

# Sex Education After *Dobbs*: A Case for Comprehensive Sex Education

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## ABSTRACT

*Abstinence-only sex education, a curriculum that teaches abstinence is the most effective form of birth control, is the dominant and most funded sex education in the United States. This is despite research that shows it is not effective, leaves students uninformed, and negatively reinforces gender stereotypes. In comparison, research suggests that comprehensive sex education, especially when evidence-based and culturally responsive, does encourage safe sex and has the potential to decrease the number of unwanted pregnancies and sexually transmitted infections.*

*The decision in *Dobbs v. Jackson Women’s Health Organization* overturned *Roe v. Wade* and the federal right to abortion. By leaving abortion regulation up to the states, *Dobbs* harms students with unwanted pregnancies. However, *Dobbs* is also predicted to harm students in another way: as a signal of incoming threats to the little comprehensive sex education that does exist in schools. In 2022, since *Dobbs*, there are already calls from Republican lawmakers at the state level to weaken or ban sex education.*

*In response, this note argues that implementing comprehensive sex education at the school district level is one way to address the harms caused by *Dobbs*. Especially inspired by the outpouring of student calls for comprehensive sex education after *Dobbs*, school district leaders can implement comprehensive sex education programs and, if done correctly, can defend these programs against legal challenge.*

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DOI: <https://doi.org/10.15779/Z38PR7MW0S>

†. J.D. 2023, University of California, Berkeley School of Law. The views and opinions expressed in this article are solely those of the author. This article was prepared in Fall 2022 for an Education Law and Policy Seminar under the guidance of Professor Jonathan Glater. Thank you to Professor Glater and my classmates in the seminar for their valuable feedback and edits, especially Jocelyn Gomez and Ridhwana Haxhillari. Thank you also to the members of the Berkeley Journal of Gender, Law & Justice for their skilled editorial assistance and the past and current leaders and members of Berkeley’s Reproductive Justice Project for all the work you do for reproductive justice organizations.

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## INTRODUCTION

The debate over sex education in public schools is storied and illuminates sharp religious, moral, and political divisions. Debates in the early 1980s over sex education were described as “touch[ing] upon the deepest religious and philosophical rifts in post-World War II America.”<sup>1</sup> The battle is over two main forms of sex education – abstinence-only and comprehensive. Abstinence-only sex education teaches that abstinence is the “only completely effective method of birth control.”<sup>2</sup> This education is preferred by conservatives.<sup>3</sup> In comparison, comprehensive sex education is intended to be “age-appropriate, medically-accurate, evidence-based, and culturally responsive.”<sup>4</sup> A more liberal view, the comprehensive model includes discussions of “birth control, healthy relationships, consent, and sexual orientation.”<sup>5</sup> As of August 2023, only twenty-nine states and the District of Columbia require sex education curricula, sixteen of which have

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1. JONATHAN ZIMMERMAN, *WHOSE AMERICA? CULTURE WARS IN THE PUBLIC Schools* 172 (Univ. of Chi. Press 2nd ed. 2022) (2002).
  2. Patrick Malone & Monica Rodriguez, *Comprehensive Sex Education vs. Abstinence-Only-Until-Marriage Programs*, A.B.A. (Apr. 1, 2011), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_spring2011/comprehensive\\_sex\\_education\\_vs\\_abstinence\\_only\\_until\\_marriage\\_programs/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/comprehensive_sex_education_vs_abstinence_only_until_marriage_programs/).
  3. Leslie Kantor, Nicole Levitz & Amelia Holstrom, *Support for sex education and teenage pregnancy prevention programmes in the USA: results from a national survey of likely voters*, 20 *SEX EDUC.* 239, 239 (2019).
  4. *Sex Ed State Law and Policy Chart*, SEICUS (2022), <https://siecus.org/wp-content/uploads/2021/09/2022-Sex-Ed-State-Law-and-Policy-Chart.pdf> [<https://perma.cc/J7TR-6P7A>] [hereinafter *SEICUS Chart*].
  5. Kantor et al., *supra* note 3, at 239.

strict abstinence-only programs and five of which require comprehensive sex education.<sup>6</sup> The remaining states do not have formal sex education requirements.<sup>7</sup>

Like the debate about sex education, the abortion debate demonstrates deep religious, moral, and political divisions.<sup>8</sup> Those who believe abortion should be illegal tend to identify as conservative and religious.<sup>9</sup> Those who identify as Democrats are comparatively more likely to agree that “abortion should be legal in all or most cases.”<sup>10</sup>

In 1973, the Supreme Court recognized the right to abortion,<sup>11</sup> but in 2022 the Supreme Court eliminated this federal right in *Dobbs v. Jackson Women’s Health Organization*. As of February 2024, twenty-one states either significantly limit or prohibit abortion.<sup>12</sup> and half of these states are states without sex education mandates in public schools.<sup>13</sup> In sex education about abortion, seven states either prohibit discussion of abortion or require a discussion that negatively frames abortion.<sup>14</sup>

Of course, these divisions are not only limited to sex education and abortion. Recent presidential elections and a pandemic<sup>15</sup> demonstrate that these political and moral divisions are not merely theoretical policy debates but are consequential to our mental, and to some extent physical, health.<sup>16</sup> As demonstrated above, these

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6. *The SIECUS State Profiles*, SEXUALITY INFO. & EDUC. COUNCIL U.S. [SIECUS] 3 (2023), <https://siecus.org/state-profiles/> [<https://perma.cc/CJX4-6CVH>].
  7. *Id.*
  8. See Dahlia Lithwick, *Foreword: Roe v. Wade at Forty*, 74 OHIO STATE L.J. 5, 5–6 (2013) (discussing the significance and controversiality of *Roe*).
  9. Michael Lipka, *A closer look at Republicans who favor legal abortion and Democrats who oppose it*, PEW RSCH. CTR. (June 17, 2022), <https://www.pewresearch.org/short-reads/2022/06/17/a-closer-look-at-republicans-who-favor-legal-abortion-and-democrats-who-oppose-it/> [<https://perma.cc/WJ98-D992>].
  10. Hannah Hartig, *About six-in-ten Americans say abortion should be legal in all or most cases*, PEW RSCH. CTR. (June 13, 2022), <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/> [<https://perma.cc/8BS9-SL3T>].
  11. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (overruled by *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2284 (2022)).
  12. *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Jan. 8, 2024), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html#:~:text=Twenty%2Done%20states%20ban%20abortion,overturned%20the%20decision%20last%20year> [<https://perma.cc/AR9H-CPW6>]; see also *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. (2022), <https://reproductiverights.org/maps/abortion-laws-by-state/> [<https://perma.cc/P6BX-LRCW>].
  13. Riley Farrell, *As states ban abortion, a new spotlight on an old battle over sex education*, RELIGION NEWS SERV. (July 14, 2022), <https://religionnews.com/2022/07/14/as-states-ban-abortion-christian-leaders-assess-abstinence-sex-education/> [<https://perma.cc/53D6-VZAG>].
  14. *Sex Ed State Law and Policy Chart*, *supra* note 4, at 17–18.
  15. Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/short-reads/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/> [<https://perma.cc/EMS6-GTJ9>].
  16. Sameera S. Nayak, Timothy Fraser, Costas Panagopoulous, Daniel P. Aldrich & Daniel Kim, *Is divisive politics making Americans sick? Associations of perceived partisan polarization with physical and mental health outcomes among adults in the United States*, 284 SOC. SCI. & MED. 113976, 113980 (2021).

consequential debates are also reflected and replicated in the American education system. Within the greater American “culture wars,” public school classrooms are on the front lines.<sup>17</sup> This is not new,<sup>18</sup> but within the modern context means that school board decisions about public school curriculums are regularly in the news, including debates over critical race theory,<sup>19</sup> gender identity,<sup>20</sup> and of course, sex education.<sup>21</sup>

Sex education curriculum debates at their core are battles to control how younger generations learn and subsequently develop their own opinions about sex and reproductive rights. Control over this development is controversial in part because sex is “so intricately connected to American assumptions about gender, race, and class.”<sup>22</sup> In 2022, the battle over sex education parallels the cultural battle to police sex in the United States’ public schools.

This note argues that *Dobbs* harms youth by limiting reproductive rights and signaling a threat to what little comprehensive sex education exists. In response, this note argues that implementing comprehensive sex education at the school district level is one way to help mitigate some of these harms.

Part I presents a brief history of sex education and abortion in the United States and argues that 1) they are connected within the greater American regulation of sex and 2) support for anti-abortion policies and abstinence-only education tend to coincide. Part II presents research about the efficacy of sex education and explains why abstinence-only education is still dominant in the United States even though research shows comprehensive sex education is more effective at changing youth behavior. Part III explains how *Dobbs* threatens the little comprehensive sex education that does exist, citing to academic scholars who share this prediction and providing examples of what states and school districts have done following *Dobbs*. Lastly, Part IV synthesizes these parts to argue how *Dobbs* harms students, how comprehensive sex education can address these harms, and provides examples of how these programs can withstand legal

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17. See generally ZIMMERMAN, *supra* note 1 (describing how culture wars in America show up in classrooms, including discussions of social studies curriculum, religious education, and sex education). Zimmerman’s book was updated in 2022 to include discussions of critical race theory, the 1619 project, mask mandates, and the impact of the Trump administration.

18. See *id.* at 2–3 (describing twentieth century culture wars in education).

19. See, e.g., Roxana Kopetman, *CRT, sex-ed among hot topics in Yorba Linda-Placentia school board races*, ORANGE COUNTY REG. (Oct. 29, 2022), <https://www.ocregister.com/2022/10/29/crt-sex-ed-among-hot-topics-in-yorba-linda-placentia-school-board-races/> (describing a school board election debate over a critical race theory ban).

20. See, e.g., Laurel Wamsley, *What’s in the so-called Don’t Say Gay bill that could impact the whole country*, NPR (Oct. 21, 2022), <https://www.npr.org/2022/10/21/1130297123/national-dont-say-gay-stop-children-sexualization-bill> [<https://perma.cc/6EP8-4LP2>] (describing a bill in Florida that bans instruction on gender identity and sexual orientation). This note recognizes that the debates over gender identity and sex education curriculum are often intertwined. However, in order to focus this note on abortion and sex education, this note attempts to look at sex education curriculums about reproductive health, contraceptives, and STIs separate from gender identity educations.

21. See, e.g., Kopetman, *supra* note 19.

22. COURTNEY Q. SHAH, *SEX ED, SEGREGATED: THE QUEST FOR SEXUAL KNOWLEDGE IN PROGRESSIVE-ERA AMERICA* 146 (2015).

challenge.

In making these arguments, this note recognizes that sex education can only do so much. Comprehensive sex education cannot replace access to abortion – “[w]e can offer better sex education, access to contraception, availability of Plan B, resources for adoption, and support for mothers and their children after birth and it will never eliminate circumstances where abortions become necessary.”<sup>23</sup> Despite these limitations, comprehensive sex education is one tool that schools can use to arm youth with medically accurate information. With this information, youth can make informed decisions about their bodies, especially recognizing that in some states, youth have little to no reproductive autonomy after *Dobbs*.

## I. THE SEX EDUCATION & ABORTION DEBATE

The goal of Part I is to illuminate how the sex education and abortion debates are related, supporting the claim presented in Part IV that *Dobbs* harms students. Part I.A1 describes how sex education ended up in public school curriculums, and Part I.A2 describes the debate over what type of sex education should be taught in schools. Part I.B gives a brief history of abortion. Part I.C connects the two histories and argues that support for anti-abortion policies tends to coincide with support for abstinence-only education.

### A. Brief History of Sex Education

#### 1. Should sex education be taught in schools?

Before the debate about what *type* of sex education should be taught in schools came the debate over *whether* sex education should be taught in schools.

In the early twentieth century, in response to declining birth rates among White Anglo- Saxon families and increasing divorce rates,<sup>24</sup> calls for “social hygiene” and “moral purity” guided sexuality education to the public.<sup>25</sup> The explicit goals were to “prevent sexually transmitted infections [STIs], stamp out masturbation and prostitution, and limit sexual expression to marriage.”<sup>26</sup> Beneath the surface, however, the “social hygiene” movement was born from and tied to eugenics movement – “[t]hose who originally pushed the importance of educating

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23. Robert Gehrke, *Goodbye Roe v. Wade. Hello, minority rule*, writes Robert Gehrke, SALT LAKE TRIB. (June 25, 2022). <https://www.sltrib.com/opinion/2022/06/25/goodbye-roe-v-wade-hello/> [<https://perma.cc/VX64-6MZW>].

24. *History of Sex Education*, SIECUS 9 (2021), [https://siecus.org/wp-content/uploads/2021/03/2021-SIECUS-History-of-Sex-Education\\_Final.pdf](https://siecus.org/wp-content/uploads/2021/03/2021-SIECUS-History-of-Sex-Education_Final.pdf) [[perma.cc/H7N3-ZWDF](https://perma.cc/H7N3-ZWDF)].

25. *History of Sex Education in the U.S.*, PLANNED PARENTHOOD 1 (Nov. 2016), [https://www.plannedparenthood.org/uploads/filer\\_public/da/67/da67fd5d-631d-438a-85e8-a446d90fd1e3/20170209\\_sexed\\_d04\\_1.pdf](https://www.plannedparenthood.org/uploads/filer_public/da/67/da67fd5d-631d-438a-85e8-a446d90fd1e3/20170209_sexed_d04_1.pdf) [<https://perma.cc/5JDA-5952>]; John P. Elia, *School-Based Sexuality Education: A Century of Sexual and Social Control*, in 1 *SEXUALITY EDUCATION: PAST PRESENT AND FUTURE*, 33–57 (Elizabeth Schroder & Judy Kuriansky eds., 2009).

26. *History of Sex Education in the U.S.*, PLANNED PARENTHOOD, *supra* note 25, at 1.

the public about sexuality did so out of a fear that their comfortable, white, middle-class way of living was being threatened by the loosening of sexual morals.”<sup>27</sup>

In 1913, Chicago public schools were the first to implement formal sex education in schools with “personal purity” talks.<sup>28</sup> However, by the next year, the school board ended the program after facing backlash from community members, including Catholic leaders.<sup>29</sup> Efforts pivoted to focus on education in community groups, including the YMCA and Boy Scouts, and were primarily focused on educating boys and young men.<sup>30</sup>

Shortly thereafter, the federal government passed the Chamberlain-Khan Act. Partially in response to rising STI rates during World War I, the Act “provided \$4 million dollars during the 1919-20 school year to train teachers about STIs, so they could then train high school students.”<sup>31</sup> The first federal funding of sex education was therefore not part of a movement to educate students about their bodies but was instead a response to what was seen as a public health crisis.<sup>32</sup>

Mirroring the social changes that occurred between the 1920s and 1960s, greater efforts were made to implement sex education in public schools.<sup>33</sup> “Schools were increasingly seen as arenas for social activism.”<sup>34</sup> In the 1930s, the Department of Education began to publish sex education materials and train educators.<sup>35</sup> In 1964, Dr. Mary Calderone, the medical director for Planned Parenthood Federation of America, founded the Sexuality Information and Education Council of the United States (SIECUS).<sup>36</sup> Although Dr. Calderone’s focus was not only sex education in schools, SIECUS was eventually “inundated with requests from schools for help with their sex education.”<sup>37</sup>

By the 1980s, the popular consensus was that sex education should be taught in schools.<sup>38</sup> New Jersey became the first state to require sex education, as

27. *History of Sex Education*, SIECUS, *supra* note 24, at 6. *See also* SHAH, *supra* note 23, at 3. The eugenics movement was based on a white supremacist “political ideology designed to sculpt societies through biological methods of population control” and aimed to reduce the number of “undesirable” people, particularly through forced sterilization. Adam Rutherford, *A cautionary history of eugenics*, 37 *SCIENCE* 1419, 1419 (2021).

28. *History of Sex Education*, SIECUS, *supra* note 24, at 14.

29. *Id.*

30. *Id.*

31. *Id.* at 18. The Chamberlain-Khan Act also created the Division of Venereal Diseases in the Public Health Service.

32. See Valerie J. Huber & Michael W. Firmin, *A History of Sex Education in the United States since 1900*, 23 *INT’L J. EDUC. REFORM* 25, 29–30 (2014), for a discussion of “Government Involvement in Social Issues.”

33. Huber & Firmin, *supra* note 32, at 32–36.

34. *Id.* at 30.

35. Johannah Cornblatt, *A Brief History of Sex Ed in America*, *NEWSWEEK* (Oct. 27, 2009), <https://www.newsweek.com/brief-history-sex-ed-america-81001> [<https://perma.cc/A7LQ-QANW>].

36. *History of Sex Education in the U.S.*, *PLANNED PARENTHOOD*, *supra* note 25, at 2.

37. *History of Sex Education*, SIECUS, *supra* note 24, at 27. SIECUS and Dr. Calderone reached out to education leaders during the early years of SIECUS. *Id.* at 26.

38. Leslie M. Kantor, John S. Santelli, Julian Teitler & Randall Balmer, *Abstinence-Only Policies and Programs: An Overview*, 5 *SEXUALITY RSCH. & SOC. POL’Y* 7 (2008).

opposed to just health education, in public schools,<sup>39</sup> followed by Kentucky, Maryland, and the District of Columbia.<sup>40</sup> The AIDS epidemic contributed, in part, to this shift.<sup>41</sup> In 1986, after receiving no response from the Reagan administration, the Congressional Select Committee on Children, Youth, and Families declared that “education is the only tool we have to prevent the spread of this deadly disease.”<sup>42</sup> The Committee also recognized that “issuing advice on moral behavior by [itself is] painfully inadequate.”<sup>43</sup> Just as in the 1920s, a public health crisis, rather than the interests of students, prompted major change in attitudes towards sex education. Following these changes in the 1980s, the debate shifted to what type of sex education should be taught in schools.

## 2. What type of sex education should be taught in schools?

During debates in the 1980s, proponents of sex education “emphasized the overwhelming support for ‘preventative’ sex education among teens themselves.”<sup>44</sup> At this point, a growing number of schools included discussion of masturbation, homosexuality, contraception, and abortion in their sexual education curriculum.<sup>45</sup> But social conservatives pushed back against curriculum that exemplified “liberal social attitudes.”<sup>46</sup> Specifically, Jerry Falwell’s Moral Majority, a component of the New Christian Right, challenged this type of sex education.<sup>47</sup> The Moral Majority argued that sex education was part of a new type of religion, secular humanism, that “supplanted God’s word with ‘godless ethics.’”<sup>48</sup> Viewing this liberal sex education as promotion of humanism, opponents argued that Christianity should get equal time in schools.<sup>49</sup>

However, the Moral Majority eventually abandoned its attempt to provide both secular humanist and Christian sex education to students in public schools. One opponent of sex education wrote, “Let’s stick to the things we do know about: reading, writing, arithmetic, the basics”<sup>50</sup> – or in other words, nuanced discussions of secular and Christian sex education should be avoided altogether. To this end, abstinence-only sex education movement would limit sex education to only

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39. ZIMMERMAN, *supra* note 1, at 206.

40. Susan Walton, *N.J.’s Sex-Education Requirement Sustained by High Court*, EDUC. WEEK (June 2, 1982), <https://www.edweek.org/education/n-j-s-sex-education-requirement-sustained-by-high-court/1982/06> [<https://perma.cc/5UST-9483>].

41. *History of Sex Education*, SIECUS, *supra* note 24, at 37.

42. *Id.* at 38.

43. JEFFREY P. MORAN, *TEACHING SEX: THE SHAPING OF ADOLESCENCE IN THE 20TH CENTURY* 207 (2000).

44. ZIMMERMAN, *supra* note 1, at 189.

45. *See id.*

46. Kantor et al., *supra* note 38, at 7.

47. *See* ZIMMERMAN, *supra* note 1, at 189-190.

48. *Id.* at 191.

49. *Id.* at 192 (“If we are to educate the whole child, practice democracy, stimulate critical thinking, then both sides of an issue must be presented.”).

50. *Id.* at 192.

discussions of abstinence.

As Republicans gained political control in the 1980s, they pushed to fund abstinence-only sex education at the federal level.<sup>51</sup> In 1981, Congress passed the Adolescent Family Life Act (AFLA) under Title XX of the Public Health Services Act.<sup>52</sup> Under AFLA, a “\$7 million appropriation was designated for promoting premarital abstinence . . . discouraging abortion and promoting adoption as an option for pregnant teens.”<sup>53</sup> Two other federal programs formed in 1996 and 2000 provided more funding.<sup>54</sup> The 1996 program also provided the following eight-point definition of abstinence-only sex education, which schools were required to follow to qualify for funding under Title V, Section 510 of the Social Security Act:<sup>55</sup>

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

- A. has as its exclusive purpose teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
- B. teaches abstinence from sexual activity outside marriage as the expected standard for all school-age children;
- C. teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
- D. teaches that a mutually faithful monogamous relationship in the context of marriage is the expected standard of sexual activity;
- E. teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
- F. teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;
- G. teaches young people how to reject sexual advances and how alcohol and drug use increase vulnerability to sexual advances; and
- H. teaches the importance of attaining self-sufficiency before engaging in sexual activity.<sup>56</sup>

A 2006 guideline for an Administration for Children and Families program made it clear, “sex education programs that promote the use of contraceptives are not eligible for funding.”<sup>57</sup> Not all states applied for funding for abstinence-only programs; for example, California never accepted funding.<sup>58</sup> And by 2009, nearly

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51. *See id.*

52. Kantor et al., *supra* note 38, at 7.

53. *Id.*

54. *Id.* at 7–8.

55. *Id.* at 7.

56. Social Security Act, § 510(b), Pub. L. No. 104–193, § 510b (1996). As of 2022, the definition has been updated. *See* 42 U.S.C. § 710.

57. Kantor et al., *supra* note 38, at 8.

58. Marissa Raymond, Lylyana Bogdanovich, Dalia Brahmi, Laura Jane Cardinal, Gulielma



half of the states chose not to take federal support.<sup>59</sup>

The development of comprehensive sex education stood in opposition to the development of abstinence-only education. In 1990, SIECUS drafted the first Guidelines for Comprehensive Sexuality Education K-12 (Guidelines).<sup>60</sup> SIECUS published the Guidelines to support educators designing curriculum, and the most recent version suggests including the topics of “abstinence, sexually transmitted diseases (STDs), HIV/AIDS, contraception, and disease prevention methods.”<sup>61</sup> Advocates for comprehensive sex education envision evidence-based curriculum that “equip[s] young people with the knowledge, skills, attitudes and values they need to determine and enjoy their sexuality—physically and emotionally, individually and in relationships.”<sup>62</sup> One vocal advocate, Dr. M. Jocelyn Elders, a pediatrician and the first Black U.S. Surgeon General, supported a message to “Get real.”<sup>63</sup> In response to the question, “Why do we remain silent on public health issues relating to sex?” Dr. Elders responded: “People realize that we all support the moral view, but we know that an awful lot of our children are not being abstinent . . . Since we can't legislate morals, we have to teach them how to take care of themselves.”<sup>64</sup>

By 2009, under the Obama administration, federal funding emphasis shifted away from abstinence-only to comprehensive “evidence-based” education.<sup>65</sup> After a waning of the controversy over sex education,<sup>66</sup> by 2016, the pendulum swung. In his presidential campaign, former President Trump ran on an abstinence-only sex education platform.<sup>67</sup> During his administration, comprehensive sex education programs were defunded,<sup>68</sup> and abstinence-only

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Leonard Fager, LeighAnn C. Frattarelli, Gabrielle Hecker, Elizabeth Ann Jarpe, Adam Viera, Leslie M. Kantor & John S. Santelli, *State Refusal of Federal Funding for Abstinence-Only Programs*, 5 SEXUALITY RSCH. & SOC. POL'Y 44, 45 (2008).

59. *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*, 61 J. ADOLESCENT HEALTH 400, 401 (2017) [hereinafter *Position Paper*]. The source does not state the exact number of states that chose not to take federal support.
60. *History of Sex Education*, SIECUS, *supra* note 24, at 39.
61. *Guidelines for Comprehensive Sexual Education*, 3rd ed., SIECUS 11 (2004).
62. *A Definition of Comprehensive Sexuality Education*, GUTTMACHER INST., [https://www.guttmacher.org/sites/default/files/report\\_downloads/demystifying-data-handouts\\_0.pdf](https://www.guttmacher.org/sites/default/files/report_downloads/demystifying-data-handouts_0.pdf) [https://perma.cc/4DM5-MTYW].
63. *History of Sex Education*, SIECUS, *supra* note 24, at 40 (citing Claudia Dreifus, *Jocelyn Elders*, N.Y. TIMES (Jan. 30, 1994), <https://www.nytimes.com/1994/01/30/magazine/joycelyn-elders.html>).
64. Dreifus, *supra* note 63.
65. Brenda Wilson, *Proven Sex-Ed Programs Get a Boost from Obama*, NPR (June 6, 2010), <https://www.npr.org/templates/story/story.php?storyId=127514185> [https://perma.cc/Q4E6-9ZF7].
66. See ZIMMERMAN, *supra* note 1, at 237 (2022) (suggesting that as some members of the New Christian Right opted out of public schools, the debate over sex education in public schools lessened).
67. Melody Alemansour, Austin Coe, Austin Donohue, Laura Shellum & Sophie Thackray, *Sex Education in Schools*, 20 GEO. L.J. 467, 499 (2019).
68. *Position Paper*, *supra* note 59, at 401. See also Cristina Leos & David Wiley, “It falls on all

funding increased by \$10 million.<sup>69</sup>

## B. Abortion

A parallel battle over abortion was simultaneous with struggles over sex education. Support for abstinence-only education coincided with anti-abortion policies.<sup>70</sup>

In *Roe v. Wade* and *Planned Parenthood v. Casey*, the Supreme Court held there was a right to abortion and grounded this right in the 14th Amendment’s “liberty doctrine . . . to make fundamental decisions about personal autonomy and bodily integrity.”<sup>71</sup> This liberty doctrine is built on case law beginning with the right to establish a home and bring up children and followed by the rights to marital privacy, contraceptives, and interracial marriage.<sup>72</sup> The liberty doctrine was also extended after *Roe* and *Casey* to the right to engage in consensual sexual acts, including same-sex intercourse, and eventually same-sex marriage.<sup>73</sup>

There was some initial opposition to *Roe* in 1973,<sup>74</sup> but it was the Reagan election campaigns in the 1980s that energized “the strongest anti-abortion

*our shoulders*”: *Overcoming Barriers to Delivering Sex Education in West Texas Schools*, 10 J. APPLIED RSCH. ON CHILD. 1,1 (2019) (noting that teen prevention programs lost \$200 million nationwide).

69. Meghan Boone, *Perverse & Irrational*, 16 HARV. L. & POL’Y REV 393, 432 (2022); see also Keli Goff, *Op-Ed: Better sex education in schools can help young people affected by abortion bans*, L.A. TIMES (Aug. 12, 2022), <https://www.latimes.com/opinion/story/2022-08-12/sex-education-abortion-bans> [<https://perma.cc/W2CG-24LX>] (Kelli Goff won two Emmy Awards for her documentary, REVERSING ROE).
70. This note does not offer a full history of abortion in America but aims to illuminate how sex education and abortion are related. For more complete histories of abortion, maternal health, and reproductive rights in America, see generally MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT (2020) (discussing the post-*Roe* backlash); KHIARA BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011) (discussing race in the medical setting, especially looking at women of color’s access to prenatal care and safe childbirth); Paul Benjamin Linton, *Roe v. Wade and the History of Abortion Regulation*, XV AM. J. LAW & MED. 227 (1989) (discussing the common-law and pre-*Roe* regulation of abortion).
71. *A Post-Roe America: The Legal Consequences of the Dobbs Decision, Before the S. Comm. on Judiciary*, 117th Cong. 2–3 (2022) (statement of Khiara M. Bridges, Professor of Law, U.C. Berkeley Sch. L.) [hereinafter Bridges] (referencing *Roe v. Wade*, 410 U.S. 113, 164–65 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (both overruled by *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2284 (2022))).
72. The referenced liberty doctrine is a result of case law including *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right to “establish a home and bring up children”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (the right to marital privacy and contraceptives for married people); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (the right to contraceptives for unmarried people); and *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (the right to interracial marriage).
73. See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (the freedom of adults to engage in consensual private sexual conduct); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (the right to same-sex marriage).
74. Ron Elving, *The leaked abortion decision blew up overnight. In 1973, Roe had a longer fuse*, NPR (May 8, 2022), <https://www.npr.org/2022/05/08/1097118409/the-leaked-abortion-decision-blew-up-overnight-in-1973-roe-had-a-longer-fuse> [<https://perma.cc/J3ZV-X9HY>] (suggesting that the *Roe* decision was overshadowed in the media by other political news, such as the Vietnam War and former President Lyndon Johnson’s death).

plank.”<sup>75</sup> This opposition grew along with the backlash against sex education in the 1980s. Following the similar shifts seen in the sex education debate, by and during the Obama administration, there were not serious calls at the federal level to end abortion. However, during this time, states vehemently fought to restrict access to abortion with medication abortion restrictions, religious refusal laws, and targeted regulation of abortion providers.<sup>76</sup>

Along with his abstinence-only platform,<sup>77</sup> it was former President Trump who reinvigorated federal anti-abortion politics, running on the promise that he would appoint Supreme Court justices who would overturn *Roe*.<sup>78</sup> Fulfilling his promise, *Roe* was not seriously threatened until the conservative majority was solidified on the Supreme Court in 2020,<sup>79</sup> and on June 24, 2022, the end of *Roe* and the end of the federal right to abortion solidified with the official publication of the *Dobbs* decision.<sup>80</sup> Unlike the initially muted response to *Roe*, the *Dobbs* decision sparked significant public protest,<sup>81</sup> and public support for the Supreme Court hit record lows.<sup>82</sup>

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75. *Id.*

76. *Center Report: More State Abortion Restrictions Passed in 2021 Than in Any Year Since Roe v. Wade*, CTR. FOR REPROD. RTS. (Jan. 4, 2022), <https://reproductiverights.org/2021-state-legislative-wrap-up/#:~:text=In%202021%2C%20states%20across%20the,right%20to%20abortion%20in%201973> [<https://perma.cc/DHU7-VB3P>].

77. Alemansour et al., *supra* note 67, at 499.

78. Elving, *supra* note 74.

79. See Nina Totenberg, *The Supreme Court is the most conservative in 90 years*, NPR (July 5, 2022), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [<https://perma.cc/A6RZ-5FJX>].

80. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2284 (2022). Before the official publication, on May 2, 2022, in an unprecedented moment, a draft *Dobbs* majority opinion by Justice Samuel Alito was leaked. See *Read Justice Alito’s initial draft abortion opinion which would overturn Roe v. Wade*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> [<https://perma.cc/SDY8-ACHD>]; Elving, *supra* note 74. The draft opinion dominated the news cycles. Chief Justice John Roberts described the leak as a “betrayal of the confidences of the court . . . intended to undermine the integrity of our operations.” *Chief Justice Roberts calls Roe v. Wade leak a betrayal*, NPR (May 3, 2022), <https://www.npr.org/2022/05/03/1096123185/supreme-court-john-roberts-roe-wade> [<https://perma.cc/FCW2-VN52>].

81. Natasha Ishak, *In 48 hours of protest, thousands of Americans cry out for abortion rights*, VOX (June 26, 2022), <https://www.vox.com/2022/6/26/23183750/abortion-rights-scotus-roe-overturned-protests> [<https://perma.cc/NLD8-PE4T>].

82. Chris Cillizza, *Trust in the Supreme Court is at a record low*, CNN (Sept. 29, 2022), <https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll/index.html> [<https://perma.cc/8UR9-F5RV>]. Although the political support for abortion has varied by president, public opinion on abortion has been less variable over time. Two years after *Roe*, in 1975, a Gallup poll found that 54% of U.S. adults supported abortion under certain circumstances. Laura Santhanam, *How has public opinion about abortion changed since Roe v. Wade?*, PBS (July 20, 2018), <https://www.pbs.org/newshour/health/how-has-public-opinion-about-abortion-changed-since-roe-v-wade> [<https://perma.cc/K6H9-ZWHG>]. For a visual presentation of statistics on abortion support over time, see *Abortion*, GALLUP <https://news.gallup.com/poll/1576/abortion.aspx>. As of 2022, 61% of U.S. adults think abortion should be legal in all or most cases. Hartig, *supra* note 10. The support for and

### C. How Are the Sex Education & Abortion Debates Related?

The abortion debate is, at its core, a debate over the regulation of sex in the United States, specifically aimed at regulating the bodies and behavior of people with the capacity for pregnancy. With abortion bans, states purposefully take away one option from pregnant people to, in theory, end the practice of abortion. But unsurprisingly, abortion bans do not end the practice of abortion. They make abortion less safe and disproportionately harms poor people of color,<sup>83</sup> specifically Black people.<sup>84</sup>

The debate about the appropriate type of sex education is an example of the sex regulation “culture war” manifesting in public schools. Sex education is an attempt to regulate sex in the United States, specifically aimed at regulating youth’s bodies and choices. With well-funded abstinence-only education, states and districts purposefully deemphasize safe sex practices in theory to stop teenage sex. But, again unsurprisingly, this does not stop teens from having sex. It makes sex less safe<sup>85</sup> and youth of color are disproportionately affected.<sup>86</sup>

These coinciding histories and debates are increasingly relevant now because of *Dobbs*. If this history repeats itself, *Dobbs* signals that the little comprehensive sex education that does exist is at risk. This likely simultaneous banning of abortion and limiting of sex education work together to the detriment of youth. Part IV explains these harms to youth in more detail, but for one example, for youth that do have sex and become pregnant, *Dobbs* limits the available options. This makes the need for comprehensive sex education even more urgent. In Part II, this note emphasizes this need by presenting evidence about the efficacy of abstinence-only and comprehensive sex educations.

## II. SEX EDUCATION EFFICACY

Significant research explores the efficacy of sex education programs. Common criteria in assessing these programs include unintended pregnancy

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opposition to abortion can be broken down by race, age, religion, and party affiliation. To highlight a few of these categories, the large majority of those who are religiously unaffiliated, 84%, tend to support the legality of abortion in all or most cases. In comparison, a majority of White evangelicals, 74%, think abortion should be illegal in all or most cases. *Id.* Most supporters of abortion are under the age of 50 and tend to have higher levels of education. Lipka, *supra* note 9; Lydia Saad, *Education Trumps Gender in Predicting Support for Abortion*, GALLUP (Apr. 28, 2010), <https://news.gallup.com/poll/127559/education-trumps-gender-predicting-support-abortion.aspx> [<https://perma.cc/5SPQ-PE7J>].

83. Michelle Oberman, *What will and won't happen when abortion is banned*, 9 J. L. & BIOSCIENCES 1, 1 (2022).

84. Bridges, *supra* note 71, at 6.

85. *See infra* notes 93–102.

86. *See* Laura D. Lindberg & Leslie M. Kantor, *Adolescents' Receipt of Sex Education in a Nationally Representative Sample, 2011–2019*, 70 J. ADOLESCENT HEALTH 290, 295 (2022) (finding racial and ethnic disparities in rates of unplanned pregnancies and sexually transmitted diseases).

rates;<sup>87</sup> knowledge about and rates of HIV and STI identification;<sup>88</sup> knowledge about and use of contraception, including condoms and birth control pills;<sup>89</sup> incidence and frequency of intercourse;<sup>90</sup> and number of sexual partners.<sup>91</sup> The research on abstinence-only programs suggests they are unsuccessful in their purported goal to encourage abstinence. In comparison, comprehensive sex education research suggests it can change young people’s behavior and improve health outcomes, as elaborated in part II.B.

### A. Abstinence-Only Sex Education

Peer reviewed, evidence-based research suggests abstinence-only education does not increase rates of abstinence and can leave youth ill-equipped with the necessary knowledge to practice safe sex.<sup>92</sup> Trial results suggest “abstinence only program[s] do not effectively encourage abstinent behavior.”<sup>93</sup> “At present, there does not exist any strong evidence that any abstinence program delays the initiation of sex, hastens the return to abstinence, or reduces the number of sexual partners.”<sup>94</sup> A 2007 study mandated by Congress evaluated four Title V, Section 510 abstinence-only education programs.<sup>95</sup> Summarizing the main goal of Section 510 abstinence programs as “to teach abstinence from sexual activity outside of marriage,” the report found that the sex education programs studied “show[ed] no

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87. See Kristen Underhill, Don Operario & Paul Montgomery, *Abstinence-only programs for HIV infection prevention in high-income countries*, 335 *Brit. Med. J.* 248, 249 (2007); Douglas Kirby, *Emerging Answers 2007: Research Findings on Programs to Reduce Teen Pregnancy and Sexually Transmitted Diseases*, NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY 14 (Nov. 2007), <https://powertodecide.org/sites/default/files/resources/primary-download/emer-ging-answers.pdf> [<https://perma.cc/X9WF-XKXJ>] (showing criteria for evaluating effectiveness of pregnancy and sexually transmitted disease-prevention programs); Kathrin F. Stanger- Hall & David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 *PLOS ONE* 1, 4 (Oct. 2011) (showing teenage pregnancy rates in relation to abstinence education programs).
88. See Underhill et al., *supra* note 87, at 249-50; Kirby, *supra* note 87, at 14; Christopher Trenholm, Barbara Devaney, Ken Fortson, Lisa Quay, Justin Wheeler & Melissa Clark, *Impacts of Four Title V, Section 510 Abstinence Education Programs Final Report*, MATHEMATICA POL’Y RSCH., INC. xx (Apr. 2007) (a contractual report submitted to the U.S. Dep’t Health & Human Services); see also Virginia A. Fonner, Kevin S. Armstrong, Caitlin E. Kennedy, Kevin R. O’Reilly & Michael D. Sweat, *School Based Sex Education and HIV Prevention in Low- and Middle- Income Countries: A Systematic Review and Meta-Analysis*, *PLOS ONE* (2014) (finding students who received school-based sex education knew more about HIV).
89. Underhill et al., *supra* note 87, at 250; Kirby, *supra* note 87, at 14; Trenholm et al., *supra* note 88, at xxi–xxii. See also Fonner et al., *supra* note 88 at 1.
90. Underhill et al., *supra* note 87, at 250; Kirby, *supra* note 89, at 14.
91. Underhill et al., *supra* note 87, at 250; Trenholm et al., *supra* note 88, at xviii; see also Fonner et al., *supra* note 88, at 1.
92. See *Position Paper*, *supra* note 59, at 400; Kirby, *supra* note 87, at 15; Underhill et al., *supra* note 87, at 248; Trenholm et al., *supra* note 88, at 59; Stanger-Hall & Hall, *supra* note 87, at 1. For summaries of this research see *History of Sex Education*, SIECUS, *supra* note 24, at 50 (all summaries of research on results of abstinence education programs).
93. Underhill et al., *supra* note 87, at 251.
94. Kirby, *supra* note 87, at 15.
95. Trenholm et al., *supra* note 88, at xiii.

impacts on the rates of sexual abstinence.”<sup>96</sup> The report also found that although the programs taught youth about the risk of pregnancy and STIs, “47 percent of sexually active youth had unprotected sex” within a year of the report.<sup>97</sup> Some studies found moderate change of sexual behavior, although critics feel that these studies are less rigorous than others.<sup>98</sup>

Regardless, “studies of abstinence programs have not produced sufficient evidence to justify their wide-spread dissemination”<sup>99</sup> backed by federal funding amounting to \$2 billion spent on these programs between 1982 and 2017.<sup>100</sup> Some recent studies suggest abstinence-only education may be correlated with an increase of teen pregnancy and STIs, making this funding especially exorbitant.<sup>101</sup>

Further, research suggests abstinence-only education reinforces gender stereotypes. For example, “[a]bstinence-only curricula implicitly and explicitly perpetuate the stereotyped double standards of virility versus chastity, homemaker versus breadwinner, subject versus object of desire.”<sup>102</sup> In a country with a disturbing prevalence of intimate partner and gendered violence,<sup>103</sup> it is concerning that the dominant form of sex education contributes to the cultural perpetuation of this violence by reinforcing gender stereotypes.<sup>104</sup>

## B. Comprehensive Sex Education

In light of the failure of abstinence-only education, social science and public health research has tried to determine which sex education programs *are* effective and how success should be measured. Joan Helmich, a sexuality educator, explains what research tells us about youth:

[W]e know that youth are exposed to lots of sexual information, sexualizing and titillating media, and pornography. They’ve received a

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96. *Id.* at 59.

97. *Id.* at 60.

98. Kirby, *supra* note 87, at 15.

99. *Id.*

100. *Abstinence-Only Education Is a Failure*, COLUMBIA MAILMAN SCH. PUB. HEALTH (Aug. 22, 2017) <https://www.publichealth.columbia.edu/news/abstinence-only-education-failure> [<https://perma.cc/8W4F-3DJC>].

101. Boone, *supra* note 69, at 434 (citing Jillian B. Carr & Analisa Packham, *The Effect of State-Mandate Abstinence-Based Sex Education on Teen Health Outcomes*, 26 HEALTH ECON. 403 (2017); M. Hogben, H. Chesson & S. O. Aral, *Sexuality education policies and sexually transmitted disease rates in the United States of America*, 21 INT’L J. STD & AIDS 293 (2010)).

102. Cornelia T. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 953 (2007).

103. *Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/STATISTICS>. [<https://perma.cc/2VEM-CXJE>].

104. For more information about gender stereotyping and its harms, see *Gender stereotyping*, UN HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/women/gender-stereotyping> [<https://perma.cc/SU6C-S4J8>]. See also Kristin L. Anderson & Debra Umberson, *Gendering Violence: Masculinity and Power in Men’s Accounts of Domestic Violence*, 15 GENDER AND SOCIETY 358 (2001). Of course, intimate partner and gendered violence are not singularly a result of gender roles. To learn more about the causes and effects of this violence and abuse, see Nancy Lemon, *DOMESTIC VIOLENCE LAW* 37-106 (5th ed. 2018).

myriad of mixed, conflicting and unclear messages about sexuality. And they talk about sex among themselves and with older peers, and the information they get from each other may not be very accurate, reasonable, or responsible. We know that youth have lots of questions and concerns. We know that they typically do not get very good information from parents, nor do they engage in reasonable discourse about sexuality with other responsible adults in their lives.<sup>105</sup>

Helmich argues that sex education should aim to be long-term, client-centered, skills-based, values-based, research-based, theory-based, broad, integrated, collaborative, and positive.<sup>106</sup>

Only comprehensive sex education programs can achieve these goals, and achieving these goals is more important when youth have fewer reproductive health options and less access to abortion. A review of three decades of sex education studies found “strong support for comprehensive sex education across a range of topics and grade levels [and] evidence for the effectiveness of approaches that address a broad definition of sexual health and take positive, affirming, inclusive approaches to human sexuality.”<sup>107</sup>

Similar to Helmich’s definition of successful comprehensive sex education, the review found that “attention to the full range of sexual health topics, scaffolded across grades, embedded in supportive school environments and across subject areas, has the potential to improve sexual, social, and emotional health, and academic outcomes for young people.”<sup>108</sup> Instruction “scaffolded across grades” is not a one-time lecture in high school, but is a regular curriculum built into education across subjects at every grade level.<sup>109</sup> For example, “some of the most effective sex education outcomes . . . were achieved not just in traditional health or sex education classrooms, but in English, social studies, physical education, music and art classes.”<sup>110</sup> Specifically, to engage Black, Latine, LGTBQ, and immigrant youth, “youth participatory action research” suggests sexual education programs should include art-based methods such as digital storytelling, body mapping, story circles, and poetry.<sup>111</sup> A review of twenty-three studies of sex education programs found that effective comprehensive sex education programs “did delay the initiation of intercourse, reduce the frequency of intercourse, reduce

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105. Joan Helmich, *What is Comprehensive Sexuality Education? Going WAAAAAY Beyond Abstinence and Condoms*, 4 AM. J. SEXUALITY EDUC. 10, 11-12 (2009).

106. *Id.* at 11–15.

107. Eva S. Goldfarb & Lisa D. Lieberman, *Three Decades of Research: The Case for Comprehensive Sex Education*, 68 J. ADOLESCENT HEALTH 13, 13 (2021)

108. *Id.*

109. *Id.*

110. Eva Goldfarb & Lisa Lieberman, *After Roe, Sex Ed Is Even More Vital*, N.Y. TIMES (July 20, 2022) <https://www.nytimes.com/2022/07/20/opinion/after-roe-sex-ed-is-even-more-vital.html?searchResultPosition=2> [<https://perma.cc/E2LY-EUMW>].

111. Isabella Caruso, Elizabeth Salerno Valdez, Camille Collins Lovell, Jazmine Chan, Elizabeth Beatriz & Aline Gubrium, *The Need for Community-Responsive and Flexible Sex Ed for Historically Marginalized Youth*, 20 SEXUALITY RSCH. & SOC. POL’Y 1, 11 (2022).

the number of sexual partners, or increase the use of condoms or other contraceptives . . . [and have the] potential to reduce exposure to unintended pregnancy and sexually transmitted disease.”<sup>112</sup>

Medical experts also advocate for comprehensive sex education programs. The American Academy of Pediatrics and the American College of Obstetricians and Gynecologists advocate for comprehensive sex education programs in part to help prevent and reduce the risks of adolescent pregnancy and STIs.<sup>113</sup> Further, the American Medical Association, American Public Health Association, National Education Association, and National School Boards Association all endorse comprehensive sex education and oppose abstinence-only education.<sup>114</sup>

### C. Current Sex Education Laws

Despite the evidence that comprehensive sex education improves youth behavior more effectively than abstinence-only education, abstinence-only education is still more prevalent in the United States. The SIECUS Sex Education Law & Policy Chart reports the sex education policies in each state and groups similar state policies to allow for numerical counts of how many states have certain types of sex education.<sup>115</sup> As of July 2022, twenty-nine states and the District of Columbia require sex education.<sup>116</sup> Thirty-seven states and the District of Columbia require education about abstinence,<sup>117</sup> sixteen of which provide abstinence-only sex education.<sup>118</sup> Only eleven states mandate sex education to be “medically accurate.”<sup>119</sup> Five states have laws requiring comprehensive sex education, two of which only require that sex education be comprehensive if it is provided.<sup>120</sup>

Linda Lindberg, a public health professor and sex education researcher, believes what little sex education does happen in schools is “too little too late.”<sup>121</sup> Her research found that fewer than half of adolescents received education about where to get birth control before the first time they had sex and that students

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112. Douglas Kirby, Lynn Short, Janet Collins, Deborah Rugg, Lloyd Kolbe, Marion Howard, Brent Miller, Freya Sonenstein & Laurie S. Zabin, *School-Based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness*, 109 PUB. HEALTH REP. 339, 339 (1994).
113. Cora C. Breuner & Gerri Mattson, *Sexuality Education for Children and Adolescents*, 138 PEDIATRICS e1, e1 (2016); Comm. on Adolescent Health Care, *Committee Opinion No. 678*, 128 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS e227, e227 (2016).
114. Katia Santiago-Taylor, *Comprehensive Sexuality Education Should be a Public Health Priority*, XVI J. HEALTH & BIOMEDICAL LAW 173, 178 (2020).
115. See *SIECUS Chart*, *supra* note 4.
116. See *The SIECUS State Profiles*, *supra* note 6.
117. *Sex and HIV Education*, GUTTMACHER INST. (Dec. 1, 2022), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [<https://perma.cc/SYT4-8796>].
118. See *The SIECUS State Profiles*, *supra* note 6.
119. Goldfarb & Lieberman, *After Roe, Sex Ed Is Even More Vital*, *supra* note 110.
120. See *The SIECUS State Profiles*, *supra* note 6.
121. Hannah Natanson, *After Roe, teens are teaching themselves sex ed, because the adults won't*, WASH. POST (Aug. 23, 2022) <https://www.washingtonpost.com/education/2022/08/23/teen-sex-education-roe/> [<https://perma.cc/9UVS-S8ZC>].



learned less about sexual health in the 2010s than they did in 1995.<sup>122</sup> Delivery of this education is also inequitable. There are “widespread racial disparities in the receipt and timing of formal sex education,” meaning that young students of color are less likely to receive instruction than white peers.<sup>123</sup> Further, despite a decline since 1991, the United States teen birth rate is still “substantially higher than in other western industrialized nations.”<sup>124</sup>

The prevalence of abstinence-only education is illogical considering the research on the positive impact of comprehensive sex education. However, as explained in Part I, sex education tied with reproductive rights is a controversial and politicized issue. Decisions about what type of sex education should be taught and funded are not made based on scientific research and consensus. America’s “way[] of thinking about sex education [has] signified not an inevitable progression toward objective truth but a series of historically contingent response[s] to social change.”<sup>125</sup> If the history of coinciding anti-abortion and abstinence-only education support described in Part I continues, on the coattails of *Dobbs*, support for abstinence-only education is likely to grow despite its documented failures. As explained in Part III, researchers predict history will repeat itself with *Dobbs* threatening what little comprehensive sex education does exist.<sup>126</sup>

### III. THE PREDICTED & ACTUAL IMPACT OF *DOBBS* ON SEX EDUCATION

The aim of Part III is to highlight why legal scholars predict that sex education is at risk because of the *Dobbs* decision and to determine if these predictions are proving true. Part III.A explains in more detail why scholars have made this prediction. Part III.B then presents examples of lawmaker responses to the *Dobbs* decision. If lawmakers are emboldened by *Dobbs* and the prediction that sex education is at risk is true, this strengthens the argument presented in Part IV regarding the urgency to implement comprehensive sex education.

#### A. Predicted Impact of *Dobbs*

The *Dobbs* majority found that “*Roe* erred when it interpreted the [14th]

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122. Lindberg & Kantor, *supra* note 86, at 294 (2022). See also the figures presented in *US Adolescents’ Receipt of Formal Sex Education*, GUTTMACHER INST. (Feb. 2022), <https://www.guttmacher.org/fact-sheet/adolescents-teens-receipt-sex-education-united-states> [https://perma.cc/AHL7-BH4W].

123. Lindberg & Kantor, *supra* note 86, at 295.

124. *About Teen Pregnancy*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 15, 2021), <https://www.cdc.gov/teenpregnancy/about/index.htm> [https://perma.cc/H2YZ-BEVL].

125. MORAN, *supra* note 43, at 230.

126. See *The Impact of the Supreme Court’s Dobbs Decision on Abortion Rights and Access Across the United States, Before the H. Comm. on Oversight & Reform*, 117<sup>th</sup> Cong. (2022) (statement of Prof. Michele Bratcher Goodwin) [hereinafter Goodwin]; Alemansour et al., *supra* note 67, at 499; Radio Atlantic, *Predictions for a Post-Roe America*, THE ATLANTIC (May 10, 2022), <https://www.theatlantic.com/politics/archive/2022/05/the-future-of-roe/629802/> [https://perma.cc/J5VV-FEQK].

Amendment’s Due Process Clause to protect a right to terminate a pre-viability pregnancy insofar as that clause only protects rights that are ‘deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.’”<sup>127</sup> In July 2022, Professor Khiara Bridges argued in her testimony before the Senate Judiciary Committee that by “privileg[ing]” America’s history and tradition from the 1860s, the majority “attempt[ed] to divine the meaning of the Constitution” by looking at “an era characterized by the formal exclusion of people with the capacity for pregnancy.”<sup>128</sup> Professor Mary Ziegler summarized how this reasoning is related to sex education:

[The *Dobbs* reasoning] is that in the 19th century—at the time of the ratification of the 14th Amendment—there was no recognition of an abortion right. And abortion was being criminalized. I mean, of course, there was no recognition of a right to same-sex marriage. Of course, there was no sense that interracial couples could constitutionally demand to get married. Birth control was being criminalized at the state as well as federal level. Sex-education materials were being criminalized at the state as well as federal level.<sup>129</sup>

Of course, unlike abortion, same-sex marriage, and contraception, there never was a constitutional right to sex education. There is not even a constitutional right to education.<sup>130</sup> The threat to sex education is not an impending Supreme Court opinion about sex education, but the potential for coinciding support and momentum for anti-abortion policies and abstinence-only education as a result of the opinion. For example, Professor Michele Bracher Goodwin testified to Congress about the impact of the *Dobbs* decision arguing that “[o]verturing *Roe v. Wade* foreshadows . . . bans on sex education in schools.”<sup>131</sup> This is not a surprise. Despite the “fundamental paradigm shift” in the United States as awareness of the benefits of comprehensive sex education spread, the opposite “distinctive paradigm shift” on the judicial level grew and gained momentum with the confirmation of Justice Brett Kavanaugh to the Supreme Court<sup>132</sup> and was solidified with *Dobbs*. Further as explained in Part I, “[r]eligious-right political groups that have spent decades dismantling abortion rights . . . have been gunning for sex education for just as long.”<sup>133</sup> These groups have also been successful in pushing and funding abstinence-only education despite the evidence presented in

127. Bridges, *supra* note 71, at 2 (quoting *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2242 (2022)).

128. *Id.* at 2-3.

129. Radio Atlantic, *supra* note 126.

130. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

131. *The Impact of the Supreme Court’s Dobbs Decision on Abortion Rights and Access Across the United States, Before the H. Comm. on Oversight & Reform*, 117<sup>th</sup> Cong. 6 (2022) (statement of Prof. Michele Bracher Goodwin) [hereinafter Goodwin].

132. *See Alemansour et al.*, *supra* note 67, at 499.

133. Goldfarb & Lieberman, *After Roe, Sex Ed Is Even More Vital*, *supra* note 110.

Part II that it has failed at encouraging abstinence. After *Dobbs*, “[i]f a state is looking toward banning abortion or has already banned abortion, then it’s incredibly likely that their sex education policy is either abstinence-only or, at the very least, abstinence-focused.”<sup>134</sup> Part III.B discusses whether these predictions are proving true in 2022.

### B. Actual Impact of *Dobbs* – District & State Responses

Following *Dobbs*, some school boards passed comprehensive sex-education for the 2022–23 school years. For example, in Tampa, Florida, the Hillsborough School Board approved a sex education curriculum in September 2022 that included discussions of gender identity and “detailed descriptions of the human body.”<sup>135</sup> In August 2022 near Milwaukee, Wisconsin, Wauwatosa School District passed a comprehensive sex education initiative.<sup>136</sup> The curriculum includes discussions of gender identities, sexual orientation, and sexual activities by eighth grade and discussions about abusive relationships and safe sex in high school.<sup>137</sup> Both school districts allow parents to opt out of the programs, meaning that parents can decide to not have their child participate.<sup>138</sup>

Although there have been some post-*Dobbs* comprehensive sex education successes, there are, as predicted, impending threats to sex education. Specifically, Republican state legislators call to ban or weaken sex education. In Texas in summer 2022, in the state with the second largest school system in the United States,<sup>139</sup> the Republican Party voted in favor of two new party platforms – “barring the teaching of sex and sexuality in schools while simultaneously calling on Texas schools to teach the ‘dignity of the preborn human’ and that life begins at fertilization.”<sup>140</sup> Although these are aspirational party platforms and not yet proposed legislation, it is impossible to disentangle these platforms from the

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134. Fiona M. D. Samuels, *Graphic: Many States That Restrict or Ban Abortion Don’t Teach Kids About Sex and Pregnancy*, SCI. AM. (July 26, 2022),

<https://www.scientificamerican.com/article/graphic-many-states-that-restrict-or-ban-abortion-dont-teach-kids-about-sex-and-pregnancy/> [https://perma.cc/ET7U-EVMG].

135. Marlene Sokol, *Hillsborough School Board Oks sex education lessons after objections*, TAMPA BAY TIMES (Sept. 21, 2022)

<https://www.tampabay.com/news/education/2022/09/21/hillsborough-school-board-oks-sex-education-lessons-after-objections/> [https://perma.cc/9949-Y58N].

136. Beck Andrew Salgado, *Wauwatosa schools change their sex education curriculum amid protests, will start teachings as early as kindergarten this year*, MILWAUKEE J. SENTINEL (Aug. 23, 2022),

<https://www.jsonline.com/story/communities/west/news/wauwatosa/2022/08/23/wauwatosa-school-board-approves-new-sex-education-curriculum/7873012001/> [https://perma.cc/643T-QJ5G].

137. *Id.*

138. *Id.*; Sokol, *supra* note 135.

139. Leos & Wiley, *supra* note 68, at 2.

140. Kate McGee, *Texas GOP platform calls for ban on teaching “sexual matters,” while requiring students to learn about “dignity of the preborn human,”* TEX. TRIB. (June 18, 2022), <https://www.texastribune.org/2022/06/18/texas-gop-platform-gender-sexuality-preborn/> [https://perma.cc/4G5Q-83Y7].

ongoing abortion debate in Texas. In 2021, a Republican representative proposed legislation that would have “define[d] personhood at fertilization and . . . provide[d] due process to a fetus.”<sup>141</sup> The bill died in committee.<sup>142</sup> Of course, after *Dobbs*, abortion is illegal in Texas at all stages of pregnancy except in a life-threatening medical emergency.<sup>143</sup> This sex education party platform, alongside the post-*Dobbs* abortion ban, is an attempt by Texan legislators to control sex education to teach youth that life begins at fertilization and build support in younger generations for abortion bans.

Republican lawmakers are also active in Oklahoma and New Jersey. In Oklahoma in October 2022, lawmakers held an interim study to discuss “how far is too far for sex education in schools.”<sup>144</sup> One senator emphasized that sex education should be up to parents and suggested a new policy that parents should have to “opt in” to sex education programs rather than “opt out.”<sup>145</sup> Another representative said that “he'd like to do away with sex education in K–12 schools entirely.”<sup>146</sup> In New Jersey in August 2022, state senators expressed support in a hearing for a “Repeal, Replace, Restore” platform as a way to attack New Jersey’s new sex education curriculum.<sup>147</sup> In response, state education officials made clear that “school districts that refuse to implement [the] new sex education standards can be disciplined.”<sup>148</sup>

Less than two years since the opinion was published, it is too early to tell what the full impact of *Dobbs* will be on sex education and public schools. Future notes should assess what sex education legislation states are able to pass in the future legislative sessions. The named examples of calls from Republican legislators to weaken or eliminate current sex education programs are likely just the beginning. Nevertheless, because *Dobbs* limited reproductive rights and access to abortion and because *Dobbs* further threatens the little sex education that does exist, *Dobbs* harms students. Part IV illuminates these harms, suggests how these harms can be mitigated with comprehensive sex education, and explores how comprehensive sex education programs can withstand legal challenges.

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141. *Id.*

142. *Id.*

143. *Abortion in Texas*, ACLU TEX. (Aug. 29, 2022), <https://www.aclutx.org/en/know-your-rights/abortion-texas#:~:text=Texas%20bans%20abortions%20at%20all,that%20involve%20rape%20or%20incest> [https://perma.cc/WW7W-BV4H].

144. Nuria Martinez-Keel & Dana Branham, *Republican legislators find next target: Sex education - Oklahoma had one of the nation's highest teen birth rates before abortion ban*, OKLAHOMAN (internal quotations omitted).

145. *Id.*

146. *Id.*

147. Eric Kiefer, *4 Republican NJ Senators Hold Hearing on Sex Education in Schools*, PATCH (Aug. 30, 2022), <https://patch.com/new-jersey/montclair/4-republican-nj-senators-hold-hearing-sex-education-schools> [https://perma.cc/BT98-Z49F].

148. Mary Ann Koruth, *School districts that don't teach new sex ed standards will be disciplined, state says*, NORTHJERSEY.COM (Sept. 20, 2022), <https://www.northjersey.com/story/news/education/2022/09/20/nj-sex-education-standards-discipline-schools/69497535007/> [https://perma.cc/327E-4SWV].

#### IV. HOW *DOBBS* HARMS YOUTH & MOVING FORWARD

Given the histories of sex education and abortion, the research on the efficacy of sex education programs, and the predicted and actual impact of *Dobbs*, the goal of Part IV is to explicitly identify how *Dobbs* harms students and look ahead to solutions. First, Part IV.A explains how *Dobbs* harms youth and why comprehensive sex education can help address these harms. Next, Part IV.B captures what current students in the United States are doing about sex education in response to *Dobbs*. Finally, Part IV.C suggests how school district leaders, inspired by their students, can implement comprehensive sex education programs and defend them against legal challenge, even in a post-*Dobbs* United States.

##### A. Why Comprehensive Sex Education & Why Now

The research from Part II.A shows that despite well-funded, abstinence-only education, teenagers still have sex. Even if the only goal of sex education is to stop teenagers from having sex, abstinence-only education has failed. As explained in Part I.A, actual public health goals are broader than preventing sex, and a common historical goal is to minimize STI risk. Research in Part II.B shows that it is comprehensive sex education, not abstinence-only education, that can actually change a student's behavior and minimize STI transmission.

*Dobbs* puts another sex education goal on the table – ending abortion. Even if you do not agree with the goal, *if it is the goal*, one way to decrease the number of abortions is to decrease the number of unwanted pregnancies.<sup>149</sup> The question is then how to decrease unwanted pregnancies, recognizing that youth will still have sex. Again, research in Part II.B shows that comprehensive-sex education, not abstinence-only education, has the potential to minimize unwanted pregnancies with knowledge about contraception, safer sex, and healthy relationships.

When judges limit reproductive rights by taking options off the table for pregnant people who do not want to be pregnant and political actors simultaneously limit access to comprehensive sex education, they place the “health and safety of young people” at risk.<sup>150</sup> *Dobbs* harms youth. And

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149. This note recognizes that this is an oversimplification and that unwanted pregnancies are not the only reason pregnant people get abortions. Sometimes, the pregnancy is wanted but having a child is not an option for that person because of finances, relationships, and other factors. See Lawrence B. Finer, Lori F. Frohworth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 110 (2005). Despite misinformation campaigns that say otherwise, abortions can also be medically necessary, including to save a pregnant person's life. See Reuters Fact Check, *Fact Check-Termination of pregnancy can be necessary to save a woman's life, experts say*, REUTERS (Dec. 27, 2021), <https://www.reuters.com/article/factcheck-abortion-false/fact-check-termination-of-pregnancy-can-be-necessary-to-save-a-womans-life-experts-say-idUSL1N2TC0VD> [<https://perma.cc/3K7T-ELD2>].

150. Goldfarb & Lieberman, *After Roe, Sex Ed Is Even More Vital*, *supra* note 110.

unsurprisingly, given the disproportionate delivery of sex education,<sup>151</sup> all of these harms to young people will be racially and socioeconomically disproportionate. Many amicus briefs submitted in *Dobbs* by reproductive justice, LGBTQ, and disability rights organizations and Indigenous communities warned that the end of *Roe* would only “exacerbate societal inequalities and disproportionately harm people of color.”<sup>152</sup> Even before *Dobbs*, Black people who gave birth had a higher maternal mortality rate compared to other races.<sup>153</sup> And now, because of *Dobbs*, Black women will be especially affected.<sup>154</sup> Socioeconomically, “[w]ith abortion access now significantly diminished, and inconsistent and incomplete sex education available to help young people prevent unwanted pregnancies, poor women” will be disproportionately harmed.<sup>155</sup>

Namely, the first of these harms is that youth in states with abortion bans because of *Dobbs* cannot access abortion in their state. Although the “vast majority of abortions” in the United States are “sought by women over the age of 20,” that is not an excuse to ignore the fact that teenagers do get pregnant and seek abortions.<sup>156</sup> Further, even if teenagers are not the majority of those seeking abortions, adolescent pregnancy (ages thirteen to nineteen) is associated with an increased risk of complications to the pregnant person and the fetus.<sup>157</sup> In 2020 in Texas, about 550 youth fifteen and younger and 4,400 teenagers between ages sixteen and nineteen had abortions<sup>158</sup> and this is likely an undercount.<sup>159</sup> In 2021,

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151. See generally Lindberg & Kantor, *supra* note 86. “Differences in the receipt of sex education, by gender, race/ethnicity, and the location of instruction, leave many adolescents without critical information.” *Id.*
  152. For a summary of the amicus briefs, see *The Disproportionate Harm of Abortion Bans: Spotlight on Dobbs v. Jackson Women’s Health, CTR. FOR REPROD. RTS.* (Nov. 29, 2021), <https://reproductiverights.org/supreme-court-case-mississippi-abortion-ban-disproportionate-harm/> [<https://perma.cc/738M-92KK>].
  153. See Dána-Ain Davis, *Reproducing while Black: the crisis of Black maternal health, obstetric racism and assisted reproductive technology*, 11 REPRODUCTIVE BIOMEDICINE & SOC. ONLINE 56, 56–64 (2020). This note uses the term Black “people” instead of Black “women” to acknowledge that not all people who give birth identify as women.
  154. Christine M. Slaughter & Chelsea N. Jones, *How Black women will be especially affected by the loss of Roe*, WASH. POST (June 25, 2022), <https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-black-racism-disparate-maternal-health/> [<https://perma.cc/WXS9-H72A>].
  155. Goff, *supra* note 69.
  156. See Naomi Schaefer Riley, *Perspective: The return of the sex-ex crusaders*, DESERET NEWS (Aug. 9, 2022), <https://www.deseret.com/2022/8/9/23290428/perspective-the-return-of-the-sex-ed-crusaders-dobbs-roe-v-wade-abortion-birth-control-sex-education> [<https://perma.cc/5N4E-6TBA>].
  157. Michael K. Magill & Ryan Wilcox, *Adolescent Pregnancy and Associated Risks: Not Just a Result of Maternal Age*, 75 AM. FAM. PHYSICIAN 1310, 1310 (2007).
  158. *2020 Induced Terminations of Pregnancy for Texas Residents*, TEX. HEALTH & HUMAN SERVS. (2020), <https://www.hhs.texas.gov/sites/default/files/documents/about-hhs/records-statistics/research-statistics/itop/2020-itop-narrative-tx-residents.pdf> [<https://perma.cc/ZJN6-LE7R>].
  159. See Mandi Cai, *Before Roe v. Wade was overturned, at least 50,000 Texans received abortion in the state each year. Here’s a look behind the numbers.*, TEX. TRIB. (May 9, 2022), <https://www.texastribune.org/2022/05/09/texas-abortion-by-the-numbers/> [<https://perma.cc/LT5N-9JDP>]. This is likely an undercount because the study did not include medication abortions or nonresidents seeking abortions in Texas.

21 youth under age fourteen and 367 teenagers aged fifteen to nineteen had abortions in Oklahoma.<sup>160</sup> Because Oklahoma bans abortion, similarly situated youth now either have to give birth, travel to Kansas, New Mexico, or Colorado to access an abortion, or risk having an illegal abortion in Oklahoma through other means.<sup>161</sup> A youth with an unwanted pregnancy facing these circumstances will not benefit from a teacher admonishing them for not having been abstinent. These youth need medically accurate information, resources, and options. Comprehensive sex education is the only sex education curriculum that can provide this information.

Second, to avoid forcing youth with unwanted pregnancies to make these decisions on their own, efforts must be made to teach young people what options exist to avoid unwanted pregnancy. If youth are not taught about options for safer sex, students will still seek out this information, likely from their peers and the internet.<sup>162</sup> In an age of misinformation, especially via social media,<sup>163</sup> and bad actors preying on vulnerable people with fake contraception<sup>164</sup> and abortion pills,<sup>165</sup> that is a frightening proposition. Only comprehensive sex education ensures what youth learn about contraception is medically accurate and provides a safe space for students' questions. After learning this curriculum in school, students can assess the information they do learn from the internet and peers with a critical eye. Abstinence-only education leaves students uninformed and ignores the reality that they will still seek out information about sex.

Third, *Dobbs* not only took options off the table for pregnant youth with unwanted pregnancies; the illegality of abortions means that the risk to students is more than just lack of abortion access. The risks are criminal and carceral<sup>166</sup> and disproportionately harm Black youth.<sup>167</sup> The criminalization of abortion is beyond the scope of this note but if youth could potentially be incarcerated for their reproductive decisions, then at the very least, sex education needs to address the criminal risks of abortion and pregnancy decisions. Abstinence-only education might try to address these risks with scare tactics, but research shows that

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160. Martinez-Keel & Branham, *supra* note 144.

161. *See After Roe Fell*, *supra* note 12.

162. *See* Helmich, *supra* note 105, at 12.

163. *See* Jahnvai Sunkara, *Sexual Health Misinformation and Potential Interventions Among Youth on Social Media*, THE CARDINAL EDGE, 2021, at 1 (discussing negative impacts of the spread of sexual health misinformation via social media on youths).

164. *See* Suzy Katz, *Desperate People Are Turning to Illegal Online Pharmacies for Birth Control*, VICE (Aug. 29, 2022), <https://www.vice.com/en/article/88q85a/illegal-online-pharmacies-counterfeit-birth-control> [<https://perma.cc/3Z7W-XKPM>].

165. *See* Ruth Reader, *The web is home to an illegal bazaar for abortion pills. The FDA is ill-equipped to stop it.*, POLITICO (Aug. 1, 2022), <https://www.politico.com/news/2022/08/01/the-web-is-home-to-an-illegal-bazaar-for-abortion-pills-the-fda-is-ill-equipped-to-stop-it-00048802> [<https://perma.cc/5AZJ-VLA9>].

166. *See* Madiba Dennie & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes*, BRENNAN CTR. FOR JUS. (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes> [<https://perma.cc/F59S-D48D>].

167. *See* Bridges, *supra* note 71, at 6–12.

abstinence-only education does not increase rates of abstinence. Comprehensive sex education is better suited to inform students of these risks.

Fourth and finally, *Dobbs* harms youth dignity. Stephanie J. Hull, President and CEO of Girls Inc.,<sup>168</sup> and a signer of an amicus brief in *Dobbs*, argues that people’s “bodily autonomy is critical to their dignity as human beings and their right to be safe in the world.”<sup>169</sup> Comprehensive sex education is “a pre-condition for exercising full bodily autonomy,” since bodily autonomy requires not only meaningful access to information about the choices youth can make about their bodies and reproduction but also meaningful access to exercise those choices.<sup>170</sup> When implemented across grades and subjects and culturally responsive, comprehensive sex education can empower students to learn about their bodies while also respecting their peers’ bodies and decisions.

### B. Student Response to *Dobbs*

Middle and high school students are in tune with the impacts and harms of *Dobbs* and what is happening in their states and school districts. In Tennessee, where abortion became illegal in August 2022 after *Dobbs*, students formed Teens for Reproductive Rights, a youth-led community organization that aims to amplify teens’ voices and support reproductive healthcare education and organizations.<sup>171</sup> A 2012 law in Tennessee prohibited instruction on what the legislation deemed “gateway sexual activity” that would encourage “non-abstinent behavior.”<sup>172</sup> Knowing they would not learn about abortion or other contraceptives in school, “the teens . . . decided, this lack of education was no longer acceptable.”<sup>173</sup> These students are not alone. In Utah, “high-schoolers rallied outside a courthouse in May [2022] to call for accurate education on sex and abortion.”<sup>174</sup> In summer

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168. Girls Inc. is a network of nonprofit organizations that serves girls ages five to eighteen with evidence-based sex education programming at more than 1,500 sites across the United States and Canada. *What We Do*, GIRLS INC. (2022), <https://girlsinc.org/what-we-do/> [https://perma.cc/62C9-5QWC].

169. *Banning Abortion Will Have Devastating Consequences for Young Women, Especially Young Women of Color, Argues YWCA USA, Girls Inc., Supermajority Education Fund, and United State of Women in Amicus Brief*, YWCA (Sept. 20, 2021), <https://www.ywca.org/blog/2021/09/20/banning-abortion-will-have-devastating-consequences-for-young-women-especially-young-women-of-color-argues-ywca-usa-girls-inc-supermajority-education-fund-and-united-state-of-women-in-amicus-bri/> [https://perma.cc/V3J5-6PDR].

170. See *Comprehensive sexuality education*, U.N. POPULATION FUND, <https://www.unfpa.org/comprehensive-sexuality-education> [https://perma.cc/NPL8-W7UB]; see also *My Body, My Life, My World Operational Guidance*, U.N. POPULATION FUND (Dec. 2022), [https://www.unfpa.org/sites/default/files/resource-pdf/UNFPA-MBMLMW\\_OperationalGuidance-EN.pdf](https://www.unfpa.org/sites/default/files/resource-pdf/UNFPA-MBMLMW_OperationalGuidance-EN.pdf) [https://perma.cc/A8V4-DM5Z] (summarizing purpose and format of the UNFPA’s My Body, My Life, My World guidance modules, as well as explaining its overarching goal to ensure rights and choices for all youth).

171. Natanson, *supra* note 121; TEENS FOR REPRODUCTIVE RIGHTS, <https://teensforreproductiverights.godaddysites.com/> [https://perma.cc/8KUV-WCCB].

172. *Tennessee State Profile*, SIECUS (May 16, 2022), [https://siecus.org/state\\_profile/tennessee-state-profile-22/](https://siecus.org/state_profile/tennessee-state-profile-22/) [https://perma.cc/UHT4-S459].

173. Natanson, *supra* note 121.

174. *Id.*



2022, a group of students from Texas (the same group that previously held a virtual protest on Minecraft to demand a more comprehensive sex education in 2020)<sup>175</sup> created an Instagram account to share sex education lessons with their peers.<sup>176</sup> A student in Virginia, in response to *Dobbs*, organized demonstrations outside of school board meetings to demand “information about reproductive health clinics, more detailed lessons on contraceptive methods other than abstinence . . . and access to contraception.”<sup>177</sup> One student from Oklahoma said that “learning about safe sex is even more critical . . . now that most abortions are banned in Oklahoma.”<sup>178</sup> There has also been activism from college students and recent graduates.<sup>179</sup> The outpouring of student responses demonstrates how the abortion debate is not insulated from public education and that students turn to sexual education to educate themselves, whether that education is delivered formally in a school setting or informally on social media and among peers. District leaders inspired by these students calling for comprehensive sex education can implement these curricula at a local level and successfully defend them against legal challenges.

### C. Legal Challenges to Sex Education

Self-implementing comprehensive sex education programs at the district level allows local district leaders to move forward without getting caught in state level politics and the legislative process. This would not be successful in a school district in a state with a statewide ban on comprehensive sex education. However, if a school district in a state without statewide sex education regulation wants to implement comprehensive sexual education, one starting point is to ensure the program would survive a legal challenge by a parent who opposes comprehensive sex education. This final section presents examples of how comprehensive sex education can survive legal challenges despite *Dobbs* and briefly mentions emerging legal theories about how a parent could potentially challenge abstinence-only education.

The debate between abstinence-only and comprehensive sex education in

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175. *Teens Use Minecraft to Demand Comprehensive Sex-Ed in Texas*, JANE’S DUE PROCESS (Nov. 14, 2020), <https://janesdueprocess.org/blog/teens-use-minecraft-to-demand-comprehensive-sex-ed-in-texas/> [<https://perma.cc/7JQM-ERLE>].

176. Fort Bend S.U.R.F. (@fortbendsurf), INSTAGRAM, <https://www.instagram.com/fortbendsurf/?hl=en> [<https://perma.cc/DR5K-DG6M>].

177. Natanson, *supra* note 121. *See also* Hannah Natanson, *Fairfax students call for sex ed reform after fall of Roe v. Wade*, WASH. POST (July 14, 2022), <https://www.washingtonpost.com/education/2022/07/14/fairfax-students-sex-ed-reform-roe/> [<https://perma.cc/CB2Q-4TV2>] (describing students’ efforts in Fairfax County, Virginia to add more information about contraception to their sex-education curriculum following the *Dobbs* ruling).

178. Martinez-Keel & Branham, *supra* note 144.

179. *See* Sofia Andrade, *What Young People Face Without Roe*, THE NATION (June 30, 2022), <https://www.thenation.com/article/politics/roe-dobbs-college-organizing/> [<https://perma.cc/YP55-H36S>].

public schools animates the delicate balancing of parental rights and control over what their children learn in school with ensuring that children have medically accurate information about their own bodies and decisions. The American Academy of Pediatrics recognizes that schools are not the only provider of this important education:

Developmentally appropriate and evidence-based education about human sexuality and sexual reproduction over time provided by pediatricians, schools, other professionals, and parents is important to help children and adolescents make informed, positive, and safe choices about healthy relationships, responsible sexual activity, and their reproductive health.<sup>180</sup>

And in the school setting, parents have argued that their views “must take precedence over ‘expert’ pronouncements.”<sup>181</sup>

The spectrum of arguments made by parents challenging sex education is wide. This is in part because, as discussed in Part I, sex education in public schools is not regulated at the federal level though a program might face certain requirements as conditions of receipt of federal funds.<sup>182</sup> What sex education looks like in practice varies state by state, district by district, and teacher by teacher.<sup>183</sup> As a result of this localism, parents have challenged sex education programs on multiple constitutional grounds depending on the individual content of that district’s program. The main constitutional arguments include “religious freedom, the right to privacy, and parental control of . . . education.”<sup>184</sup>

Many of these challenges fail. Despite the Supreme Court’s recognition that “liberty” protected by the 14th Amendment Due Process Clause includes the right to “direct the education and upbringing of one’s children,”<sup>185</sup> challenges to sexual education programs have failed before reaching the merits because parents lacked standing.<sup>186</sup> On the merits, these challenges fail when objections were based solely on a parent’s personal morals<sup>187</sup> or when parents had adequate opt-out options.<sup>188</sup>

180. Breuner & Mattason, *supra* note 113, at e1 (emphasis added).

181. ZIMMERMAN, *supra* note 1, at 171.

182. *Sex Education Laws and State Attacks*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks> [<https://perma.cc/A6T2-V3YY>]; see also Kantor et al., *supra* note 39, at 8.

183. *Id.*; Natanson, *supra* note 121.

184. Alemansour et al., *supra* note 67, at 483–84 (citing *Smith v. Ricci*, 446 A.2d 501, 503 (N.J. 1982); *Fields v. Palmdale School Dist.* 427 F.3d 1197, 1199 (9th Cir. 2005); *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)).

185. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer*, 262 U.S. at 390; *Pierce*, 268 U.S. at 510).

186. See, e.g., *Bergstrand v. Rock Island Bd. of Educ.*, 514 N.E.2d 256, 258-59 (Ill. App. Ct. 1987) (holding that a father without full custody of his daughter could not opt-out of the school’s sex education program and noting that the mother did not want to opt-out). For a more complete discussion of sex education and standing cases see Tommy Ou, *Sex Education in Schools*, 9 GEO. L.J. 795, 807 (2022).

187. *Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995).

188. *Smith*, 446 A.2d at 523.

The federal circuit courts define and limit parental rights differently, including the First and Ninth Circuits holding a narrower view than the Third Circuit. This can impact the outcome of a parental legal challenge.<sup>189</sup>

Specifically, courts have pointed to the adequate opt-out provisions as the reason programs can survive legal challenge.<sup>190</sup> In *Smith v. Ricci*, a parental challenge to a family-life education program on religious grounds, the Supreme Court of New Jersey found that “because the program included a provision allowing parents to remove their children from parts they felt violated their beliefs, there was no infringement upon their religious freedom.”<sup>191</sup> The opt-out provisions also likely do not have to allow opt-out for the full sex education program. In *Leebaert v. Harrington*, a parent challenged a sex education program that allowed opt-out for up to six days of the sexual health unit, but not the entire 45-day health and hygiene education.<sup>192</sup> The Second Circuit held that the parent did not have a fundamental right to remove the student for the entire program and that the required sex education class survived rational basis review.<sup>193</sup>

On the other side, as of now, there have not been any successful challenges to abstinence-only education laws.<sup>194</sup> However, there are emerging legal theories for how parents might go about challenging abstinence-only education programs. A recent Harvard Law and Policy Review article suggests a path for parents that support more comprehensive sex education to legally challenge abstinence-only education as “irrationally perverse.”<sup>195</sup> Considering the sex education efficacy research that has found that abstinence-only education programs are not only ineffective, but also may “result in outcomes that are opposite of legislative intent,” the author suggests that abstinence-only education programs could be challenged at the state and federal level:<sup>196</sup>

[T]he moment may be ripe to bring a claim that state and local laws that require abstinence-only education – and the federal laws that fund them – are irrational because they employ methods that are likely to

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189. Emily J. Brown, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L.J. 109, 116 (2009). For a discussion of parental rights to educate children outside of the United States, see JONATHAN ZIMMERMAN, TOO HOT TO HANDLE: A GLOBAL HISTORY OF SEX EDUCATION 94–98 (2015).

190. For a more in-depth analysis of what types of opt-out provisions have survived legal challenge, see Alemansour et al., *supra* note 67, at 483–88.

191. *Id.* at 484 (citing *Smith*, 446 A.2d at 520).

192. *Leebaert v. Harrington*, 332 F.3d 134, 136–37 (2d Cir. 2003).

193. *Id.* at 135, 142.

194. *But see Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12CECG02608, 2015 WL 2298565 (Cal. Super., April 28, 2015) (ruling against a school district for non-compliance with California’s comprehensive sex education requirement); see also *Campaigns to Undermine Sexuality Education in the Public Schools*, ACLU, <https://www.aclu.org/documents/campaigns-undermine-sexuality-education-public-schools> [<https://perma.cc/573K-PPES>] (discussing legal challenges to abstinence-only education that were partially successful or resulted in settlement).

195. Boone, *supra* note 69, at 431–436.

196. *Id.* at 436.

have perverse outcomes from the stated legislative intent.<sup>197</sup>

Judge Pillard, a former Georgetown professor and current circuit judge, suggests that because abstinence-only education is based on gendered stereotypes, “[p]ublic school teaching of gender stereotypes violates the constitutional bar against sex stereotyping and is vulnerable to equal protection challenge.”<sup>198</sup> Finally, Leslie M. Kantor, a public health researcher at Rutgers School of Public Health, also suggests that abstinence-only education should be attacked as an international human rights violation – “[t]he articulation of human rights concerns alongside health arguments could bring additional advocates to [the] issue and illuminate further reasons why [abstinence-only] policies and programs are harmful and misguided.”<sup>199</sup>

### CONCLUSION

Given the coinciding history of support for abstinence-only education and anti-abortion policies, it is not surprising that *Dobbs*, an anti-abortion opinion, signals a threat to the little comprehensive sex education that exists. Because of this threat and the fact that *Dobbs* limited reproductive rights, including youth reproductive rights, *Dobbs* harms youth. When looking at these harms and reviewing the sex education efficacy research, comprehensive sex education is one way to mitigate these harms, especially when compared to abstinence-only education. Although it is too early to understand the full impact of *Dobbs* on sex education and youth, the calls from Republican lawmakers to further weaken or ban sex education creates an urgency to implement comprehensive sex education at the district level. Inspired by student responses to *Dobbs*, districts that want to implement comprehensive sex education can and should act, ensuring to model their programs after other sex education programs that have withstood legal challenges.

As the current generation of students becomes the next generation of educational, political, and legal leaders, hopefully comprehensive sex education programs will become the dominant form of sex education in the United States. In the meantime, especially in the immediate fallout of *Dobbs*, the onus is on current leaders to ensure that the harms of *Dobbs* to youth are mitigated through comprehensive sex education.

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197. *Id.*

198. Pillard, *supra* note 102, at 948.

199. Leslie M. Kantor, *Abstinence-Only Education: Violating Students' Rights to Health Information*, A.B.A. (July 1, 2008), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol35\\_2008/human\\_rights\\_summer2008/hr\\_summer08\\_kantor/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_summer2008/hr_summer08_kantor/).