, individuals were teaching others about the “immense evils” of sexual activity outside of marriage.<sup>86</sup> It was not until the late 1800s and early 1900s that schools began implementing sex education courses.<sup>87</sup> One of the biggest movements toward sex education was in response to the rise in STIs being contracted by American soldiers during World War I.<sup>88</sup> Many professionals opined that the soldiers would have been in a better position regarding sexual health if they had been taught sex education while in school.<sup>89</sup> While the sex education taught at the time was far from complete by today’s standards, it marked an important point in our history, one where the American government realized the important role education can play in preventing STIs.<sup>90</sup>

Almost from its inception, the idea of sex education as a public mandate has been the subject of much strong debate and a large portion of the resistance to sex education has come from religious conservatives.<sup>91</sup> Despite the continuing

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85. ARIZ. REV. STAT. ANN. § 15-706(A)(1)–(2) (Westlaw current through legislation effective Mar. 27, 2020 of Second Reg. Sess. of the Fifty-Fourth Legis.).

86. Sylvester Graham was among those who considered masturbation to be an “immense evil of self-pollution” and continually warned his audiences that masturbation would cause warts, insanity, and death. Johanna Cornblatt, *A Brief History of Sex Ed in America*, NEWSWEEK (Oct. 27, 2009, 8:00 PM), <https://www.newsweek.com/brief-history-sex-ed-america-81001>.

87. The National Education Association passed a resolution calling for “moral education” in schools in 1892. *Id.* Chicago was the first city to teach sex education in its high schools. *Id.*

88. Congress passed the Chamberlain-Kahn Act, which provided money to educate soldiers about both syphilis and gonorrhea. *Id.*

89. *Id.* (discussing a 1919 report from the U.S. Department of Labor’s Children’s Bureau). “The worries and doubts and brooding imposed on boys and girls of the adolescent period as a result of lack of simple knowledge is a cruelty on the part of any society that is able to furnish that instruction.” *Id.*

90. *Id.*

91. In the 60s and 70s, Christian conservative groups like the Christian Crusade attacked sex education courses for “promoting promiscuity and moral depravity.” *Id.* Even today, organizations like the John Birch Society claim that movements toward comprehensive sex education are “filled with the sexual-revolution ideology that has helped devastate families across the Western world” and that teaching children about

opposition to comprehensive sex education by Christian conservatives, statistics and reliable data have continually demonstrated the effectiveness of comprehensive sex education<sup>92</sup> and the ineffectiveness of abstinence-only approaches.<sup>93</sup>

While this heated debate has not completely abated over time, legal protection of sexual autonomy and reproductive liberty has evolved. Substantive due process has, in the last few decades, been construed to include the right to contraception;<sup>94</sup> early-term abortions;<sup>95</sup> and sexual freedom between consenting adults of the same sex, in the privacy of their own home.<sup>96</sup> Most recently, the Court held that denying same-sex partners the ability to legally marry violates the fundamental rights of same-sex partners.<sup>97</sup> Taken together, this case law demonstrates that constitutional liberty now includes significant protection for sexual and reproductive autonomy, which one cannot meaningfully exercise without medically accurate and complete sex education. Moreover, freedom of speech has been interpreted to include the rights of listeners to receive

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homosexuality, gender-questioning, sex, and contraception is “a crucial weapon in the war on the family.” Alex Newman, *UN “Sex Education” Standards Push LGBT Agenda on 5-Year-Olds*, NEW AM. (Feb. 13, 2018), <https://www.thenewamerican.com/culture/faith-and-morals/item/28269-un-sex-education-standards-push-lgbt-agenda-on-5-year-olds>.

92. In 2006, Douglas Kirby summarized the findings of studies on sex education programs and found that programs with a certain 17 characteristics resulted in improved sexual health outcomes such as: delaying first sexual intercourse, reducing the number of sexual partners, reducing the frequency of sex, and increasing the use of condoms and contraceptives. DOUGLAS KIRBY & LORI ROLLER, *THE IMPACT OF SEX AND HIV EDUCATION PROGRAMS IN SCHOOLS AND COMMUNITIES ON SEXUAL BEHAVIORS AMONG YOUNG ADULTS 6–7* (Family Health Int’l ed., 2006).

Among these 17 characteristics, 2 of them are that the curriculum should be: (1) focused on the clear health goals of preventing STI/HIV and/or pregnancy, and (2) narrowly focused on specific behaviors that will lead to these health goals, like abstinence or using condoms or other contraceptives. *Id.* at 7 (emphasis added).

93. Several recent studies show that abstinence-only sex education does not help teens abstain from sex for a longer period of time than comprehensive sex education, nor does it reduce the average number of sexual partners teens have. Furthermore, teens who completed abstinence-only programs were less likely than teens who received comprehensive sex education to believe condoms would reduce the risk of an infection. *See, e.g.*, CHRISTOPHER TRENHOLM ET AL., *IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS 29* (Mathematica Policy Research, Inc. ed., 2007).

94. *Griswold v. Connecticut*, 381 U.S. 479, 481, 485–86 (1965) (holding married couples have the right to access contraception); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding unmarried adults also have the right to access contraception); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 681–82 (1977) (holding that the right to contraception extended to minors as well as adults).

95. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that women have the right to get an abortion within the first trimester of the pregnancy); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (reaffirming that women have the right to access abortion services without the state placing an undue burden on that right).

96. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

97. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

information<sup>98</sup> and to receive information that is not skewed by government to favor or disfavor particular viewpoints.<sup>99</sup> The fact that the government does not have an affirmative obligation to provide information, contraception, or other means of exercising these reproductive rights or related liberties does not give it license to unduly burden, distort, or otherwise undermine access to these rights and liberties. As the Court stated in *Eisenstadt v. Baird*, few decisions are as fundamental as the decision to bear or beget a child.<sup>100</sup> Informed decisions are difficult to make when the government affirmatively undertakes to teach children about sexuality but does so in a way that obscures, misleads, and confuses children about the facts of reproduction, sexual relationships, STIs, and pregnancy. State action that results in inaccurate, incomplete sex education taught to minors in public schools is, therefore, unconstitutional under the Due Process Clause of the Fourteenth Amendment.

### C. Liberty

History does not stand alone; the definitions and constraints of the word “liberty” also support this Note’s assertion. Justice Kennedy began the majority opinion in *Obergefell* by stating: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>101</sup>

“Liberty” encompasses several different rights, all of which have one characteristic in common: individual autonomy. Liberty “extend[s] to certain personal choices central to individual dignity and autonomy, includ[ing] intimate choices that define personal identity and beliefs.”<sup>102</sup> The Court has repeatedly interpreted the Constitution in such a way as to protect the choices that are fundamental to making each of us the autonomous, unique individuals that we are.<sup>103</sup> Every time one argues the recognition of a new fundamental liberty, there will be justices of the Court who will inevitably disagree and claim that those who wrote the Constitution and the Bill of Rights never intended “liberty” to be an all-encompassing attribute.<sup>104</sup> However, it is unlikely that the Framers could have anticipated the considerable social progress made since the inception of the Constitution. The plain language of the Fourteenth Amendment Due Process

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98. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (reaffirming that the First Amendment protects the right to receive information and ideas).

99. *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (holding that local school boards cannot remove books from a school library solely based on a moral, political, or religious opinion).

100. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

101. *Obergefell*, 135 S. Ct. at 2593.

102. *Id.* at 2597.

103. See, e.g., *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Eisenstadt*, 405 U.S. at 443; *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

104. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) (arguing abortion is not a liberty protected in the Constitution because “the Constitution says absolutely nothing about it”).

Clause asserts that no state shall “deprive any person of life, liberty, or property, without due process of law . . . .”<sup>105</sup> It is safe to assume that the Fourteenth Amendment’s authors likely did not foresee “liberty” extending to include rights such as sexual autonomy at all, let alone to minors.

The liberty of access to medically accurate and complete sex education in public schools is not so different from fundamental rights that have been previously recognized. In the past, the thought of protecting minors’ right to receive medically accurate and complete sex education may have seemed improbable, if not impossible. Indeed, the idea of complete and accurate sex education as a protected liberty under our Constitution may seem unconventional even by today’s standards. However, the same could have been said for so many liberties before this: the liberty to be a free individual; to vote in an election; to exercise sexual autonomy; to marry whoever we want; to access birth control; to have an abortion. All these liberties were once “unconventional” and some may still be considered controversial today.<sup>106</sup> But as we change in how we express our autonomy and self-expression, the constraints on liberty must also change. Liberty has expanded and contracted throughout American history, and to suggest it should not continue to do so is to forget much of the history, new and old, that has brought us where we are now. Thus, evaluating this evolving definition of “liberty” along with the history of sex education, and now the Supreme Court’s recognition of unenumerated rights, grounds this Note’s argument in constitutional law.

#### ***D. Prior Unenumerated Rights: The Right to Privacy and the Fourteenth Amendment***

The Supreme Court has repeatedly recognized many unenumerated fundamental rights under another previously unenumerated right: the right to privacy.<sup>107</sup> The right to privacy is best described as a broad umbrella, encompassing many other unenumerated fundamental rights. Several of the rights found under the right to privacy are central to reproductive justice, including the rights to abortion,<sup>108</sup> access to contraceptive services,<sup>109</sup> sexual autonomy,<sup>110</sup> and

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105. U.S. CONST. amend. XIV, § 1.

106. For example, even after *Roe v. Wade*, states have resisted providing access to abortions with Targeted Restrictions on Abortion Providers (“T.R.A.P.”) laws, leading to more cases going to the Supreme Court on the issue of abortion. *See, e.g., Hellerstedt*, 136 S. Ct. at 2300 (describing the Texas law at issue in this case).

107. *See generally, e.g., Lawrence*, 539 U.S. at 564–65 (using the right to privacy as founded in *Griswold* to support the right to privacy extending to sexual autonomy between consenting adults).

108. *See generally, e.g., Roe*, 410 U.S. 113 (recognizing that women have the right to access abortion services within the first trimester of pregnancy).

109. *See generally, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding married couples have the protected right to access contraception).

110. *See generally Lawrence*, 539 U.S. 558 (acknowledging that the right to privacy extends to sexual autonomy among unmarried, consenting adults).

marriage.<sup>111</sup> While the Supreme Court has not yet addressed the specific issue of medically accurate and complete sex education per se, the Court has demonstrable precedent that extends the right to privacy in ways that comport with this new unenumerated right.

The right to complete sex education should exist within the Due Process Clause of the Fifth and Fourteenth Amendments within the right to privacy. Several unenumerated rights relating directly to the content of sex education were previously found protected under the right to privacy. The Supreme Court has found that the Constitution protects our right to privacy,<sup>112</sup> which encompasses the right to access contraceptive services,<sup>113</sup> the right to sexual autonomy,<sup>114</sup> and the right to an abortion.<sup>115</sup> This Note argues that states risk infringing upon these privacy rights by permitting, even encouraging, public schools to teach students inaccurate and incomplete sex education. The argument for the existence of the right to medically accurate and complete sex education is supported through several Supreme Court cases discussed below.

### 1. Contraception

The saga of the right to contraception began in 1965 with *Griswold v. Connecticut*.<sup>116</sup> In *Griswold*, the Court held that a Connecticut law that prohibited the use of contraceptives, even among married couples, was unconstitutional because it infringed upon the right of marital privacy.<sup>117</sup> The Court elaborated on the right of marital privacy, stating that rights enumerated in the Bill of Rights have penumbras to ensure those privacy rights are actually effective in protecting individuals.<sup>118</sup> Those penumbras, the Court said, include the right to privacy which encompasses the relationship between a husband and wife.<sup>119</sup> Even though contraception is an activity that is regularly left up to state regulation, the Court held that the Connecticut law was unnecessarily broad and invaded a zone of

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111. See generally, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing that the right to marry includes same-sex couples).

112. See generally, e.g., *Lawrence*, 539 U.S. 558 (holding that the right for two adults to engage in consensual sex within the privacy of their own home is protected by the right to privacy under the Fourteenth Amendment).

113. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681–82 (1977) (invalidating a law prohibiting the sale of contraceptive devices to anyone under the age of 16); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (providing that the right to contraception applies to all adults, not just married adults).

114. *Lawrence*, 539 U.S. at 575–76 (finding a state statute violated the Due Process Clause by criminalizing two people of the same sex engaging in intimate, sexual conduct).

115. *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2298 (2016) (reaffirming the holding in *Roe* that every woman enjoys the right to access an abortion unlimited by the state until a certain time in her pregnancy); *Roe v. Wade*, 410 U.S. 113, 114 (1973).

116. 381 U.S. 479 (1965).

117. *Id.* at 485.

118. *Id.* at 484.

119. *Id.* at 485.

privacy that falls within the area of protected freedoms.<sup>120</sup> In 1971, the Court further extended this right to privacy beyond married couples in *Eisenstadt v. Baird*, holding that unmarried adults also enjoy the right to access contraception.<sup>121</sup> While the Court addressed the same right to privacy in *Griswold*, the heart of the *Eisenstadt* decision was grounded in the Equal Protection Clause of the Fourteenth Amendment.<sup>122</sup>

Finally, in 1977, the Court held in *Carey v. Population Services International* that minors also have a constitutionally protected right to access contraception.<sup>123</sup> In *Carey*, the Court held unconstitutional a New York statute prohibiting the distribution of nonprescription contraceptives to minors under the age of 16.<sup>124</sup> The Court's analysis stated that "the business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices"<sup>125</sup> and that a regulation may only "be validated by a sufficiently compelling state interest."<sup>126</sup> The State argued that the compelling interest served by the prohibition of contraceptives to minors was "the State's policy against promiscuous sexual intercourse among the young."<sup>127</sup> The Court did not find this policy compelling enough to justify the infringement imposed upon minors' rights to contraceptives.<sup>128</sup> While the Court acknowledged that the State has more power to control the conduct of children than adults,<sup>129</sup> the majority held that the right to privacy involving decisions regarding procreation applies to minors as well.<sup>130</sup> The Court further held that since the State is not permitted to impose a blanket prohibition on a minor's choice to end her pregnancy,<sup>131</sup> neither can the State impose a blanket prohibition on distribution of contraceptives to minors.<sup>132</sup> Additionally, the Court found there was "substantial reason" to doubt that limiting access to contraceptives would actually discourage early sexual behavior.<sup>133</sup>

*Carey* found that a blanket prohibition on contraceptives for minors was unconstitutional.<sup>134</sup> If that remains true, it should stand to reason that legislation encouraging public schools not to inform students of the contraception options available to them is also unconstitutional. At the very least, legislation blatantly

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120. *Id.* at 485–86.

121. 405 U.S. 438, 443 (1972).

122. *Id.* at 446–47.

123. 431 U.S. 678, 678–679 (1977).

124. *Id.* at 699.

125. *Id.* at 686.

126. *Id.*

127. *Id.* at 692.

128. *Id.* at 695.

129. *Id.* at 692 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

130. *Id.* at 693.

131. *Id.* (discussing the holding in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976)).

132. *Id.* at 694.

133. *Id.* at 695.

134. *Id.* at 694.

prohibiting schools from teaching about any form of contraception should be unconstitutional under the same rationale as *Carey*.<sup>135</sup> As the Court recognized in *Carey*, this “state interest” of discouraging early sexual activity by limiting access to contraceptives cannot stand as compelling enough to justify regulating such a private area of minors’ lives.<sup>136</sup> Even though sex education statutes do not directly ban minors’ access to things like contraceptives, like the statute in *Carey*, legislation that permits withholding information necessary to protect impressionable minors from conception or STIs should nevertheless be impermissible—it is implemented in the hope that minors will not need to utilize their right to contraceptives because they will only be taught abstinence-only sex education. The effect is essentially comparable: to prevent minors from exercising their right to access contraception—a prevention that constitutes a violation of their constitutional rights.

## 2. Abortion

In 1973, the Supreme Court decided *Roe v. Wade*, granting a woman the right to terminate her pregnancy within the first trimester, free from state regulation.<sup>137</sup> The Court reasoned that, regardless of whether the right to privacy resides in the Bill of Rights or in the concept of liberty within the Fourteenth Amendment, precedent has determined that there is a right to privacy.<sup>138</sup> Furthermore, while a state may regulate issues regarding health, medical standards, and potential life, regulation by the state must be justified by a “compelling state interest” whenever a fundamental right is involved.<sup>139</sup> Although the State did have a compelling interest, the Court permitted only tailored regulation after a certain point in the pregnancy (after the first trimester).<sup>140</sup> This same right was extended to minors three years later in *Planned Parenthood of Central Missouri v. Danforth*.<sup>141</sup> In this case, the Court found a Missouri statute requiring parental consent for a woman under 18 to receive an abortion unconstitutional.<sup>142</sup> The Court extended its logic from *Roe v. Wade*, claiming that within the first trimester, the state cannot regulate a woman’s right to access an abortion, regardless of her age.<sup>143</sup> While this

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135. *Id.* at 693 (“Of particular significance to the decision of this case, the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”).

136. *Id.* at 695.

137. 410 U.S. 113, 164–65 (1973).

138. *Id.* at 153.

139. *Id.* at 155.

140. *Id.* at 164–65. The trimester analysis adopted in *Roe* has since been changed to the “undue burden” test. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992). The “undue burden” test keeps the right recognized by *Roe* in place but laws regulating abortion are invalid if they place an undue burden on women’s right to access abortion services with the “purpose or effect [of] plac[ing] substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.” *Id.*

141. 428 U.S. 52, 74 (1976).

142. *Id.*

143. *Id.* at 75.

opinion avoided a direct analysis of the Fourteenth Amendment, it applied an extension of the right to privacy founded in *Roe* to all women, minors included.<sup>144</sup>

These two cases also support the argument for constitutionally protected accurate and complete sex education. States have an interest in protecting potential life, but only at a certain point in a woman's pregnancy.<sup>145</sup> Prior to that point, the state is not permitted to regulate her access to abortion services.<sup>146</sup> This includes mandating a minor to have parental consent.<sup>147</sup> If all women have a protected right to receive an abortion in the early weeks of pregnancy, legislation prohibiting public schools from discussing or mentioning the option of abortion is an indirect attempt to deny minors that right. If minors are unaware of that option, they will likely not seek it. Whether the state's interest being "protected" by these regulations on abortion information in sex education is protecting potential life<sup>148</sup> or discouraging early sexual behavior<sup>149</sup> is inconsequential; either justification is insufficient. Both state interests have been deemed inadequate<sup>150</sup> to support the regulation of minors ability to utilize rights relating to something so private as "whether to bear or beget a child."<sup>151</sup> To echo the logic posited in *Eisenstadt v. Baird*, "[i]t would be . . . unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child as a punishment for fornication."<sup>152</sup>

### 3. Sexual Autonomy

In 2003, the Court found the Fourteenth Amendment Due Process Clause also protects the right to sexual autonomy.<sup>153</sup> In *Lawrence v. Texas*, the Court held a Texas law criminalizing "deviate sexual intercourse with another individual of the same sex"<sup>154</sup> unconstitutional.<sup>155</sup> The Court cited cases like *Griswold v. Connecticut*,<sup>156</sup> *Eisenstadt v. Baird*,<sup>157</sup> *Carey v. Population Services*,<sup>158</sup> and *Roe v.*

144. *Id.*

145. *See, e.g., Casey*, 505 U.S. at 846 (stating that the state has a legitimate interest in protecting the life of the woman and the life of the fetus that may become a child).

146. *See, e.g., id.* (holding that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion . . .").

147. *Danforth*, 428 U.S. at 74. "Constitutional rights to not mature and come into being magically only when one attains the state-defined age of majority." *Id.* (citing *Bellotti v. Baird*, 443 U.S. 622 (1979)).

148. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (the Court found that, at some point, the state's interest in potential life becomes compelling enough to regulate abortion).

149. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977).

150. *Id.* at 699; *Roe*, 410 U.S. at 154 (this state interest regarding abortion is only inadequate to a certain point in a woman's pregnancy).

151. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

152. *Carey*, 431 U.S. at 695 (quoting *Eisenstadt*, 405 U.S. at 453).

153. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

154. *Id.* at 563 (citing TEX. PENAL CODE ANN. § 21.06(a) (West, Westlaw current through end of 2019 Reg. Sess. of 86th Legis.)).

155. *Id.* at 578–79.

156. *Id.* at 564–65 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

157. *Id.* at 565 (citing *Eisenstadt*, 405 U.S. at 438 (1972)).

158. *Id.* at 566 (citing *Carey v. Population Services Int'l*, 431 U.S. 678 (1977)).

*Wade*<sup>159</sup> to support its holding that, under the Due Process Clause of the Fourteenth Amendment, the government cannot intrude on matters so fundamentally private such as with whom one engages in sexual relations when the individuals are consenting adults.<sup>160</sup>

Thus far, there has been no case before the Court about extending the right prescribed in *Lawrence* to minors. That is most likely because state laws consider minors incapable of providing consent.<sup>161</sup> The purpose of this Note is not to dissect the rationale behind the ages of consent across the states, nor does this Note argue that ages of consent should be lowered or abandoned in order to apply the holding of *Lawrence* to minors. This Note does argue, however, that if *Lawrence* is to be valid law regarding adults, then minors should be taught sex education that reflects that law. Complete or comprehensive sex education includes not just teaching about sex, the potential results of sex, and how to prevent pregnancy or STIs.<sup>162</sup> It also includes teaching about healthy, consenting relationships of all types.<sup>163</sup> Statutes prohibiting or discouraging public schools from teaching sex education addressing relationships other than heterosexual<sup>164</sup> serve no *compelling* state interest. They only serve to deny minors the comfort of knowing that, regardless of their sexual orientation, they are equally protected by the right to privacy. Of course, sex-education statutes prohibiting discussion of any relationships beyond heterosexual are not criminalizing relationships that are not heterosexual. However, they are implying a lack of institutional support of those relationships. Through the eyes of impressionable minors, this lack of support can be detrimental to their understanding of their liberties when it comes to sexual autonomy. Like sex-education legislation regarding contraception and abortion, legislation attempting to reduce or prevent discussions about nonheterosexual relationships is an indirect attempt to reduce the individuals exercising their right to sexual autonomy.

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159. *Id.* at 565 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

160. *Id.* at 578.

161. States generally have their age of consent set at either 16, 17, or 18. *United States Age of Consent*, AGE OF CONSENT, <https://www.ageofconsent.net/states> (last updated 2019). Additionally, many states have a close-in-age exemption (also known as a “Romeo and Juliet Law”) that protects underage couples who engage in consensual sexual activities when the underage individuals are significantly close in age. *Id.* While these laws are an important factor of sex education and promoting the public policy of preventing adolescent sexual activity, the main purpose of these laws is to protect minors from being taken advantage of by individuals significantly older than them.

162. *Supra* notes 51–53 and accompanying text.

163. *Id.* Only half of the states and the District of Columbia statutorily require sex education to discuss how to avoid coercion in sexual relationships. *Sex and HIV Education*, *supra* note 11.

164. Additionally, only 17 states and the District of Columbia address homosexuality or other sexual orientations in the statutes; 11 states are inclusive of other sexual orientations than heterosexuality; 7 of those states have “negative” treatment toward other sexual orientations and prohibit discussion of it. *Id.* Specifically, Oklahoma requires HIV education to claim that homosexual activities are among the behaviors “responsible for contact with the AIDS virus.” *Id.*

While it may seem controversial to require schools to teach accurate and complete sex education, this suggested requirement falls squarely within the realm of privacy the Court has protected. Sex education, if taught at all in public schools, is generally not taught after high school.<sup>165</sup> After this period, individuals generally do not receive sex education again. Presuming this is the only time in a person's life that they will receive sex education, what are the ramifications of providing inaccurate information by only teaching abstinence as a method of "safe sex"? The consequences of poor sex education could negatively impact minors and adolescents well into adulthood. Abstinence-only sex education could result in a woman having to cope with an unwanted pregnancy because she was never taught about contraception or that abortion was an option for her; a couple having more children than they wanted because they were never informed how to avoid pregnancy; or an individual being shamed out of exploring same-sex relationships because they never received positive sex education about same-sex relationships. If individuals have the right to make important life decisions such as how many (if any) children to have,<sup>166</sup> it cannot stand as acceptable to withhold the knowledge they need to exercise that right.

#### *E. The Counterarguments*

The biggest challenge to the argument made in this Note is that the Supreme Court has never recognized education as a fundamental right.<sup>167</sup> In *San Antonio Independent School District v. Rodriguez*, the Court rejected the argument that education should be a fundamental right because it has a particularly close relationship to other rights protected by the Constitution, like freedom of speech.<sup>168</sup> The Court reasoned that while freedom of speech is a protected right, the Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech . . ." <sup>169</sup> The Court went on to say that an important distinction between this case and prior fundamental rights cases was that, in this instance, the law was not denying or diluting a right but was trying to extend public education which, while criticized for its failures, should not be scrutinized as if a fundamental right was at risk.<sup>170</sup> Although this may appear analogous to the argument presented in this Note, there are some important differences.

First, the argument made here is *not* that all public schools should be required to teach sex education. The argument is that *if* a public school elects to teach sex education, then it should be required to provide medically accurate and

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165. See *American Adolescents' Sources of Sexual Health Information*, *supra* note 40 (stating that sex education primarily is taught in high school, compared to younger grade levels).

166. "[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

167. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that the Federal Constitution does not explicitly or implicitly protect education).

168. *Id.* at 35–37.

169. *Id.* at 36.

170. *Id.* at 37–39.

complete sex education.<sup>171</sup> The Court in *Rodriguez* held that, even though it has protected individuals' rights to speak and vote, the Court has never recognized a constitutional authority to guarantee individuals the most effective forms of speech or the most informed voting rights.<sup>172</sup> The case here is similar in that this argument proposes that certain sex-education legislation prevents full access to certain fundamental rights. However, this Note never asserts that sex education in its entirety should be a recognized and protected fundamental right. Even though *Rodriguez* stated that education is not a fundamental right merely because it allows individuals to utilize their fundamental rights fully,<sup>173</sup> the Supreme Court has constitutionally protected the information provided to minors in schools.<sup>174</sup>

In *Board of Education v. Pico*, the Board of Education removed nine books from a high school and junior high library on the basis that the books were "anti-American, anti-Christian, anti-Semitic, and just plain filthy"<sup>175</sup> and that it was "[their] duty, [their] moral obligation, to protect the children in [their] schools from this moral danger as surely as from physical and medical dangers."<sup>176</sup> The Supreme Court determined that although school boards possess broad discretion over the content of the school libraries, that discretion could not "be exercised in a narrowly partisan or political matter."<sup>177</sup> The Court reasoned that when books were removed from library shelves with the intention of deciding "what shall be orthodox in politics, nationalism, religion, or other matters of opinion"<sup>178</sup> the Board had exceeded its constitutional limitations.<sup>179</sup> This case expands the scope of the First Amendment to not only the right to share ideas and knowledge, but also the right to access such ideas and knowledge.<sup>180</sup>

When analyzed from this point of view, it stands to reason that even though we may not enjoy the right to an education to learn about and access our rights, we should enjoy the protected right to *accurate* education. It would be difficult to argue that a public school's decision to not provide any form of sexual education violates a fundamental right because *Rodriguez* does not grant individuals the right to education. However, the provision of inaccurate sex

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171. It could be argued that requiring sex education to be medically accurate would encourage states to simply not require sex education to be taught at all rather than conforming to the new requirements. I would argue that both *Rodriguez*, 411 U.S. 1, and *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982), support the argument that a school could not simply refuse to teach sex education purely based on opposition to new standards.

172. *Rodriguez*, 411 U.S. at 36.

173. *Id.* at 35–36.

174. *See, e.g., Pico*, 457 U.S. at 872 (holding that school boards could not remove books from a school library because the board did not like the ideas in those books).

175. *Id.* at 857.

176. *Id.*

177. *Id.* at 870.

178. *Id.* at 872 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

179. *Id.*

180. *Id.* at 866 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)) ("And we have recognized that 'the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.'").

education can also impact adolescents' future privacy and reproductive rights. Adolescents who are given false or incomplete sex education are denied the knowledge they need to make decisions regarding their right to privacy both as adolescents and as adults. Accurate sex education is arguably something all individuals need to know not just for their health but to exercise their constitutional rights, including the right to have children, the right to access contraceptive services, and the right to sexual autonomy. Even without a recognized right to education, the Supreme Court has indicated the importance of providing complete information to minors, regardless of the public school's moral, political, or religious opinions. There is no reason that logic should not apply to sex education as well.

Additionally, some may argue that because children enjoy limited constitutional rights,<sup>181</sup> they do not enjoy the same right to privacy that is recognized in the cases discussed above.<sup>182</sup> While it is true the Supreme Court has acknowledged reasons for children having different constitutionally protected rights than adults,<sup>183</sup> those reasons also support the argument that minors should enjoy a constitutional right to receive accurate and complete sex education when their public school chooses to teach sex education.

The first reason children are deemed to have different constitutional rights is because of "the peculiar vulnerability of children."<sup>184</sup> Teaching comprehensive sex education acknowledges the vulnerability of minors and combats it by providing them the tools they need to be safe. It is arguably more logical to provide the most vulnerable individuals with the knowledge and resources they need to be safe than to keep them ignorant of the spectrum of ideas and perspectives.

The Court's second reason for not equating the rights of children with the rights of adults is because children are unable "to make critical decisions in an informed mature manner."<sup>185</sup> Children, especially adolescents, are known to behave impulsively and (to adults) somewhat irrationally.<sup>186</sup> Those against comprehensive sex education may argue that children cannot make informed, mature decisions and therefore, should not be given complete sex education. Instead, sex education should be abstinence-only. However, this serves to confuse the issue and the purpose of sex education. The Supreme Court has stated that

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181. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). The Court recognized three reasons to justify why children's constitutional rights are not equal to those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.*

182. See *supra* Section II.D.

183. See generally *Bellotti*, 443 U.S. at 622.

184. *Id.* at 634.

185. *Id.*

186. Julia Scott, *Why Is the Teenage Brain So Unpredictable? A Neurobiologist Explains*, PBS (May 24, 2017), <https://www.pbs.org/newshour/health/teenage-brain-unpredictable-neurobiologist-explains>. Because the frontal lobe of the adolescent brain is not fully developed, they are less capable of judging the risks and rewards of situations and actions; they act more impulsively than adults do. *Id.*

when a child does not have the “full capacity” to make an individual choice, the “State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.”<sup>187</sup> However, deciding what form of sex education to teach is not tantamount to asking children to make a decision. For example, in *Bellotti v. Baird*, the question was whether a statute could require a minor to obtain parental consent or a judicial order before being able to access abortion services.<sup>188</sup> In *Prince v. Massachusetts*, the Court evaluated a statute prohibiting children below a certain age from selling merchandise in any street or public place.<sup>189</sup> Unlike *Bellotti* and *Prince*,<sup>190</sup> sex education does not involve a child making a decision to do something. Sex education is simply education. Comprehensive sex education is not encouraging adolescents to have sex. In fact, it is acknowledging the same fact that the Court did in *Bellotti*: that adolescents are impulsive and will make poor decisions because of their lesser cognitive abilities at that age.<sup>191</sup> Comprehensive sex education realizes this shortcoming and provides youth with the knowledge necessary to make the most educated and informed decisions about sex that they can before it is too late. Indeed, if adolescents cannot make mature, well-reasoned decisions, one could suggest that *Bellotti* would find it unconstitutional to intentionally provide youth with incomplete and inaccurate sex education. The reasoning behind *Bellotti* (and really all cases limiting the rights of minors) is to protect youth, accounting for their vulnerability. If we are to uphold that reasoning today, we should be providing youth in schools with complete and accurate sex education. Intentionally providing them incomplete and inaccurate information would be to take advantage of their vulnerability, the very thing the Court has sought to prevent.

Finally, the Court in *Bellotti* stated that children have different rights than adults because the Court must recognize “the guiding role of parents in the upbringing of their children.”<sup>192</sup> While this is true, this reason is insufficient to justify the failure to provide youth with complete and accurate sex education. Parents may still excuse their children from sex education courses if they so desire,<sup>193</sup> or they may send their children to a private school that is not mandated to provide accurate or complete sex education. Regardless of what parents choose to

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187. *Ginsberg v. New York*, 390 U.S. 629, 650 (1968) (Stewart, J., concurring).

188. 443 U.S. at 622.

189. 321 U.S. 158, 160–164 (1944).

190. *Bellotti*, 443 U.S. at 634; *Prince*, 321 U.S. at 170.

191. Scott, *supra* note 186.

192. *Bellotti*, 443 U.S. at 637.

193. As mentioned earlier, parental waivers for children to get out of sex education classes are beyond the scope of this Note. Even if comprehensive sex education became mandated in public schools and parental waivers were removed from statutes, parents could still choose to keep their children home on the day(s) sex education was taught. Parents would still retain their rights even if schools were mandated to teach comprehensive sex education.

do, the focus of this Note is to argue for statutory requirements for school curricula in a manner which would not impact parental rights.<sup>194</sup>

Minors are, of course, not adults. However, one day, the youth in public schools listening to sex education will be adults who will make decisions pertaining to sex. How can one argue that adults have the right to make decisions regarding sex without intrusion from the state and yet not adequately prepare minors for the time when they may have to make those very same decisions? Schools do their best to prepare students for adulthood in various ways: they teach them how to read, how to write, how to create a resume, how to write an effective personal statement, and how to think critically. Some of the most important decisions students will one day make are about sex: what romantic relationships they want in life, who they want to have relationships with, if they want children, and more. The Supreme Court has recognized that adults (and sometimes minors) have the right to make those decisions without state intrusion.<sup>195</sup> Enacting legislation with the intended effect, even if not explicit, of dissuading individuals from exercising certain fundamental rights must be considered unconstitutional. If such legislation is constitutional, then the fundamental rights we value may not be as strong as we hope.

### III. THE PROBABILITY OF MEDICALLY ACCURATE AND COMPLETE SEX EDUCATION BECOMING A FUNDAMENTAL RIGHT

The right to complete sex education, like all unenumerated rights, is difficult to argue for. Whether comprehensive sex education could be a recognized fundamental right under the Fourteenth Amendment depends on whether the issue ever comes before the Supreme Court. Presently, this does not appear likely. Part of why this specific argument would be difficult to bring to the Court is because it would require an individual to fulfill the standing requirements.<sup>196</sup> It would not be

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194. The Court's purpose in granting parents the right to raise their children as they see fit, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), is to ensure that parents uphold their "high duty, to recognize and prepare [them] for additional obligations." *Id.* at 535. If that is the duty of parents, it seems that making sure their children fully understand sex education and all that that encompasses is part of raising a "mature, socially responsible [citizen]." *Bellotti*, 443 U.S. at 638.

195. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (extending the constitutional right to marry to same-sex couples); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that consenting adults are entitled to the right to engage in private, sexual conduct); *Bellotti*, 443 U.S. at 643 (stating parents cannot have veto power over an unmarried minor's decision to receive an abortion); *Carey v. Population Services Int'l*, 431 U.S. 678, 693–94 (1977) (holding minors also have the right to access contraceptives); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating a woman's decision whether or not to terminate a pregnancy falls within the right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (stating marriage is within the zone of privacy created by the Constitution and married couples cannot be prohibited from accessing contraception).

196. CHEMERINSKY, *supra* note 75, at 45. To establish standing at the federal level, (1) the plaintiff must have suffered an "injury in fact," that is, it is of a legally protected interest that is concrete and particularized, and actual or imminent; (2) there must

difficult for an individual to show an injury that satisfies the requirements of standing.<sup>197</sup> a minor with an STI, a minor who is likely to get pregnant or get an STI,<sup>198</sup> or a minor who is pregnant might all fit that criterion.<sup>199</sup> Were injury alone the only requirement needed to meet standing, standing would not be such an issue. However, plaintiffs with the alleged injuries would also have to show the injuries are traceable to the defendants' conduct,<sup>200</sup> and that they are redressable by the Court.<sup>201</sup> The argument for whether these hypothetical plaintiffs fulfill the standing requirements could go either way. On one hand, the Court has previously found standing for plaintiffs alleging injuries similar to those that would occur in this hypothetical case.<sup>202</sup> Additionally, the argument could easily be made that the statutorily supported inaccurate and incomplete sex education was the direct cause of the injury alleged,<sup>203</sup> and therefore, the Court could redress the plaintiff by requiring the sex education taught in public schools to be medically accurate and complete.<sup>204</sup> On the other hand, the opposite argument could be made. If such an injury was incurred, the Court could find that the sex education provided did not directly cause the injury. Depending on the facts of the hypothetical case, the Court may hold that the minors who engaged in sexual activity caused the harm or

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be a causal connection between the injury and the conduct at issue before the court; and (3) it must be likely that a favorable decision by the court will redress the injury. *Id.*

197. An alleged injury to satisfy the standing requirements must be "distinct and palpable," not just "hypothetical." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

198. The injury does not necessarily have to have occurred when the case is brought, but it must be more than mere speculation that the injury might occur. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

199. In *Bellotti*, one of the plaintiffs was "Mary Moe," a pregnant minor who lived with her parents and wanted to get an abortion. Mary was deemed by the Court to have standing to represent "the class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent [to abortion], and who do not wish to involve their parents." *Bellotti*, 443 U.S. at 626.

200. *Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 77 (1978) (holding the Act that allowed for a nuclear reactor to be built met the causation requirement because but-for the reactor being built, the plaintiffs would not be at risk for the injuries they claimed).

201. *Warth v. Seldin*, 422 U.S. 490, 504 (1975). Causation and redressability are intrinsically bound up within each other; often, if an individual's claim is not redressable, it is because the injury was not directly caused by the defendant's conduct. *See id.* at 504 (holding that invalidating zoning ordinances may not allow the plaintiffs to live in the desired neighborhood because they may still not have the money to live there regardless).

202. *Bellotti*, 443 U.S. at 626 (Mary Moe was granted standing as a pregnant minor seeking an abortion); *Roe v. Wade*, 410 U.S. 113 (1973) (finding that although the plaintiff was no longer pregnant the chance that she would become pregnant again was great enough that she was deemed to have standing).

203. For example, if the plaintiff had an STI, the plaintiff could argue that but-for the inadequate and inaccurate sex education she/he received in public school, the plaintiff could have avoided contracting an STI with contraceptives.

204. Assuming the same hypothetical in the above footnote, the chances of that plaintiff contracting another STI, or any of the individuals of the class that plaintiff represents contracting another STI, would be significantly lower because they would be informed of how to avoid STIs and unwanted pregnancies.

that the parents who did not inform the minors are also culpable. Without a potential case facing the Court and a fact pattern to analyze, it is difficult to predict whether any hypothetical plaintiff bringing this claim would have standing.

Additionally, even if a case such as this did come before the Court, it would most likely be analyzed under the rational basis test.<sup>205</sup> If no fundamental right is at issue when a law is challenged, the law will survive the rational basis test if the law is rationally related to any legitimate government purpose.<sup>206</sup> Rational basis places the burden of proof on the complainant and grants the state broad discretion.<sup>207</sup> Essentially, rational basis favors legislation over judicial interference which makes it very difficult for the complainant to show that the state has overstepped its power. As difficult as succeeding against a state in rational basis territory or elevating the level of scrutiny used may be, it is not impossible.<sup>208</sup> The data discussed in this Note and in other sources indicates that abstinence-only education is ineffective and is not serving an important state interest.<sup>209</sup> It may be a difficult argument, but evidence supports the argument that abstinence-only sex-education legislation, at least, does not serve a rational state interest.<sup>210</sup> Even if a plaintiff brought a case that presented this issue to the Court and failed under the rational basis test, the plaintiff will have told an important narrative. Every unenumerated fundamental right we recognize today began with failure at some point, until the narrative softened the Court enough to realize that the issue can no longer go unaddressed.

The likelihood of this Note's argument being brought before the Court may not be strong, but that is not to say there is no hope for the issue of sex education. In 2015, a school district in California was found to have inadequate sex education curricula that violated California state law.<sup>211</sup> While only decided in Fresno County Superior Court in California, this case upheld California's 2003 law requiring that sex education in public schools be medically accurate, comprehensive, science-based, and bias-free.<sup>212</sup> The fact that sex-education statutes as thorough and effective as the California Healthy Young Act are being upheld at any court level is an encouraging sign in the debate on sex education.

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205. This is the lowest level of scrutiny and therefore, the government's purpose does not have to be important, just "something that the government may legitimately do." CHEMERINSKY, *supra* note 75, at 728.

206. *Id.*

207. *Id.*

208. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (determining that a married couple's access to contraception lay within the zone of privacy of the Fourteenth Amendment, such that a law infringing on access to contraception was analyzed with strict scrutiny and was found unconstitutional).

209. *See supra* Section II.B.

210. *Id.* Even if the state's interest is in the health and safety of the minors in that state, the statistics show abstinence-only education is ineffective in reducing the number of STIs among adolescents and young adults. *Id.*

211. *American Academy of Pediatrics v. Clovis USD (Comprehensive Sex Education)*, ACLU NORTHERN CAL. (May 4, 2015), <https://www.aclunc.org/our-work/legal-docket/american-academy-pediatrics-v-clovis-usd-comprehensive-sex-education>.

212. *Id.*

Unfortunately, the current Administration has ignored evidence-based sex-education approaches and reverted to abstinence-only approaches.<sup>213</sup> However, states are still pushing back and arguing for upholding federal funding for comprehensive sex education. For example, a Baltimore judge ordered the current Administration to restore funding to teen pregnancy prevention programs that had been summarily cut in 2017.<sup>214</sup> The Federal Health Department justified their funding cut by claiming Baltimore's Teen Pregnancy Prevention Program was not working. However, Baltimore health officials reported data showing that such programs resulted in a 61% drop in teen birth rates in Baltimore between 2000 and 2016.<sup>215</sup> The data strongly supports the contention comprehensive sex education is more effective than abstinence-only approaches.<sup>216</sup> It is critical that funding be maintained against false claims of comprehensive sex education's ineffectiveness. Such an imperative goal can be accomplished by courts supporting state programs that provide comprehensive sex education.

Additionally, Arizona just repealed the State's previous legislation that effectively prevented LGBTQ students from being taught medically accurate sex education.<sup>217</sup> The repeal of this part of Arizona's sex-education legislation will now help remove incomplete and incorrect information being taught in sex education courses throughout Arizona public schools. This legislative action also provides more support for all states to adopt a comprehensive approach to sex education. While the process of appealing to state legislatures may be difficult and sometimes prove ineffective, it is a crucial part of the argument for comprehensive sex education that cannot be forgotten.

### CONCLUSION

Throughout U.S. history, the Supreme Court has interpreted the Constitution to expand the rights deemed fundamental to the well-being of those in this country.<sup>218</sup> These rights have been expanded well beyond what the Framers of the Constitution ever imagined. Generally, it appears that the rights protected by the Constitution have paralleled the evolving culture and values of the United

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213. Sarah Shapiro, *Sex Ed – We're Doing It Wrong*, INSIDE SOURCES: EDUC. (May 10, 2018), <https://www.insidesources.com/sex-ed-wrong>. In February of 2018, the Title V abstinence-only program was renewed for two more years at \$75 million annually under the new name of "sexual risk avoidance education." Jessica Boyer, *New Name, Same Harm: Rebranding of Federal Abstinence-Only Programs*, GUTTMACHER INST. (Feb. 28, 2018), <https://www.guttmacher.org/gpr/2018/02/new-name-same-harm-rebranding-federal-abstinence-only-programs>.

214. Ian Duncan, *Judge Orders Trump Administration to Restore \$5M in Funding to Baltimore Teen Pregnancy Prevention Programs*, BALT. SUN (Apr. 26, 2018, 1:20 PM), <https://www.baltimoresun.com/health/bs-md-ci-teen-pregnancy-ruling-20180426-story.html>.

215. *Id.*

216. *See, e.g.*, UNITED NATIONS POPULATION FUND (UNFPA), *supra* note 54.

217. *Victory! Arizona Repeals Anti-LGBTQ Curriculum Law After Filing of Lawsuit*, LAMBDA LEGAL (Apr. 11, 2019), [https://www.lambdalegal.org/blog/20190411\\_victory-az-repeals-anti-lgbtq-curriculum-law](https://www.lambdalegal.org/blog/20190411_victory-az-repeals-anti-lgbtq-curriculum-law).

218. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

States. Yet there are many obstacles that prevent individuals from accessing the rights that are deemed fundamental. Educators are permitted (and in some instances, even mandated or encouraged) to teach incomplete and medically inaccurate sex education by state law. Though they have been granted the right to decide whether “to bear or beget a child,”<sup>219</sup> thousands of female minors every year give birth to children,<sup>220</sup> often without being taught how to utilize contraception or how to access abortion services—essential knowledge required to exercise that right.<sup>221</sup> States pass legislation prohibiting the discussion of how to use a condom,<sup>222</sup> claiming it is for the health and safety of its citizens,<sup>223</sup> yet minors and young adults make up half of new STI’s in this country every year.<sup>224</sup> Most states do not require comprehensive sex education, including discussion of healthy, nonabusive relationships,<sup>225</sup> yet intimate-partner violence is the predominant cause of injury in women ages 15 to 44.<sup>226</sup> States exist, in part, to protect their citizens. Yet the youth in this country, the most vulnerable individuals, are often harmed by these inaccurate and inadequate laws governing sex education. What are minors to do when the very place they go to learn accurate information is providing them information about sex that is incomplete or downright false? History has shown that when the legislature is unresponsive to the needs of individuals, those individuals can make their case to the judiciary.

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219. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

220. In 2016, there were 20.3 births for every 1,000 adolescent females ages 15–19, making up 5.3% of all births in the U.S. that year. *Trends in Teen Pregnancy and Childbearing*, *supra* note 33.

221. See, e.g., ARIZ. REV. STAT. ANN. § 15-115(B) (Westlaw current through legislation effective Mar. 27, 2020 of Second Reg. Sess. of the Fifty-Fourth Legis.) (to support “the state’s strong interest in promoting childbirth and adoption over elective abortion,” no public-school district or charter school may allow a presentation that does not give “preference, encouragement and support” to childbirth and adoption). Only 20 states and D.C. require schools that teach sex education to include instruction about contraception. *Sex and HIV Education*, *supra* note 11. Additionally, even if adolescents are taught about contraception options, some adolescents (18% of teens aged 15–17) will still not seek proper contraceptive services for fear their parents will find out or because they are unaware female contraceptive methods are covered by health insurance under federal law. *Adolescent Sexual & Reproductive Health*, *supra* note 7.

222. MISS. CODE ANN. § 37-13-171(2)(d) (West, Westlaw current with laws from 2020 Reg. Sess.).

223. See, e.g., Muller v. Oregon, 208 U.S. 412 (1908); see also Roe v. Wade, 410 U.S. 113, 153–54 (1973).

224. *Adolescent Sexual & Reproductive Health*, *supra* note 7 (individuals between 15 and 24 years old make up half of the 20 million new STI cases in the United States every year).

225. Only 35 states and the District of Columbia require sex education to include information about healthy romantic and sexual relationships. *Sex and HIV Education*, *supra* note 11. Additionally, 38 states and the District of Columbia require schools to teach students about the prevention of teen dating violence and sexual violence, but only 8 states require schools to teach the concept of consent to sexual activity. *Id.*

226. Daniel Brookoff et al., *Characteristics of Participants in Domestic Violence: Assessment at the Scene of Domestic Assault*, 277 J. AM. MED. ASS’N 1336, 1369–73 (1997).

Members of the Supreme Court have said that “[l]iberty finds no refuge in a jurisprudence of doubt.”<sup>227</sup> If there is a doubt that minors have the right to learn about their reproductive rights through comprehensive sex education, then we must doubt the strength and protection of those fundamental rights in their entirety.

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227. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (O'Connor, J., Kennedy, J., Souter, J., plurality opinion).