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## Anti-Gay Curriculum Laws

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## ANTI-GAY CURRICULUM LAWS

Clifford Rosky

*Since the Supreme Court’s invalidation of anti-gay marriage laws, scholars and advocates have begun discussing what issues the LGBT movement should prioritize next. This article joins that dialogue by developing the framework for a national campaign to invalidate anti-gay curriculum laws—statutes that prohibit or restrict the discussion of homosexuality in public schools. These laws are artifacts of a bygone era in which official discrimination against LGBT people was both lawful and rampant. But they are far more prevalent than others have recognized. In the existing literature, scholars and advocates have referred to these provisions as “no promo homo” laws and claimed that they exist in only a handful of states. Based on a comprehensive survey of federal and state law, this article shows that anti-gay provisions exist in the curriculum laws of twenty states, and in several provisions of one federal law that governs the distribution of \$75 million in annual funding for abstinence education programs. In light of the Supreme Court’s rulings in four landmark gay rights cases, these laws plainly violate the Constitution’s equal protection guarantees, because they are not rationally related to any legitimate governmental interests. For the moment, however, federal and state officials still have the legal authority to enforce these laws, because no court has enjoined them from doing so. By challenging one of the country’s last vestiges of state-sponsored homophobia, advocates can help to protect millions of students from stigmatization and bullying, giving them an opportunity to thrive in our nation’s public schools.*

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## INTRODUCTION

This article is about anti-gay curriculum laws—laws that prohibit or restrict the discussion of homosexuality in public schools.<sup>1</sup> Some of these laws require teachers to instruct students that “homosexual conduct is a criminal offense,”<sup>2</sup> that “homosexuality is a lifestyle unacceptable to the general public,”<sup>3</sup> or that “homosexual activity . . . is . . . primarily responsible for contact with the AIDS virus.”<sup>4</sup> Others prohibit teachers from “promoting”<sup>5</sup> or “advocating”<sup>6</sup> homosexuality, or suggesting that “some methods of sex are safe methods of homosexual sex.”<sup>7</sup> Still others require

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<sup>1</sup> This article uses the term “anti-gay,” rather than “anti-LGBT,” because it articulates a facial challenge to laws that discriminate against “homosexuality,” the “homosexual life-style,” and “homosexual relationships.” The article uses the term “homosexuality,” rather than less stigmatizing terms like “same-sex intimacy,” “same-sex relationships,” or “lesbian, gay, and bisexual identities,” because it challenges laws that simultaneously discriminate along all of these dimensions. By using the terms “anti-gay” and “homosexuality,” I do not mean to downplay the existence of lesbian, bisexual, or transgender people—nor to deny that these laws facially discriminate against lesbians and bisexuals, and are applied against transgender people in a discriminatory manner. Rather, I use these terms to accurately reflect the text of the challenged laws, which is necessary in articulating facial challenges. *United States v. Williams*, 553 U.S. 285, 293 (2008).

<sup>2</sup> ALA. CODE §16-40A-2(c)(8) (2016); TEX. HEALTH & SAFETY CODE ANN. §85.007(b)(2) & §163.002(8) (Vernon 2015).

<sup>3</sup> ALA. CODE §16-40A-2(c)(8); TEX. HEALTH & SAFETY CODE ANN. §85.007(b)(2) & §163.002(8).

<sup>4</sup> 70 OKLA. STAT. ANN. §11-103.3 (2016).

<sup>5</sup> ARIZ. REV. STAT. ANN. §15-716(C)(1) (2016).

<sup>6</sup> UTAH CODE ANN. §53A-13-101(1)(c)(iii)(A)(II) (West 2016).

<sup>7</sup> ARIZ. REV. STAT. ANN. §15-716(C)(3).

teachers to “teach honor and respect for monogamous heterosexual marriage”<sup>8</sup> or emphasize “the benefits of monogamous heterosexual marriage.”<sup>9</sup> Nearly all of these laws require teachers to emphasize “abstinence from sexual activity until marriage”<sup>10</sup> while excluding same-sex unions from the definition of “marriage.”

Now that anti-gay sodomy and marriage laws have been declared unconstitutional, anti-gay curriculum laws look anachronistic—remnants of a bygone era in which official discrimination against LGBT people was both lawful and rampant. Yet these laws remain on the books,<sup>11</sup> they are still being enforced,<sup>12</sup> and no court has had an opportunity to determine whether they are constitutional.<sup>13</sup> This article develops the framework for a nationwide campaign to invalidate them.

The scope of this campaign will be broader than anyone has anticipated. In the recent literature, scholars and advocates have commonly referred to anti-gay curriculum laws as “no promo homo” or “don’t say gay” laws,<sup>14</sup> drawing on terminology developed by earlier scholars.<sup>15</sup> While these labels are catchy, they are imprecise in this context: They use a single clause that appears in only one or two statutes to describe a wide variety of anti-gay laws. Because of this imprecision, scholars and advocates have been unable to agree on the most basic facts about anti-gay curriculum laws: how many states have them,<sup>16</sup> the reasons they were adopted,<sup>17</sup> and the reasons they should be invalidated.<sup>18</sup>

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<sup>8</sup> 105 ILL. COMP. STAT. ANN. 5/27-9.1(c)(2) (West 2016).

<sup>9</sup> FLORIDA STAT. ANN. §1003.46(2)(a) (West 2016).

<sup>10</sup> See *infra* Part I.E.

<sup>11</sup> See *infra* Part I.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See Brian Barnett & Arron Bound, *A Critical Discourse Analysis of No Promo Homo Policies in U.S. Schools*, 51 J. AMER. ED. STUD. ASS’N 267 (2015); Amanda Harmon Cooley, *Constitutional Representations of the Family in Public Schools*, 76 OHIO ST. L.J. 1007, 1009 (2015); Ronny Hamed-Troyansky, *Erasing “Gay” from the Blackboard: The Unconstitutionality of “No Promo Homo” Education Laws*, 20 U.C. DAVIS JOURNAL OF JUVENILE LAW & POLICY 85 (2016); Leora Hoshall, *Afraid of Who You Are: No Promo Homo Laws in Public School Sex Education*, 22 TEXAS J. WOMEN, GENDER, & LAW 219 (2013); Jillian Lenson, *Litigation Primer Attacking State “No Promo Homo” Laws: Why “Don’t Say Gay” Is Not O.K.*, 24 TULANE J. L. & SEXUALITY 145 (2015); Ashley McGovern, *When Schools Refuse To “Say Gay”: The Constitutionality of Anti-LGBTQ “No-Promo-Homo” Public School Policies in the United States*, 22 CORNELL J. L. & PUB. POL’Y 465 (2012); Madelyn Rodriguez, *See No Evil, Hear No Evil, Speak No Evil: Stemming the Tide of No Promo Homo Laws in American Schools*, 8 MODERN AMERICAN 29 (2013); The Trevor Project, *“No Promo Homo” and “Don’t Say Gay” Laws*, <http://www.thetrevorproject.org/pages/no-promo/>; Gay, Lesbian & Straight Education Network, *“No Promo Homo” Laws*, <http://www.glsen.org/learn/policy/issues/nopromohomo>.

<sup>15</sup> William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channelling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000); Nan Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1702 (1993).

<sup>16</sup> See *infra* notes 19-21.

<sup>17</sup> Most authors assert that anti-gay curriculum laws are based on “animus,” without discussing the historical reasons that they were adopted. See Cooley, *supra* note \_\_, at 1048;

This article introduces a new term to clear up the confusion surrounding this subject: anti-gay curriculum laws. This phrase does not rhyme, but it identifies the only two features that are actually shared by the group of statutes commonly referred to as “no promo homo” and “don’t say gay” laws: They are anti-gay and they are curricular. They discriminate against homosexuality, and they govern the curricula of public schools.

As that more precise definition makes clear, anti-gay curriculum laws are more prevalent than others have recognized. While scholars and advocates have claimed that “no promo homo” laws exist in seven,<sup>19</sup> eight,<sup>20</sup> or nine<sup>21</sup> states, a comprehensive survey shows that anti-gay curriculum laws actually exist in twenty states.<sup>22</sup> More than 25 million children—nearly half of all school-aged children in the United States—are attending public schools in these twenty states.<sup>23</sup> In half of these states, teachers are affirmatively required to teach anti-gay curricula in all public schools.<sup>24</sup> In the other half, teachers may choose between offering students an anti-gay curriculum or providing no health, sex, or HIV education at all.<sup>25</sup>

In particular, this article identifies two types of anti-gay curriculum laws that scholars and advocates have overlooked: “promo hetero” laws and “abstinence until marriage” laws. In three states, curriculum laws require teachers to emphasize the alleged benefits of “monogamous *heterosexual* marriage.”<sup>26</sup> In seventeen states, curriculum laws require emphasis on “abstinence from sexual activity until marriage,”

Hamed-Troyansky, *supra* note \_\_, at 114; Lenson, *supra* note \_\_, at 159; McGovern, *supra* note \_\_, at 485; Rodriguez, *supra* note \_\_, at 37.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> Hoshall, *supra* note \_\_, at 222, McGovern, *supra* note \_\_, at 467.

<sup>20</sup> Ian Ayres & William Eskridge, *U.S. hypocrisy over Russia’s anti-gay laws*, WASH. POST, Jan. 31, 2014; Hamed-Troyansky, *supra* note \_\_, at 90; Rodriguez, *supra* note \_\_, at 31-32; Gay, Lesbian & Straight Education Network, *supra* note \_\_; The Trevor Project *supra* note \_\_.

<sup>21</sup> Cooley, *supra* note \_\_, at 1014; Lenson, *supra* note \_\_, at 147.

<sup>22</sup> ALA. CODE §16-40A-2; ARIZ. REV. STAT. ANN. §15-716; ARK. CODE ANN. §6-18-703; FLORIDA STAT. ANN. §1003.46; 105 ILL. COMP. STAT. ANN. 5/27-9.1; IND. CODE ANN. §20-34-3-17(a) & §20-30-5-13; LA. REV. STAT. §17:281; MICH. COMP. LAWS ANN. §380.1507; MISS. CODE ANN. §37-13-171; MO. STAT. ANN. §170.015; N.C. GEN. STAT. ANN. §115C-81; N.D. CENT. CODE ANN. §15.1-21-24; OHIO REV. CODE ANN. §3313.6011; 70 OKLA. STAT. ANN. §11-103.3 (2016); S.C. CODE ANN. §59-32-30(A) (2016); TENN. CODE ANN. §49-6-1304; TEX. HEALTH & SAFETY CODE ANN. §85.007 & §163.002; UTAH CODE ANN. §53A-13-101; VA. CODE ANN. §22.1-207.1; WIS. STAT. ANN. §118.019.

<sup>23</sup> Digest of Education Statistics: 2015, National Center for Education Statistics (Table 203.20), [https://nces.ed.gov/programs/digest/d15/tables/dt15\\_203.20.asp](https://nces.ed.gov/programs/digest/d15/tables/dt15_203.20.asp).

<sup>24</sup> 105 ILL. COMP. STAT. ANN. 5/27-9.1; IND. CODE ANN. §20-34-3-17(a) & §20-30-5-13; MISS. CODE ANN. §37-13-171; N.C. GEN. STAT. ANN. §115C-81; N.D. CENT. CODE ANN. §15.1-21-24; OHIO REV. CODE ANN. §3313.6011; 70 OKLA. STAT. ANN. §11-103.3; S.C. CODE ANN. §59-32-30(A); TENN. CODE ANN. §49-6-1304; UTAH CODE ANN. §53A-13-101.

<sup>25</sup> ALA. CODE §16-40A-2; ARIZ. REV. STAT. ANN. §15-716; ARK. CODE ANN. §6-18-703; FLORIDA STAT. ANN. §1003.46; LA. REV. STAT. §17:281; MICH. COMP. LAWS ANN. §380.1507; MO. STAT. ANN. §170.015; TEX. HEALTH & SAFETY CODE ANN. §85.007 & §163.002; VA. CODE ANN. §22.1-207.1; WIS. STAT. ANN. §118.019.

<sup>26</sup> See *infra* Part I.D.

while defining the term “marriage” to exclude same-sex couples.<sup>27</sup> The most prominent example of an “abstinence until marriage” law is Title V of the Social Security Act, a federal law governing the annual distribution of up to \$75 million for “abstinence education” programs.<sup>28</sup> While this law has not been previously identified as a “no promo homo” or “don’t say gay” law, it is especially significant. In 2016, the Department of Health and Human Services distributed more than \$58 million to thirty-six states and two U.S. territories to support “abstinence education” programs under Title V.<sup>29</sup> Two-thirds of these funds were received by the twenty states governed by anti-gay curriculum laws.<sup>30</sup>

The article proceeds in five parts. Part I introduces a new typology of anti-gay curriculum laws. It identifies five types of anti-gay provisions that commonly appear in curriculum laws and provides the most salient examples of each type. Part II examines the history of anti-gay curriculum laws, based on an original survey of state legislative histories and local newspaper archives. This collection reveals that most of these laws were passed during the late 1980s and early 1990s, during a period of national hysteria about the AIDS epidemic and the LGBT movement’s early gains. Yet a surprising number were passed more recently, in the midst of local and national struggles over the legalization of same-sex marriage. Regardless of when they were passed, these laws were aimed at preventing minors from developing same-sex attractions, establishing same-sex relationships, and identifying as lesbian, gay, or bisexual.<sup>31</sup>

Part III addresses two questions commonly asked by people who are skeptical about the enforcement of anti-gay curriculum laws, especially in light of the Supreme Court’s invalidation of anti-gay sodomy and marriage laws: (1) whether state and federal agencies still have the *legal authority* to enforce anti-gay curriculum laws and (2) whether officials still have the *political will* to enforce anti-gay curriculum laws. For the moment, the answer to both questions is yes. Although the Supreme Court has invalidated anti-gay marriage and sodomy laws, no court has had an opportunity to determine whether anti-gay curriculum laws are constitutional. Unless and until courts declare anti-gay curriculum laws to be unconstitutional and enjoin officials from enforcing them, state and federal agencies have the legal authority to enforce them. The available evidence suggests that at least some jurisdictions are currently enforcing these laws, even after the invalidation of anti-gay sodomy and marriage laws.

Part IV explains why anti-gay curriculum laws are unconstitutional. These laws violate the Constitution’s equal protection guarantees, regardless of what level of scrutiny applies to them. In four rulings issued over a period of twenty years, the Supreme Court has invalidated anti-gay laws under the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. Based on the principles

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<sup>27</sup> See *infra* Part I.E.

<sup>28</sup> 42 U.S.C. §710(d).

<sup>29</sup> 2016 Title V State Abstinence Education Program Grant Awards, U.S. Department of Health & Human Services (2016), <https://www.acf.hhs.gov/fysb/resource/2016-title-v-grant-awards>.

<sup>30</sup> *Id.*

<sup>31</sup> See generally Clifford Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013).

articulated in these cases, this Part begins by explaining why anti-gay curriculum laws injure and stigmatize lesbian, gay, and bisexual students, as well as students who are the children of same-sex couples. Like anti-gay sodomy and marriage laws, anti-gay curriculum laws demean the lives of lesbian, gay, and bisexual people, inviting others to discriminate against them. In particular, these laws promote a climate of silence and shame for lesbian, gay, bisexual students, and students who are the children of same-sex couples, by instructing them that “homosexuality” is so shameful, immoral, or unlawful that it should not be discussed. By doing so, these laws deny this class of students an equal opportunity to learn basic information about themselves and their families—information about the social prevalence and legal status of their own feelings, relationships, identities, and family members. Finally, anti-gay curriculum laws contribute to the pervasive isolation, bullying and harassment experienced by LGBT students in our nation’s schools, exposing them to increased risks of pregnancy, HIV, school dropout, unemployment, and suicide.

After establishing that anti-gay curriculum laws inflict such injuries, Part IV explains why these laws are not rationally related to any legitimate governmental interests. In particular, this Part reviews and rejects four interests that state legislatures have historically invoked to justify anti-gay curriculum laws: (1) promoting moral disapproval of homosexual conduct; (2) promoting children’s heterosexual development; (3) preventing sexually transmitted infections; and (4) recognizing that States have broad authority to prescribe the curriculum of public schools. Under the principles articulated in *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*, the first and second interests do not qualify as legitimate. The third and fourth interests qualify as legitimate, but anti-gay curriculum laws are not rationally related to either of them. Although no court has ruled on the issue yet, the Supreme Court’s jurisprudence leaves no doubt that anti-gay curriculum laws violate the Constitution’s equal protection guarantees.

Since the Supreme Court’s invalidation of anti-gay marriage laws, scholars and advocates have begun asking “what’s next” for the LGBT movement.<sup>32</sup> The article concludes by explaining why LGBT advocates have waited until now to launch a campaign against anti-gay curriculum laws—and why they should not wait any longer. As long as anti-gay sodomy and anti-gay marriage laws were enforceable, anti-gay curriculum laws could have been justified by reference to them—as the state’s means of deterring public school students from engaging in criminal conduct or extramarital sex. Now that sodomy and marriage laws have been declared unconstitutional, LGBT advocates can launch a national campaign to invalidate anti-gay curriculum laws.

Public schools represent a vital institution in our democracy, integrating young people into citizenship.<sup>33</sup> But across the country, our public schools have been failing LGBT youth, who report alarming levels of bullying, isolation, and suicide. Invalidating anti-gay curriculum laws will not eliminate these risks, but it will reduce them—protecting millions of LGBT students, and students with LGBT parents, from

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<sup>32</sup> See, e.g., AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS (Carlos Ball ed. 2016); Rebecca Isaacs, *The LGBT Movement After Marriage*, THE ADVOCATE, June 12, 2014; Urvashi Vaid et al., *What’s Next for the LGBT Movement?*, NATION, June 27, 2013;

<sup>33</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

both physical and psychological harms. By eradicating one of the country's last vestiges of state-sponsored homophobia, advocates can take another step toward the integration of LGBT youth into American society, and toward the equal protection of LGBT people of any age.

### I. TYPOLOGY: IDENTIFYING ANTI-GAY CURRICULUM LAWS

The phrase “no promo homo” was originally coined by Nan Hunter to describe the Briggs Initiative, a 1978 California ballot proposal allowing the termination of any public school teacher who engaged in the “advocating, soliciting, imposing, encouraging, or promoting of public or private homosexual activity.”<sup>34</sup> Later, William Eskridge used the phrase “no promo homo” to describe similar laws that emerged during this period that prohibited the “promotion” of “homosexuality” in various settings: federal taxation and spending, state university funding, FBI hate crime reporting, and public school curricula.<sup>35</sup>

This original usage of “no promo homo” allowed Hunter, Eskridge, and other scholars to identify important shifts that took place in anti-gay rhetoric during the 1970s. Before that era, anti-gay rhetoric relied primarily on metaphors of predation and disgust, invoking the specter of the “homosexual child molester.”<sup>36</sup> During the 1970s, anti-gay rhetoric developed “more abstract, less personal” appeals<sup>37</sup>—new claims about the spread of homosexuality through the subtler dynamics of indoctrination, role modeling, and public approval.<sup>38</sup> By dubbing this shift “no promo homo,” scholars revealed the anti-gay premises underlying the opposition's new rhetoric, establishing continuity between old and new fears.<sup>39</sup>

More recently, however, scholars and advocates have begun to use the phrase “no promo homo” to refer specifically to anti-gay curriculum laws.<sup>40</sup> This new usage is understandable, because some of the country's last remaining “no promo homo” laws are anti-gay curriculum laws.<sup>41</sup> But the new usage is also problematic, because many anti-gay curriculum laws do not fit the “no promo homo” model. As a result of this imprecision, scholars and advocates have been unable to agree on how many states have these laws, why they were adopted, or how they should be analyzed.

Based on a comprehensive survey of federal and state statutes, this Part shows that anti-gay provisions exist in the curriculum laws of twenty states and in several provisions of one federal law that governs funding for abstinence education programs. The Part divides these measures into five types, which reflect the particular ways that they discriminate: (1) Don't Say Gay; (2) No Promo Homo; (3) Anti-Homo;

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<sup>34</sup> Hunter, *supra* note \_\_, at 1702.

<sup>35</sup> Eskridge, *supra* note \_\_, at 1356-1361.

<sup>36</sup> Hunter, *supra* note \_\_, at 1704; Eskridge, *supra* note \_\_, at 1328-1329; Rosky, *supra* note \_\_, at 639-640.

<sup>37</sup> Eskridge, *supra* note \_\_, at 1365.

<sup>38</sup> Rosky, *supra* note \_\_, at 641-657.

<sup>39</sup> Eskridge, *supra* note \_\_, at 1331, 1338.

<sup>40</sup> See *supra* note \_\_.

<sup>41</sup> See *infra* Part I.B.



(4) Promo Hetero; and (5) Abstinence Until “Marriage.”<sup>42</sup> Eleven of these states have one of these anti-gay provisions; the remaining nine states have two types.

#### A. *Don’t Say Gay*

Strictly speaking, there is no state that actually has a “don’t say gay” law—one that explicitly prohibits teachers from discussing homosexuality at all. But South Carolina comes close. In South Carolina, health education programs “may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.”<sup>43</sup>

Louisiana’s law has a narrower scope. In Louisiana, “No sex education course offered in the public schools of the state shall utilize any sexually explicit materials depicting male or female homosexuality.”<sup>44</sup> Because of the ambiguity of the term “depicting,” it is not clear whether this limitation applies to verbal descriptions, as well as graphic depictions.<sup>45</sup> It is clearly a “don’t show gay” law; it may also be a “don’t say gay” law.<sup>46</sup>

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<sup>42</sup> In the literature on this subject, authors have proposed two alternative typologies for understanding anti-gay curriculum laws. The first typology distinguishes between anti-gay curriculum laws that are “negative” (requiring teachers to discuss homosexuality in a disparaging manner) and those that are “neutral” (prohibiting teachers from discussing homosexuality in a supportive manner). Lenson, *supra* note \_\_, at 147. But this typology has two flaws. First, it is incomplete: In this article’s terms, the typology includes “anti-homo” and “no promo homo” laws, but it excludes “don’t say gay,” “promo hetero,” and “abstinence until marriage” laws. Second, this typology is misleading, because it implies that “no promo homo” laws are “neutral.” Although “no promo homo” laws do not require teachers to disparage homosexuality, they still discriminate against lesbian, gay, and bisexual people by facially prohibiting teachers from discussing homosexuality in a supportive manner.

A second typology distinguishes between anti-gay curriculum laws based on whether the discriminatory language is “direct” (discriminating against lesbian, gay, and bisexual people by using terms like “homosexuality” or “homosexual”) or “indirect” (using terms that are not inherently discriminatory—e.g., “criminal,” “marriage,” “unmarried,” and “wedlock”—but are defined in a discriminatory manner by sodomy and marriage laws. Barrett & Bound, *supra* note \_\_, at 275. This distinction is accurate, but it is not relevant in construing anti-gay curriculum laws or determining whether they are constitutional.

<sup>43</sup> S.C. CODE ANN. §59-32-30(A)(5).

<sup>44</sup> LA. REV. STAT. §17:281(A).

<sup>45</sup> Webster’s Third New International Dictionary, Unabridged, s.v. “depict,” (“a: to form a likeness of by drawing or painting; b: to represent, portray, or delineate in other ways than in drawing or painting”).

<sup>46</sup> In recent years, the Tennessee and Missouri legislatures have rejected “don’t say gay” bills. See Tennessee Senate Bill 49 (2011); Missouri House Bill 2051 (2012); Tennessee Senate Bill 234 (2013).

*B. No Promo Homo*

Despite the popularity of the term “no promo homo,” there are only two states that prohibit teachers from “promoting” or “advocating” “homosexuality” in health, sex, or HIV education courses. Arizona law prohibits teachers from offering any “instruction which . . . promotes a homosexual life-style,” “portrays homosexuality as a positive alternative life-style,” or “suggests that some methods of sex are safe methods of homosexual sex.”<sup>47</sup> Utah law prohibits “the advocacy of homosexuality” in health education curricula.<sup>48</sup>

*C. Anti-Homo*

Four states affirmatively require teachers to portray “homosexuality” in a negative manner—as an unacceptable lifestyle, a criminal offense, or a cause of sexually transmitted diseases.<sup>49</sup> In both Alabama and Texas, sex education courses must include “[a]n emphasis . . . that homosexuality is not a lifestyle acceptable to the general public.”<sup>50</sup> In addition, both states require sex education to include “[a]n emphasis . . . that homosexual conduct is a criminal offense under the laws of this state.”<sup>51</sup>

Although the portrayal of homosexual conduct as a “criminal offense” may sound obsolete, both Alabama and Texas still have sodomy laws on the books. In Alabama, it is a crime to engage in any form of “deviate sexual intercourse.”<sup>52</sup> In Texas, it is a crime to engage in “deviate sexual intercourse with another individual of the same sex.”<sup>53</sup>

This interplay between curricular and criminal laws is apparent in other states, too. In Mississippi, sex education must include instruction that “[t]eaches the current state law related to sexual conduct, including forcible rape, statutory rape, paternity establishment, child support and homosexual activity.”<sup>54</sup> Mississippi still criminalizes sodomy as “the detestable and abominable crime against nature.”<sup>55</sup>

Rather than portraying same-sex intimacy as immoral or criminal, Oklahoma portrays it as inherently dangerous—“primarily responsible for contact with the AIDS

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<sup>47</sup> §15-716(C).

<sup>48</sup> §53A-13-101(1)(c)(iii)(A)(II).

<sup>49</sup> ALA. CODE §16-40A-2(c)(8); MISS. CODE ANN. §37-13-171(2)(e); 70 OKLA. STAT. ANN. §11-103.3(D)(1); TEX. HEALTH & SAFETY CODE ANN. §85.007(b)(2) & §163.002(8).

<sup>50</sup> ALA. CODE §16-40A-2(c)(8); TEX. HEALTH & SAFETY CODE ANN. §85.007(b)(2) & §163.002(8).

<sup>51</sup> *Id.*

<sup>52</sup> ALA. CODE §13A-6-64.

<sup>53</sup> TEX. PENAL CODE ANN. §21.06. The enforceability and constitutionality of these provisions are analyzed in Parts III and IV.

<sup>54</sup> MISS. CODE ANN. §37-13-171(2)(e). *See also* Act of July 29, 1995, ch. 534, §3, 1995 N.C. Laws 1931, 1932, amended by Act of Aug. 26, 2006, ch. 2006-264, §54(b), 2006 N.C. Sess. Laws 23, 24.

<sup>55</sup> §97-29-59.

virus.”<sup>56</sup> In Oklahoma, all public schools are required to teach a program of “AIDS prevention education.”<sup>57</sup> Under this law,

AIDS prevention education shall specifically teach students that:

1. engaging in homosexual activity, promiscuous sexual activity, intravenous drug use or contact with contaminated blood products is now known to be primarily responsible for contact with the AIDS virus.
2. avoiding the activities specified in paragraph 1 of this subsection is the only method of preventing the spread of the virus.<sup>58</sup>

In one respect, Oklahoma’s law is unique: It is the only law that affirmatively requires teachers to instruct students that “homosexual activity” is responsible for spreading HIV/AIDS. But as we have already seen, similar language appears in other states. In Arizona, for example, teachers may not suggest “that some methods of sex are safe methods of homosexual sex.”<sup>59</sup> While this law is less specific than Oklahoma’s, it presumes and implies that same-sex intimacy is dangerous.<sup>60</sup>

Strictly speaking, Utah does not have an “anti-homo” law—i.e., a law that affirmatively requires teachers to portray “homosexuality” in a negative manner. In Utah, however, the curricular and criminal law are woven together to produce a “no promo homo” policy of unparalleled scope. Utah law provides that “[a]t *no time* may instruction be provided . . . regarding any means or methods that facilitate or encourage the violation of any state or federal criminal law by a minor or an adult.”<sup>61</sup> Remarkably, this provision applies to any and all “instruction” in public schools—at any time, on any subject—“including responses to spontaneous questions raised by students.”<sup>62</sup> Moreover, Utah’s law provides that “because school employees and volunteers serve as examples to their students, school employees or volunteers acting in their official capacities may not support or encourage criminal conduct by students, teachers, or volunteers.”<sup>63</sup> Finally, the law adds that “[n]either the State Office of Education nor local school districts may provide training of school employees or volunteers that supports or encourages criminal conduct.”<sup>64</sup> Given that Utah is one of twelve states that still defines “sodomy” as a criminal offense,<sup>65</sup> these provisions prohibit all educators from engaging in any activities that might be said to “facilitate,” “encourage,” or “support” same-sex relationships.

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<sup>56</sup> 70 OKLA. STAT. ANN. §11-103.3(D)(1).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> §15-716(C)(3).

<sup>60</sup> *See also* S.C. CODE ANN. §59-32-30(A); N.C. GEN. STAT. ANN. §115C-81.

<sup>61</sup> §53A-13-101(1)(b)(ii)(A).

<sup>62</sup> *Id.*

<sup>63</sup> §53A-13-101(4)(a).

<sup>64</sup> §53A-13-101(4)(c).

<sup>65</sup> §76-5-403.

*D. Promo Hetero*

Three states specifically require the promotion of “heterosexual” relationships. In North Carolina, all reproductive health and safety education programs must teach that “a mutually faithful monogamous *heterosexual* relationship in the context of marriage is the best lifelong means of avoiding sexually transmitted diseases, including HIV/AIDS.”<sup>66</sup> In Illinois, sex education classes “shall teach honor and respect for monogamous *heterosexual* marriage.”<sup>67</sup> In Florida, health education must “[t]each abstinence from sexual activity outside of marriage as the expected standard for all school age children, while teaching the benefits of monogamous *heterosexual* marriage.”<sup>68</sup>

*E. Abstinence Until “Marriage”*

The last group of anti-gay curriculum provisions is by far the largest, and the most frequently overlooked. Seventeen states require teachers to emphasize the benefits of “abstinence from sexual activity outside of marriage,” while defining the term “marriage” to exclude same-sex couples.<sup>69</sup> (This group includes eight of the eleven states already mentioned, as well as nine additional states.)

The details of abstinence-until-marriage provisions vary, but they typically require teachers to emphasize one of the following claims in sex education materials:

- (1) “the social, psychological, and physical health gains realized by abstaining from sexual activity before and outside of marriage”;<sup>70</sup>
- (2) “abstinence from sexual activity before marriage is the only reliable way to prevent pregnancy, sexually transmitted diseases,

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<sup>66</sup> N.C. GEN. STAT. ANN. § 115C-81.

<sup>67</sup> 105 ILL. COMP. STAT. ANN. 5/27-9.1(c)(2).

<sup>68</sup> FLORIDA STAT. ANN. §1003.46(2)(a). Some authors have identified North Carolina’s law as a “no promo homo” law. Cooley, *supra* note \_\_, at 1015; Lenson, *supra* note \_\_, at 150 & n.29. Although the laws in Illinois or Florida are similar, they have not previously been identified as “no promo homo” laws.

<sup>69</sup> ALA. CODE §16-40A-2; ARK. CODE ANN. §6-18-703 (West 2016); FLORIDA STAT. ANN. §1003.46(2)(a); IND. CODE ANN. §20-34-3-17(a) & §20-30-5-13 (West 2016); LA. REV. STAT. §17:281 (West 2016); MICH. COMP. LAWS ANN. §380.1507 (2016); MISS. CODE ANN. §37-13-171 (West 2016); MO. STAT. ANN. §170.015 (Vernon 2016); N.C. GEN. STAT. ANN. §115C-81 (West 2016); N.D. CENT. CODE ANN. §15.1-21-24 (West 2017); OHIO REV. CODE ANN. §3313.6011 (Baldwin 2015-2016); S.C. CODE ANN. §59-32-30(A) (2016); TENN. CODE ANN. §49-6-1304 (West 2016); TEX. HEALTH & SAFETY CODE ANN. §85.007 & §163.002; UTAH CODE ANN. §53A-13-101; VA. CODE ANN. §22.1-207.1 (West 2016); WIS. STAT. ANN. §118.019 (West 2015).

<sup>70</sup> N.D. CENT. CODE ANN. §15.1-21-24; OHIO REV. CODE ANN. §3313.6011; VA. CODE ANN. §22.1-207.1.

including human immunodeficiency virus and acquired immunodeficiency syndrome”;<sup>71</sup> or

(3) “abstinence from sexual activity outside of marriage as the expected standard for all school age children”<sup>72</sup>

Standing alone, none of these provisions is anti-gay. Depending on how these states define the term “marriage,” the provisions could permit or require teachers to emphasize abstinence from sexual activity until any kind of “marriage”—including marriages between two persons of any sex. But these seventeen states still have anti-gay marriage laws on the books. As a result, these “abstinence until marriage” laws still facially require teachers to falsely instruct students that same-sex relationships are not sanctioned, because they do not fall within the state’s definition of “marriage.”<sup>73</sup>

Many of these abstinence-until-marriage provisions parallel the definition of “abstinence education” in Section 510 of Title V of the Social Security Act, which has governed the distribution of federal block grants for abstinence education programs for twenty years. Section 510(b) provides an eight-point definition of “abstinence education.” Five of the definition’s eight requirements use the term “marriage” or “wedlock”:

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

- (A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
- (B) teaches abstinence from sexual activity outside *marriage* as the expected standard for all school age children;
- (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-*wedlock* pregnancy, sexually transmitted diseases, and other associated health problems;
- (D) teaches that a mutually faithful monogamous relationship in context of *marriage* is the expected standard of human sexual activity;
- (E) teaches that sexual activity outside of the context of *marriage* is likely to have harmful psychological and physical effects;
- (F) teaches that bearing children out-of-*wedlock* is likely to have harmful consequences for the child, the child’s parents, and society;

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<sup>71</sup> ARK. CODE ANN. §6-18-703(d)(3); IND. CODE ANN. §20-34-3-17(a) & §20-30-5-13(2); MICH. COMP. LAWS ANN. §380.1507; MO. STAT. ANN. §170.015; WIS. STAT. ANN. §118.019 (West 2015); TEX. HEALTH & SAFETY CODE ANN. §85.007(b)(1).

<sup>72</sup> FLORIDA STAT. ANN. §1003.46(2)(a); IND. CODE ANN. §20-30-5-13(1). *See also* MO. STAT. ANN. §170.015; MICH. COMP. LAWS ANN. §380.1507; TEX. HEALTH & SAFETY CODE ANN. §85.007.

<sup>73</sup> The enforceability and constitutionality of these provisions are analyzed in Parts III and IV.

- (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
- (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.<sup>74</sup>

According to guidance issued by the Department of Health and Human Services, “no funds may be used in ways that contradict the eight A-H components of Section 510(b)(2).”<sup>75</sup>

One month after President Clinton signed Title V into law, he signed the Defense of Marriage Act (DOMA), a statute providing that “the word ‘marriage’ means “only a legal union between one man and one woman as husband and wife” for all purposes of federal law.<sup>76</sup>

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The following table identifies all of the country’s anti-gay curriculum laws, based on the typology outlined above:

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<sup>74</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §710).

<sup>75</sup> See Combined FY 2016 and FY 2017 Applications, Title V State Abstinence Education Grant Program, U.S. Department of Health and Human Services at 5, 22, 36, [https://ami.grantsolutions.gov/files/HHS-2016-ACF-ACYF-AEGP-1131\\_1.pdf](https://ami.grantsolutions.gov/files/HHS-2016-ACF-ACYF-AEGP-1131_1.pdf).

<sup>76</sup> The enforceability and constitutionality of these provisions are analyzed in Parts III and IV.

<sup>76</sup> Defense of Marriage Act of 1996, Pub. L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. §7).

**Table 1. Typology of Anti-Gay Curriculum Laws**

State	Don't Say Gay	No Promo Homo	Anti-Homo	Promo Hetero	Abstinence Until "Marriage"
Alabama			✓		✓
Arizona		✓	✓		
Arkansas					✓
Florida				✓	✓
Illinois				✓	
Indiana					✓
Louisiana	✓				✓
Michigan					✓
Mississippi			✓		✓
Missouri					✓
North Carolina				✓	✓
North Dakota					✓
Ohio					✓
Oklahoma			✓		
South Carolina	✓				✓
Tennessee					✓
Texas			✓		✓
Utah		✓			✓
Virginia					✓
Wisconsin					✓
U.S. (Federal)					✓

## II. HISTORY: ANITA, AIDS, AND ABSTINENCE UNTIL "MARRIAGE"

Anti-gay curriculum laws have not received specific attention from historians. To recover the history of these laws, this part draws on state legislative and local newspaper archives from the twenty states in which they were adopted. In order to place the adoption of these laws in broader context, the part presents them alongside a timeline of significant events in the history of sex education and LGBT rights in the United States. This timeline focuses on developments in the laws governing abstinence education, which played an especially significant role in the adoption of anti-gay curriculum laws.

The narrative is divided into three chronological sections. The first discusses the adoption and invalidation of the country's first anti-gay curriculum law in the late 1970s, which established the political and legal framework for the legislation that

followed it. The second describes the wave of anti-gay curriculum laws adopted in the late 1980s and early 1990s, in response to early demands for AIDS education in public schools. The third depicts the adoption of abstinence-until-marriage laws and same-sex marriage bans in the late 1990s and early 2000s, and struggles over the fate of these laws in recent years.

*A. Oklahoma's Teacher Fitness Law, 1978-1986*

The country's first anti-gay curriculum law was adopted by the Oklahoma Legislature on April 6, 1978.<sup>77</sup> In the legislative record, it was known as H.B. 1629, co-sponsored by two prominent conservative state legislators.<sup>78</sup> In the popular press, it was recognized as the work of Anita Bryant and John Briggs, two of the country's leading opponents of gay rights.<sup>79</sup>

*1. Anita Bryant*

On January 18, 1977, Dade County, Florida adopted a local ordinance prohibiting discrimination based on "sexual preference" in employment, housing, and public accommodations.<sup>80</sup> At the time, Anita Bryant was living in Miami, and had achieved national fame as a beauty queen, singer, and a spokeswoman for Florida orange juice.<sup>81</sup> In response to her hometown's adoption of a gay rights law, Bryant launched the "Save Our Children" campaign to repeal the ordinance by popular vote.<sup>82</sup>

Although the ordinance banned discrimination in a wide range of settings, Bryant's campaign was especially focused on the employment of "homosexual schoolteachers."<sup>83</sup> Among other things, she claimed that "homosexual teachers" would "sexually molest children," serve as "dangerous role models," and "encourage more homosexuality by inducing pupils into looking upon it as an acceptable lifestyle."<sup>84</sup> Protesting that "homosexuals . . . do not have the right to influence our

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<sup>77</sup> Act of Apr. 14, 1987, ch. 189, 1978 Okla. Laws 381, 381.

<sup>78</sup> Oklahoma, *supra* note \_\_.

<sup>79</sup> See, e.g., Linda Greenhouse, *Supreme Court Roundup: 4-to-4 Vote Upholds Teachers on Homosexual Rights Issue*, N.Y. TIMES, Mar. 27, 1985; Glen Elsasser, *Gay-Rights Advocacy Wins Test: Law Punishing Oklahoma Teachers Invalidated*, CHICAGO TRIBUNE, Mar. 27, 1985; Aaron Epstein, *Gay Rights Law Before High Court*, PHILADELPHIA INQUIRER, Jan. 15, 1985, at A4.

<sup>80</sup> DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 297 (1999); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003*, at 210 (2008); FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY* 2, 69 (2008).

<sup>81</sup> CLENDINEN & NAGOURNEY, *supra* note \_\_, at 292-293, 296-299; ESKRIDGE, *supra* note \_\_, at 210-11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; ANITA BRYANT, *THE ANITA BRYANT STORY. THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 113-120 (1977).

<sup>84</sup> BRYANT, *supra* note \_\_, at 114.



children to choose their way of life,” she promised, “I will lead such a crusade to stop it as this country has not seen before.”<sup>85</sup>

Bryant’s campaign against “homosexual recruitment” was remarkably successful. Only six months after the county’s gay rights ordinance was adopted, it was repealed in a two-to-one landslide.<sup>86</sup> In the meantime, Bryant’s work had attracted national headlines and won support from conservative leaders.<sup>87</sup> On the eve of her victory, Bryant promised to “carry our fight against similar laws throughout the nation.”<sup>88</sup>

## 2. John Briggs

John Briggs was a state senator from California. Shortly after Bryant’s victory, Briggs announced his plan to bring the Save Our Children campaign to California.<sup>89</sup> Within a few months, Briggs submitted a ballot initiative to the state’s attorney general, which became known as the Briggs Initiative.<sup>90</sup>

The Briggs Initiative allowed school districts to suspend, dismiss, and deny employment to “any person who has engaged in public homosexual activity and/or public homosexual conduct.”<sup>91</sup> Although the terms “public homosexual activity” and “public homosexual conduct” sound similar, the initiative defined them differently from each other.<sup>92</sup> The measure defined “public homosexual activity” to include an act of oral or anal intercourse performed “upon any other person of the same sex, which is not discreet and not practiced in private.”<sup>93</sup> In contrast, it defined “public homosexual conduct” to include “the advocating, soliciting, imposing, encouraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employees.”<sup>94</sup>

The initiative required school boards to consider the following factors “in evaluating the charges of public homosexual activity or public homosexual conduct and in determining unfitness for service”: “(1) the likelihood that the activity or conduct may adversely affect students or other employees; (2) the proximity or remoteness in time or location of the conduct to the employee’s responsibilities; (3) [any] extenuating or aggravating circumstances . . . ; and (4) whether the conduct includes acts, words or deeds, or a continuing or comprehensive nature which would

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<sup>85</sup> CLENDINEN & NAGOURNEY, *supra* note \_\_, at 292.

<sup>86</sup> *Id.* at 308; ESKRIDGE, *supra* note \_\_, at 212.

<sup>87</sup> CLENDINEN & NAGOURNEY, *supra* note \_\_, at 300 (U.S. Senator Jesse Helms); *id.* at 306 (Reverend Jerry Falwell); ESKRIDGE, *supra* note \_\_, at 211 (Governor Reuben Askew).

<sup>88</sup> CLENDINEN & NAGOURNEY, *supra* note \_\_, at 309.

<sup>89</sup> *Id.* at 365; RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK* 160 (1982).

<sup>90</sup> Initiative Measure to be Submitted Directly to the Voters (1977), [http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1323&context=ca\\_ballot\\_inits](http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1323&context=ca_ballot_inits); SHILTS, *supra* note \_\_, at 219.

<sup>91</sup> California Proposition 6, at 29 (1978), [http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1837&context=ca\\_ballot\\_props](http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1837&context=ca_ballot_props).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

tend to encourage, promote, or dispose schoolchildren toward private or public homosexual activity or private or public homosexual conduct.”<sup>95</sup>

During his campaign, Briggs sought to identify himself with Anita Bryant and to justify his initiative in similar terms. He introduced his proposal as the “California Save Our Children Initiative,” borrowed heavily from Bryant’s pamphlets and speeches, and circulated photographs of himself and Bryant together.<sup>96</sup> Like Bryant, Briggs defended his initiative as an attempt to protect children from gay teachers: “What I am after is to remove those homosexual teachers who through word, thought or deed want to be a public homosexual, to entice young impressionable children into their lifestyle.”<sup>97</sup>

By its own terms, however, the Briggs Initiative was more ambitious than the senator acknowledged. Because the initiative prohibited “advocating,” “encouraging,” or “promoting” homosexual behavior,<sup>98</sup> it could be applied to heterosexual teachers, as well as gay teachers. And because the initiative prohibited speech that was “likely to come to the attention of schoolchildren and/or other employees,”<sup>99</sup> it could be applied outside of the classroom, or indeed, outside of schools. Seizing on these scenarios, opponents argued that “You don’t have to be gay to be fired!” and “You just have to: Express an unpopular opinion,” or “Speak out for human rights.”<sup>100</sup> In a prominent op-ed, Ronald Reagan argued that the inclusion of the word “advocacy” had “generated heavy bipartisan opposition,” because it was not “confined to prohibiting the advocacy in the classroom of a homosexual lifestyle.”<sup>101</sup> Although early polls indicated that the initiative was likely to pass, it was defeated by a substantial margin on November 7, 1978.<sup>102</sup>

### 3. *H.B. 1629: Oklahoma’s Teacher Fitness Law*

Although the Briggs Initiative failed to pass in California, a remarkably similar proposal was adopted in Oklahoma, Anita Bryant’s home state. On January 16, 1978, while Senator Briggs was still gathering signatures to put his initiative on the ballot, H.B. 1629 was introduced into the Oklahoma House.<sup>103</sup> The bill was sponsored by

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<sup>95</sup> *Id.* at 41.

<sup>96</sup> Initiative Measure, *supra* note \_\_\_, at 4; CLENDINEN & NAGOURNEY, *supra* note \_\_\_, at 365; SHILTS, *supra* note \_\_\_, at 238-239.

<sup>97</sup> FEJES, *supra* note \_\_\_, at 183.

<sup>98</sup> California Proposition 6, *supra* note \_\_\_, at 29.

<sup>99</sup> *Id.*

<sup>100</sup> Vote No on 6, <http://www.boxturtlebulletin.com/2014/11/07/67706>.

<sup>101</sup> Ronald Reagan, *Two Ill-Advised California Trends*, LOS ANGELES HERALD-EXAMINER, Nov. 1, 1978.

<sup>102</sup> Hunter, *supra* note \_\_\_, at 1703.

<sup>103</sup> Oklahoma Legislative History Materials, H.B. 1629 (on file with author) [hereinafter Oklahoma].

Senator Mary Helm and Representative John Monks,<sup>104</sup> proud members of the John Birch Society and strident opponents of the Equal Rights Amendment.<sup>105</sup>

H.B. 1629 sailed through the Oklahoma Legislature with little debate.<sup>106</sup> On February 7, it was adopted by the House in a 88-2 vote.<sup>107</sup> To explain the bill's purpose, Representative Monks argued that H.B. 1629 allowed school boards “to fire those who are afflicted with this degenerate problem—people who are mentally deranged in this way.”<sup>108</sup>

After the bill passed out of the House, Senator Helm invited “Oklahoma’s most famous woman” to address her colleagues.<sup>109</sup> On February 21, in a brief speech supporting HB 1629, Bryant claimed that Americans wanted to return to the moral values “which our forefathers fought and died for.”<sup>110</sup> Although she recognized that “we cannot legislate morality,” she added that Americans wanted to “stop legislating immorality,” to a round of applause.<sup>111</sup> In her view, H.B. 1629 was “not an attempt to legislate morality, but a defense against pro-homosexual bills.”<sup>112</sup>

On March 15, the bill was adopted by the Senate in a 42-0 vote.<sup>113</sup> In presenting the bill, Senator Helm explained that “it would head off a threat to the children of Oklahoma.”<sup>114</sup> In response to a question from one of her colleagues, she acknowledged that teachers could already be dismissed for “moral turpitude.”<sup>115</sup> She warned, however, that there was a “strong, powerful, effective, nationwide move” to remove homosexuality from the definition of moral turpitude, and “to lessen restrictions on homosexual activity” in general.<sup>116</sup> “In four or five years,” she predicted, “you will be able to look around and see what’s happening and be proud of what we did.”<sup>117</sup>

Especially in historical context, the legislative purpose of H.B. 1629 was clear. Like the Briggs Initiative, the bill specifically targeted speech that was “likely to come to the attention of school children,”<sup>118</sup> and speech that was “of a repeated or continuing nature which tends to encourage or dispose school children toward similar

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<sup>104</sup> *Id.*

<sup>105</sup> Mike Hammer, *Teacher Firings Allowed: Bill Hits Homosexuals*, DAILY OKLAHOMAN, Feb. 8, 1978; Judy Fossett, *Opponent of Equal Rights Amendment Aiming Campaign at Grass Roots*, DAILY OKLAHOMAN, Jan. 15, 1982.

<sup>106</sup> Hammer, *supra* note \_\_, at 2.

<sup>107</sup> *Id.*; Oklahoma, *supra* note \_\_.

<sup>108</sup> Hammer, *supra* note \_\_, at 2.

<sup>109</sup> John Greiner, *Anita’s Plea to Senate: Don’t Legislate Immorality*, DAILY OKLAHOMAN, Feb. 22, 1978, at 2.

<sup>110</sup> *Id.* at 1-2.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> *Id.*

<sup>113</sup> Oklahoma, *supra* note \_\_; *Senate OKs Bill to Fire Homosexual Teachers*, DAILY OKLAHOMAN, Mar. 16, 1978.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Act of Apr. 14, 1987, ch. 189, §1(A)(2), 1978 Okla. Laws 381, 381.

conduct.”<sup>119</sup> Like Bryant and Briggs, the Oklahoma Legislature worried that if children learned about homosexuality from teachers, they would be more likely to become gay themselves.

#### 4. *National Gay Task Force v. Oklahoma City Board of Education*

In October 1980, the National Gay Task Force filed a class action lawsuit challenging the constitutionality of H.B. 1629.<sup>120</sup> On June 29, 1982, a federal district judge upheld H.B. 1629 by interpreting it narrowly, to apply only when a teacher’s public homosexual activity or conduct caused a “material and substantial disruption of the school.”<sup>121</sup> Although the judge acknowledged that “[t]he Oklahoma Legislature chose to use the language ‘unfit to teach,’ rather than the language ‘materially or substantially disrupt,’ he found that the distinction was meaningless: “It is apparent to this court that a teacher found unfit because of public homosexual activity or conduct would cause a material and substantial disruption of the school.”<sup>122</sup>

In the conclusion of his ruling, however, the district judge issued a warning that proved to be prescient. Throughout the proceedings, the plaintiff had claimed that the statute was “overbroad” because it applied to a wide range of protected speech activities. Based on his narrow interpretation of the law, the judge found that “many of plaintiff’s fears are unwarranted.”<sup>123</sup> In particular, he reassured the plaintiffs that:

The Act does not . . . allow a school board to discharge, declare unfit or otherwise discipline[:]

- a. a heterosexual or homosexual teacher who merely advocates equality for or tolerance of homosexuality;
- b. a teacher who openly discusses homosexuality;
- c. a teacher who assigns for class study articles and books written by advocates of gay rights;
- d. a teacher who expresses an opinion, publicly or privately on the subject of homosexuality; or
- e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals.<sup>124</sup>

The judge warned, however, that if any of these interpretations were incorrect, then the law was likely to be unconstitutional: “If, under the Act, a school board could

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<sup>119</sup> *Id.* at §1(B)(4).

<sup>120</sup> Paul Wenske, *Gays Challenging State Teacher Law*, DAILY OKLAHOMAN, Oct. 14, 1980; Paul Wenske, *Teacher Law Challenged: Suit Filed*, DAILY OKLAHOMAN, Oct. 15, 1980. *See also* ESKRIDGE, *supra* note \_\_, at 226.

<sup>121</sup> *National Gay Task Force v. Board of Education of Oklahoma City*, 1982 WL 31038 \*3 (W.D. Okla. Jun. 29, 1982).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at \*13.

<sup>124</sup> *Id.*

declare a teacher unfit for doing any of the foregoing or refuse to hire one for similar reasons, it would likely not meet constitutional muster.”<sup>125</sup>

Two years later, a divided panel of the Tenth Circuit found that the statute was unconstitutionally overbroad.<sup>126</sup> Although the 10th Circuit upheld the law’s provision that applied to “public homosexual activity,” it struck down the provision that applied to “public homosexual conduct.”<sup>127</sup> Under this provision, the court reasoned, “A teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute would be ‘advocating,’ ‘promoting,’ and ‘encouraging’ homosexual sodomy and creating a substantial risk that his or her speech would come to the attention of school children or school employees.”<sup>128</sup> In such a scenario, a teacher might be fired for saying, “I think it is psychologically damaging for people with homosexual desires to suppress those desires. They should act on those desires and be legally free to do so.”<sup>129</sup> Although the court acknowledged that the law required a finding that the teacher’s conduct had an “adverse effect” on students, it did not require “a material and substantial disruption,” or even that “the teacher’s public utterance occur in the classroom.”<sup>130</sup> A dissenting judge argued that because “sodomy is *malum in se*, i.e. immoral and corruptible in its nature,” any teacher who advocates sodomy in a manner that “will come to the attention of school children” is “in fact and in truth *inciting* school children to participate in the abominable and detestable crime against nature.”<sup>131</sup>

In Oklahoma, the Tenth Circuit’s ruling was sharply criticized. The following day, the *Daily Oklahoman* condemned it as “further erosion of the nation’s moral environment,” which threatened to “driv[e] more families to enroll their children in private institutions.”<sup>132</sup> In a mocking tone, the paper professed “wonder” at the court’s conclusion that “it is all right for a teacher to tell the pupils that homosexuality is an acceptable lifestyle, as long as the teacher doesn’t touch one of the children.”<sup>133</sup> A week later, the Oklahoma House of Representatives adopted a resolution urging the Oklahoma Attorney General to “assume control” of the appeal, on the ground that “homosexuality is ungodly, unnatural and unclean, . . . and an unfit example for the children in the State of Oklahoma to follow.”<sup>134</sup>

On appeal to the Supreme Court, six justices voted to grant certiorari.<sup>135</sup> Justice Powell did not participate, because he was recovering from cancer surgery.<sup>136</sup> At oral

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<sup>125</sup> *Id.*

<sup>126</sup> *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984).

<sup>127</sup> *Id.* at 1273-1274.

<sup>128</sup> *Id.* at 1274.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1276 (Barrett, J., dissenting).

<sup>132</sup> Editorial, *Boost for Permissiveness*, DAILY OKLAHOMAN, Mar. 16, 1984.

<sup>133</sup> *Id.*

<sup>134</sup> Act of Mar. 22, 1984, H. Res. No. 1054, 1984 Okla. Laws 1238, 1239.

<sup>135</sup> ESKRIDGE, *supra* note \_\_\_, at 226; Papers of Justice Harry A. Blackmun, Library of Congress, Manuscript Reading Room, Box 699, Folder 5 (Board of Education v. National Gay Task Force, No. 83-2030) (on file with author); Papers of Justice William J. Brennan, Jr., Box

argument, the school board's attorney sought to defend H.B. 1629 as a measure intended to teach students "the obligation to obey the law"—in this case, the law against "criminal homosexual sodomy."<sup>137</sup> Although many of the Justices focused on procedural issues, Chief Justice Warren Burger seemed keen to defend the law on the merits. First, he asked the board's attorney whether the state could "prohibit a school teacher from smoking in the classroom,"<sup>138</sup> in light of "the role model factor."<sup>139</sup> The board's attorney agreed, "in light of the crucial value orientation foundation which public schools and public school teachers, who obviously act as role models to impressionable youth, are called upon to fulfill."<sup>140</sup> Quoting an opinion by Justice Frankfurter, the board's attorney explained: "In the classroom, the law of imitation operates."<sup>141</sup>

Representing NGTF, law professor Laurence Tribe claimed that H.B. 1629 violated the First Amendment because "it in effect tells teachers, you had better shut up about this subject, or if you talk about it, you had better be totally hostile to homosexuals."<sup>142</sup> Again, the Chief Justice asked whether "a legislature is entitled to take into account the reality . . . that teachers in schools, especially grade school and high school level, are role models for the pupils?"<sup>143</sup> Tribe answered by quoting from Ronald Reagan's op-ed criticizing the Briggs Initiative:

When President Reagan editorialized against this very law in California, about six years ago, his answer to the role model point was, first of all, as a matter of common sense, there is no reason to believe that homosexuality is something like a contagious disease. He quoted a woman who said that if teachers had all that much power as role models, I would have been a nun many years ago.<sup>144</sup>

When the Justices met to discuss the case, they were evenly divided.<sup>145</sup> The Chief Justice, who was determined to uphold the law, asked his colleagues to have the case reargued after Justice Powell returned.<sup>146</sup> They declined.<sup>147</sup> On March 26, 1985, the

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I: 661, Folder 4 (Board of Education v. National Gay Task Force, No. 83-2030). Many thanks to Professor Eskridge for sharing photocopies of the Brennan and Blackman papers.

<sup>136</sup> ESKRIDGE, *supra* note \_\_, at 227; Brennan Papers, *supra* note \_\_, at 1-3; Blackmun Papers, *supra* note \_\_, at 1-3.

<sup>137</sup> Oral Argument at 22:44, Board of Education of Oklahoma City v. National Gay Task Force, 470 U.S. 903 (1985) (No. 83-2030), available at <https://www.oyez.org/cases/1984/83-2030>.

<sup>138</sup> *Id.* at 05:06.

<sup>139</sup> *Id.* at 05:31.

<sup>140</sup> *Id.* at 20:05.

<sup>141</sup> *Id.* at 28:10.

<sup>142</sup> *Id.* at 52:13.

<sup>143</sup> *Id.* at 44:32.

<sup>144</sup> *Id.* at 44:49.

<sup>145</sup> ESKRIDGE, *supra* note \_\_, at 227; Brennan Papers, *supra* note \_\_, at 1-3; Blackmun Papers, *supra* note \_\_, at 1-3.

<sup>146</sup> *Id.*

Supreme Court announced, in a one-sentence opinion, that the judgment of the Tenth Circuit was “affirmed by an equally divided Court.”<sup>148</sup>

### 5. *A Clash of Two Movements*

The Save Our Children campaign marked a turning point in the development of two movements—the gay liberation movement and the religious right. During the late 1960s, both movements experienced political rebirths, which sparked significant gains by the late 1970s.

The gay liberation movement is often dated to the Stonewall riots of June 29, 1969, when LGBT bar patrons responded to a police raid by resisting arrest, sparking a series of protests.<sup>149</sup> In the wake of these demonstrations, gay students across the country began organizing on college campuses,<sup>150</sup> and the gay liberation movement rapidly mobilized.<sup>151</sup> By 1977, sodomy laws had been repealed in nineteen states, and antidiscrimination ordinances had been adopted in more than forty municipalities.<sup>152</sup>

During this period, the religious right began to reenter U.S. politics, establishing a sprawling network of grassroots organizations across the United States.<sup>153</sup> Sparked by fears of a “sexual revolution,” organizations like the Christian Crusade, the John Birch Society, and the Eagle Forum mobilized local residents to protect “family values.”<sup>154</sup> Throughout the nation, these groups attracted members, media, and resources by launching single-issue campaigns on a wide range of topics related to sexuality, sex, and schools—abortion, contraception, creationism, homosexuality, pornography, school prayer, and sex education, and women’s rights.<sup>155</sup>

Opposition to sex education played a pivotal role in the rise of the religious right by helping organizations develop reliable strategies for mobilizing local communities.<sup>156</sup> As sociologist Janice Irvine has explained, opponents of sex

<sup>147</sup> *Id.*

<sup>148</sup> 470 U.S. 903 (1985).

<sup>149</sup> Hunter, *supra* note \_\_, at 1702; *see generally* MARTIN DUBERMAN, STONEWALL (1993).

<sup>150</sup> *See, e.g.*, Gay Lib v. Univ. of Mo., 416 F.Supp. 1350 (W.D. Mo. 1976), rev’d, 558 F.2d 848 (8th Cir. 1977); Gay Students Org. of Univ. of N.H. v. Bonner, 367 F.Supp. 1088 (D.N.H. 1974), aff’d as modified, 509 F.2d 652 (1st Cir. 1974) (quoting Healy v. James, 408 U.S. 169, 187 (1972)); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Activists Alliance v. Bd. of Regents of Univ. of Okla., 638 P.2d 1116 (Okla. 1981).

<sup>151</sup> CLENDINEN & NAGOURNEY, *supra* note \_\_, at 33-266.

<sup>152</sup> William N. Eskridge, Jr., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 328-337, 356-361 (2000).

<sup>153</sup> *See generally* SETH DOWLAND, FAMILY VALUES AND THE RISE OF THE CHRISTIAN RIGHT (2015); STEPHEN P. MILLER, THE AGE OF EVANGELICALISM: AMERICA’S BORN-AGAIN YEARS (2014); DANIEL K. MARTIN, GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT (2012).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> ALEXANDRA M. LORD, CONDOM NATION: THE U.S. GOVERNMENT’S SEX EDUCATION CAMPAIGN FROM WORLD WAR I TO THE INTERNET 141-142 (2010); JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES 35-

education widely circulated “depravity narratives” that relied on “distortion, innuendo, hyperbole, or outright fabrication” to foster “a climate of sexual suspicion in which sex educators might well be molesters.”<sup>157</sup> In two widely circulated narratives, opponents reported that one sex education teacher had disrobed, and another had engaged in sexual intercourse, in front of students.<sup>158</sup> In addition, opponents often claimed that sex education teachers had exposed children to pornographic material—material that opponents would display, and read aloud, while testifying before local school boards.<sup>159</sup> Although these claims were demonstrably false, they provoked emotional responses that were difficult to dispel.<sup>160</sup> By the late 1960s, controversies about sex education had divided communities in close to forty states.<sup>161</sup>

In the early 1970s, religious conservatives began to subtly transform anti-LGBT rhetoric in response to the rapid gains of the gay liberation movement. Before Stonewall, opponents had played to the public’s fears of molestation and seduction—LGBT adults initiating children into homosexuality by engaging in sexual relations with them.<sup>162</sup> After Stonewall, opponents sought to appeal to a broader audience by developing claims about gay advocacy, recruitment, and role modeling—claims that played to similar fears, without explicitly portraying LGBT people as child molesters.<sup>163</sup>

By the late 1970s, figures like Anita Bryant, John Briggs, and Mary Helm were ideally positioned to build on depravity narratives about sex education, and popularize this new paradigm in anti-LGBT rhetoric. By launching campaigns to “Save Our Children” from “homosexual teachers,” they wove together old fears of sex educators and LGBT people as child molesters with new fears of LGBT people as advocates, recruiters, and role models. By deploying these rubrics, they presented the potent specter of mandatory “homosexual education” in the nation’s public schools.

#### *B. Sex Education in the AIDS Epidemic, 1986-1996*

In the early 1980s, two developments undermined the religious right’s traditional opposition to sex education: the rise of abstinence education and the spread of the AIDS epidemic.<sup>164</sup> By the late 1980s, these developments brought about a paradigm shift in sex education debates<sup>165</sup> which inspired many states to adopt new sex education and AIDS education laws. In more than a dozen states, these new laws included anti-gay language, reflecting a national backlash against the gay liberation

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62 (2002); JEFFREY P. MORAN, *TEACHING SEX: THE SHAPING OF ADOLESCENCE IN THE 20TH CENTURY* 186 (2000).

<sup>157</sup> IRVINE, *supra* note \_\_\_, at 54, 58.

<sup>158</sup> *Id.* at 54-55.

<sup>159</sup> *Id.* at 59.

<sup>160</sup> *Id.* at 56.

<sup>161</sup> *Id.* at 60.

<sup>162</sup> Rosky, *supra* note \_\_\_, at 618-635.

<sup>163</sup> *Id.* at 635-657. *See also* Eskridge, *supra* note \_\_\_, at 1328-1329, 1365.

<sup>164</sup> IRVINE, *supra* note \_\_\_, at 83-91.

<sup>165</sup> *Id.* at 93-94.



movement, and a specific backlash against the adoption of anti-bullying curriculum in urban schools.

### 1. *Abstinence Education*

In 1980, the religious right had burst onto the national political landscape, claiming a pivotal role in the election of President Reagan.<sup>166</sup> In 1981, Reagan signed the Adolescent and Family Life Act, which sought to promote “chastity” among adolescents.<sup>167</sup> Although AFLA was designed as an anti-abortion law, it established the first source of federal funding for abstinence education programs.<sup>168</sup> To qualify for this funding, programs had to discourage adolescents from engaging in premarital sex, without providing any information about abortion or birth control.<sup>169</sup> In a significant departure, ALFA’s sponsors presented abstinence education as an alternative form of sex education—i.e., an alternative to comprehensive sex education—rather than a rejection of sex education itself.<sup>170</sup> In response to the new funding, religious conservatives began to develop a new industry of abstinence education programs.<sup>171</sup> Rather than debating whether sex education should be taught, they began debating which type of sex education should be offered.<sup>172</sup>

### 2. *AIDS Education*

The spread of AIDS further consolidated support for this strategic shift.<sup>173</sup> During the early 1980s, more than 12,000 people died of AIDS in the United States, but the syndrome had been widely dismissed as a “homosexual” disease by politicians, journalists, and physicians.<sup>174</sup> Throughout this period, President Reagan remained silent about the AIDS epidemic, and prohibited the Surgeon General, C. Everett Koop, from publicly addressing it.<sup>175</sup> By 1985, however, the death toll was rapidly rising, and the public pressure was mounting.<sup>176</sup> When the media reported that the actor Rock Hudson had contracted AIDS, many Americans became aware of the risk of HIV infection and the scope of the AIDS epidemic.<sup>177</sup>

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<sup>166</sup> DOWLAND, *supra* note \_\_, at 14.

<sup>167</sup> Pub. L. 97–35, 95 Stat. 578 (1981) (codified at 42 U.S.C. §300z).

<sup>168</sup> IRVINE, *supra* note \_\_, at 93.

<sup>169</sup> 42 U.S.C. §300z-10.

<sup>170</sup> IRVINE, *supra* note \_\_, at 93 (quoting Senator Jeremiah Denton).

<sup>171</sup> *Id.* at 101.

<sup>172</sup> IRVINE, *supra* note \_\_, at 93-94.

<sup>173</sup> *Id.* at 89; MORAN, *supra* note \_\_, at 213; JONATHAN ZIMMERMAN, TOO HOT TO HANDLE: A GLOBAL HISTORY OF SEX EDUCATION 117-118 (2015).

<sup>174</sup> RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC, at xxi-xxiii (2007).

<sup>175</sup> LORD, *supra* note \_\_, at 140, 148.

<sup>176</sup> SHILTS, *supra* note \_\_, at 578; LORD, *supra* note \_\_, at 148.

<sup>177</sup> SHILTS, *supra* note \_\_, at xxi; 577-581.

In February 1986, President Reagan authorized the Surgeon General to issue a report to the public on AIDS.<sup>178</sup> Given Koop's identity as an evangelical, and his history as an anti-abortion activist, the President likely expected a report in line with his administration's conservative policies.<sup>179</sup> In October 1986, the Surgeon General surprised his supporters by concluding that "Education concerning AIDS must start at the lowest grade possible."<sup>180</sup> He explained: "There is now no doubt that we need sex education in schools and that it must include information on heterosexual and homosexual relationships."<sup>181</sup> In a dramatic departure from religious conservatives, the Surgeon General bluntly encouraged Americans to use condoms to prevent the spread of AIDS: "A condom should be used during sexual relations, from start to finish, with anyone whom you know or suspect is infected."<sup>182</sup> Two years later, he took the unprecedented step of mailing a summary of his report to every household in the United States.<sup>183</sup>

Religious conservatives sharply criticized the Surgeon General's report, dubbing him "the Condom King,"<sup>184</sup> deriding his AIDS education program as "the teaching of safe sodomy,"<sup>185</sup> and suggesting that his report "looks and reads like it was edited by the Gay Task Force."<sup>186</sup> Calling for mandatory AIDS testing and the mass quarantine of AIDS patients, they claimed that AIDS was a form of divine punishment for sinful behavior.<sup>187</sup> In the end, however, the religious right was not able to resist the widespread adoption of AIDS education and sex education laws. By 1990, all fifty states had adopted laws encouraging or mandating AIDS education, and at least forty states had adopted similar sex education laws.<sup>188</sup>

### 3. *Anti-Gay Curriculum Laws*

Although religious conservatives did not prevent the adoption of AIDS and sex education laws, they had a profound impact on how these laws were drafted. In one state after another, they fought for the inclusion of anti-gay provisions within AIDS and sex education laws, rather than opposing the laws altogether. They were often—though not always—successful. In 1987 and 1988, nine states adopted anti-gay

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<sup>178</sup> LORD, *supra* note \_\_\_, at 149.

<sup>179</sup> *Id.* at 145; SHILTS, *supra* note \_\_\_, at 588.

<sup>180</sup> C. Everett Koop, Surgeon General, *Surgeon General's Report on Acquired Immunity Deficiency Syndrome* (1986), at 31 (on file with author).

<sup>181</sup> *Id.*

<sup>182</sup> Statement of C. Everett Koop, Surgeon General (Oct. 22, 1986), at 10 (on file with author).

<sup>183</sup> LORD, *supra* note \_\_\_, at 158-159. The mailer was read by 82 percent of Americans. *Id.* at 159.

<sup>184</sup> *Id.* at 154.

<sup>185</sup> Alessandra Stanley, AIDS Becomes a Political Issue, *Time*, Mar. 23, 1987.

<sup>186</sup> Martin, *supra* note \_\_\_, at 250.

<sup>187</sup> CLENDINEN & NAGOURNEY, *supra* note \_\_\_, at 487-488, 519, 540-542.

<sup>188</sup> D. deMauro, *Sexuality Education 1990: A Review of State Sexuality and AIDS Education Curricula*, 18 SIECUS REPORTS 1 (1989-1990).

curriculum laws.<sup>189</sup> Between 1989 and 1996, another seven states adopted them.<sup>190</sup> All told, sixteen states adopted a total of twenty anti-gay sex education and AIDS education laws in a period of nine years.<sup>191</sup> In many instances, these were the state's first laws discussing sex education of any kind. In one form or another, they all facially discriminated against homosexuality—as an unacceptable “lifestyle,” a cause of “AIDS,” a “criminal offense,” or an invalid form of “marriage.” In the last thirty years, only one of these states—California—has repealed all of the anti-gay language contained in the state's curriculum laws.<sup>192</sup>

Once again, Oklahoma was at the forefront of this anti-gay trend. Within months of the Surgeon General's AIDS report, the state's legislature passed H.B. 1476, one of the country's first AIDS education laws.<sup>193</sup> In sharp contrast to the earlier debate over H.B. 1629, the debate over H.B. 1476 was “emotional,” and the legislation was narrowly adopted.<sup>194</sup> One of the bill's opponents handed out “explicit” materials from San Francisco, which “crudely” depicted “homosexual and heterosexual practices,” arguing that “lawmakers might be voting to expose students to similar language.”<sup>195</sup> Another objected, “If you really want to stop it, are you going to tell these children that homosexuality is not the way to go?”<sup>196</sup> In response, newspaper coverage emphasized that “the disease is spreading among heterosexuals,” and that “the core curriculum being proposed stresses the avoidance of homosexual or promiscuous sexual activity, as well as the shared use of needless for intravenous

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<sup>189</sup> Act of Sept. 24, 1988, ch. 1337, §2, 1988 Cal. Legis. Serv. 4425, 4426, repealed by Act of Oct. 1, 2003, ch. 650, §10, 2003 Cal. Legis. Serv. 4984, 4989; Act of June 6, 1988, ch. 88-380, §15, 1988 Fla. Sess. Law Serv. 1996, 2005; Act of May 16, 1988, ch. 512, §3, 1988 Miss. Laws 569, 571; Act of Apr. 18, 1988, No. 437, §3, 1988 S.C. Laws 2911, 2913; Public School Curriculum Amendments, ch. 80, §1, 1988 Utah Laws 449, 449; Act of July 20, 1987, Act No. 904, §1, 1987 La. Laws 2483, 2484; Act of July 1, 1987, ch. 46, §1, 1987 Okla. Laws 190, 191; Act of Apr. 30, 1987, P.L. 197-1987, §§1-2, 1987 Ind. Pub. Laws 2279, 2279-2280.

<sup>190</sup> Act of July 29, 1995, ch. 534, §3, 1995 N.C. Laws 1931, 1932; Act of Dec. 31, 1993, P.A. 1993, No. 335, §1, 1993 Mich. Pub. Acts 2119, 2123; Act of Apr. 15, 1993, Act 1173, §36, 1993 Ark. Acts 1745-A; Act of May 21, 1992, No. 92-590, §2, 1992 Ala. Laws 1216, 1218; Act of June 21, 1991, ch. 269, §1, 1991 Ariz. Laws 1392, 1392; Act of May 29, 1989, ch. 1195, §1, 1989 Tex. Sess. Laws Serv. 4854, 4856; Act of Apr. 27, 1989, ch. 215, §1, 1989 Tenn. Pub. Acts 306, 307.

<sup>191</sup> Four states passed two anti-gay curriculum laws during this period. In addition to the laws cited *supra* notes \_\_\_ and \_\_\_, see Act of Apr. 30, 1996, ch. 10, §§ 1-2, 1996 Utah Laws 2nd Sp. Sess. 268, 1872; Act of Mar. 21, 1991, ch. 14, §51, 1991 Tex. Sess. Laws Serv. 42, 83; Act of Oct. 31, 1989, Pub. Act 86-941, §1, 1989 Ill. Legis. Serv. P.A. 5660, 5660; Act of Mar. 5, 1988, P.L. 134-1988, §3, 1988 Ind. Pub. Laws 1763, 1765.

<sup>192</sup> Act of Sept. 24, 1988, ch. 1337, §2, 1988 Cal. Legis. Serv. 4425, 4426, repealed by Act of Oct. 1, 2003, ch. 650, §10, 2003 Cal. Legis. Serv. 4984, 4989.

<sup>193</sup> Act of July 1, 1987, ch. 46, § 1, 1987 Okla. Laws 190, 191.

<sup>194</sup> Chris Casteel, *Debate on AIDS Education Emotional*, DAILY OKLAHOMAN, Mar. 18, 1987, at 1.

<sup>195</sup> *Id.*

<sup>196</sup> Casteel, *supra* note \_\_\_.

drug use.<sup>197</sup> Although this amendment mollified some of the bill's early opponents,<sup>198</sup> others still worried that “[t]o some children, the information might be titillating and lead them to want to experiment.”<sup>199</sup>

Similar claims and concerns were raised in other states. In Louisiana, the bill's sponsor sought to clarify that the bill “does not mandate sex education, has nothing to do with abortions, has nothing to do with homosexuals,”<sup>200</sup> and that under the bill's language, “you can't use any material that talks about homosexual conduct.”<sup>201</sup> In response, opponents claimed that the bill would allow schools to teach textbooks depicting homosexuality, masturbation, and sexual intercourse. After reading several passages aloud from a textbook, one opponent declared, “Homosexual love is stated as a way that people can have intercourse and not have babies, so now homosexual love is a contraceptive.”<sup>202</sup>

In several states, local conservative groups lobbied for the inclusion of “anti-homo” provisions—language that affirmatively required teachers to disparage same-sex relationships as immoral, criminal, or dangerous. In Alabama, newspapers consistently identified “the conservative Eagle Forum” as the source of S.B. 72, “a bill that would require sex education courses in public schools to include instruction that homosexual conduct is a crime.”<sup>203</sup> A similar proposal was defeated in South Carolina, even as the state adopted other anti-gay provisions.<sup>204</sup>

Throughout this period, many conservatives continued to resist the adoption of mandatory AIDS education laws. In 1991, conservative Republicans in the Arizona Legislature added several anti-gay provisions to an AIDS education bill, even as they remained “vehemently opposed” to it.<sup>205</sup> As the sponsor of these amendments explained: “Many people today still believe that homosexuality is not a positive, or

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<sup>197</sup> John Greiner, *Senate Panel OKs AIDS Education Bill*, DAILY OKLAHOMAN, Apr. 7, 1987; see also Jim Killackey, *AIDS Classes to Promote Abstinence*, DAILY OKLAHOMAN, May 19, 1987; Chris Casteel, *House Panel Votes to Require Education on AIDS*, DAILY OKLAHOMAN, Mar. 12, 1987.

<sup>198</sup> Greiner, *supra* note \_\_.

<sup>199</sup> Letter to Editor, *Say No to AIDS Education Bill*, DAILY OKLAHOMAN, Apr. 6, 1987.

<sup>200</sup> Louisiana Legislative History File, H.B. 484, Audio Tape of House Comm. on Education, H.B. 484 (May 20, 1987) (statement of Rep. Alphonse J. Jackson) (on file with author).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* (statement of unidentified opponent #2).

<sup>203</sup> Phillip Rawls, *Bill Changes Sex Education Class Focus*, HUNTSVILLE TIMES (AL), Feb. 12, 1992; Phillip Rawls, *Bill Would Make Schools Teach Sexual Abstinence*, HUNTSVILLE TIMES (AL), Jan. 28, 1992; Bill Poovey, *Opponents of Sex Education Bill Stall House to a Crawl*, HUNTSVILLE TIMES (AL), May 8, 1992; Bill Poovey, *House Bill Requires Teaching Homosexuality is a Crime*, HUNTSVILLE TIMES (AL), May 1, 1992.

<sup>204</sup> South Carolina Legislative History File, S.B. 546 (Feb. 16, 1988) (describing House amendment requiring that “information on homosexuality must present homosexual behavior as unnatural, unhealthy, and illegal and may not include information that promotes the behavior) (on file with author).

<sup>205</sup> Mary K. Reinhart, *House Backs Bill Requiring AIDS Teaching*, ARIZONA DAILY STAR, June 15, 1991.

even an alternative, lifestyle[.] Medical science has shown that there are no safe methods of homosexual sex.”<sup>206</sup>

Nearly all of these statutes required teachers to emphasize abstinence from sexual activity until “marriage.” In a few states, legislators chose to modify the term “marriage” with “heterosexual.”<sup>207</sup> In hindsight, this may seem like a puzzling step, given that same-sex marriage would not become legal in any state for another twenty-five years. But by the late 1980s, the issue was already on the national radar. The first same-sex marriage lawsuits had been filed in the early 1970s,<sup>208</sup> and couples had been litigating the issue periodically throughout the 1980s and 1990s.<sup>209</sup> In the meantime, same-sex couples were performing “marriage” ceremonies, even though the resulting unions were not legally valid.<sup>210</sup> By specifying that they were referring to “heterosexual marriage,” some legislatures chose to eliminate any ambiguity in the state’s curriculum law.<sup>211</sup>

#### 4. *Inclusive Curricula*

Until the 1980s, LGBT organizations had not attempted to advocate for the rights of LGBT students in elementary or secondary schools, or the inclusion of LGBT issues in public school curricula.<sup>212</sup> But in 1984, Congress passed the Equal Access Act, a law that required federally funded schools to provide equal access to extracurricular student clubs.<sup>213</sup> Although Senator Orrin Hatch introduced the law to support Bible study groups, it served as a bulwark for LGBT student organizations in the coming years.<sup>214</sup>

Shortly after the passage of the Equal Access Act, a Los Angeles teacher founded Project 10, the country’s first school program devoted to supporting lesbian, gay, and bisexual students.<sup>215</sup> The program was founded in response to an incident

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<sup>206</sup> *Id.*

<sup>207</sup> Act of July 29, 1995, ch. 534, § 3, 1995 N.C. Laws 1931, 1932; Act of Oct. 31, 1989, Pub. Act 86-941, § 1, 1989 Ill. Legis. Serv. P.A. 5660, 5660; Act of Aug. 5, 1989, ch. 89-350, § 4, 1989 Fla. Sess. Law Serv. 2233, 2236; Act of Sept. 24, 1988, ch. 1337, § 2, 1988 Cal. Legis. Serv. 4425, 4426.

<sup>208</sup> *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), appeal denied, 84 Wash. 2d 1008 (1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff’d*, 409 U.S. 810 (1972). *See generally* Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 *YALE J. L. & HUMANITIES* 1 (2015).

<sup>209</sup> *Dean v. District of Columbia*, 653 A.2d 307, 315-16 (D.C. 1995); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Adams v. Howerton*, 486 F.Supp. 1119, 1122-1124 (C.D. Cal. 1980).

<sup>210</sup> *See, e.g., Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997).

<sup>211</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>212</sup> MORAN, *supra* note \_\_\_, at \_\_\_, \_\_\_.

<sup>213</sup> Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C.A. §§ 4071-4074 (West 2015)).

<sup>214</sup> James Brooke, *To Be Young, Gay, and Going to High School in Utah*, *N.Y. TIMES*, Feb. 29, 1996.

<sup>215</sup> Virginia Uribe & Karen Harbeck, *Addressing the Needs of Lesbian, Gay, and Bisexual Youth: The Origins of Project 10 and School-Based Intervention*, in *COMING OUT OF THE CLASSROOM*

involving a gay male student who had dropped out of high school, after being repeatedly harassed by classmates and teachers. Named after Alfred Kinsey's estimate that 10% of the population is "exclusively homosexual," the program was conceived as "an in-school counseling program providing emotional support, information, resources, and referrals to young people who identified themselves as lesbian, gay or bisexual," and an attempt "to heighten the school community's acceptance of and sensitivity to gay, lesbian, and bisexual issues."<sup>216</sup>

Project 10 drew national media, and became a popular target of religious conservatives campaigning for anti-gay curriculum laws. In 1988, the Traditional Values Coalition cited Project 10 as the justification for two anti-gay curriculum bills introduced in the California Senate.<sup>217</sup> The first bill, S.B. 2807, prohibited "any public school from operating a program that encourages or supports any sexual lifestyle that may unduly expose a minor to contracting AIDS, or suggests that such a lifestyle is positive."<sup>218</sup> The second bill, S.B. 75, required that "[c]ourse material and instruction shall teach honor and respect for heterosexual marriage" in AIDS education classes.<sup>219</sup> Only the second bill was defeated, after a heated debate about whether it would stigmatize students raised in "untraditional" families.<sup>220</sup>

The following year, a similar attack on Project 10 led to the adoption of one of the country's most virulently anti-gay curriculum laws. In Texas, a member of the John Birch Society testified to the Senate Education Committee that the state's new AIDS education bill should be amended to require teachers to specifically instruct students that "homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under Section 21.06, Penal Code."<sup>221</sup> When asked why this language was necessary, he explained that the Los Angeles School District had adopted a program known as "Project 10," which taught students that homosexuality was an acceptable alternative lifestyle.<sup>222</sup> He warned that if the Texas bill were not clarified in this manner, Project 10 would soon be adopted by Texas schools.<sup>223</sup>

In addition to debates in state legislatures, a number of local controversies erupted over the inclusion of "homosexuality" in public school curricula.<sup>224</sup> In 1989, New York City educators began drafting the *Children of the Rainbow* curriculum, with the primary goal of teaching first graders to respect the city's many racial and ethnic

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CLOSET: GAY AND LESBIAN STUDENTS, TEACHERS, AND CURRICULA 9, 10 (Karen Harbeck ed. 1992).

<sup>216</sup> *Id.* at 11.

<sup>217</sup> California Legislative History Files, S.B. 75 [hereinafter California] (on file with author).

<sup>218</sup> *Id.*

<sup>219</sup> Act of Sept. 24, 1988, ch. 1337, §2, 1988 Cal. Legis. Serv. 4425, 4426, repealed by Act of Oct. 1, 2003, ch. 650, §10, 2003 Cal. Legis. Serv. 4984, 4989.

<sup>220</sup> California, *supra* note \_\_\_\_.

<sup>221</sup> Texas Legislative History Files, H.B. 213 [hereinafter Texas] (on file with author).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Janice M. Irvine, *One Generation Post-Stonewall: Political Contests over Lesbian and Gay School Reform*, in A QUEER WORLD 572 (Martin Duberman ed. 1997).

groups.<sup>225</sup> Among the curriculum's 443 pages, three pages in a section on families urged teachers to include references to lesbian and gay people and to teach children that some people are gay and should be respected like everyone else.<sup>226</sup> One district's school board president called the curriculum "dangerously misleading lesbian/homosexual propaganda," and accused the New York City Chancellor of perpetrating "as big a lie as any concocted by Hitler or Stalin."<sup>227</sup> After a brief battle between the board and the chancellor, the *Children of the Rainbow* was shelved, providing a highly publicized, cautionary tale for educators throughout the United States.<sup>228</sup>

In Merrimack, New Hampshire, a conservative school board chair sought to capitalize on the conflict over *Children of the Rainbow*, but his effort soon backfired. Initially, the chair had persuaded his colleagues to pass a broad policy that prohibited any instruction or counseling that had "the effect of encouraging or supporting homosexuality as a positive lifestyle alternative."<sup>229</sup> In response, students threatened to wear black armbands and pink buttons until the policy was repealed, and protesters held the city's first gay rights rally in the school's parking lot.<sup>230</sup> In the next election, the chair and his allies were defeated, and the policy was repealed by the new school board.<sup>231</sup>

### C. Abstinence Until "Marriage," 1996-2016

In 1996, the landscape for federal abstinence education was fundamentally altered when President Clinton signed laws adopting a new definition of "abstinence education"<sup>232</sup> and a new definition of "marriage."<sup>233</sup> At the behest of the religious right, Title V established a stream of \$50 million per year in federal funding for a period of five years.<sup>234</sup> States that chose to accept these funds were required to match every four federal dollars with three state-raised dollars, and were then responsible for using the funds themselves or distributing them.<sup>235</sup> With the exception of California, every state has accepted Title V abstinence-only-until-marriage funds in at least one year.<sup>236</sup>

Since the adoption of Title V, all twenty states that currently have anti-gay curriculum laws adopted constitutional amendments excluding same-sex couples from

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<sup>225</sup> IRVINE, *supra* note \_\_, at 154-158; Irvine, *supra* note \_\_, at 574-576; Steven Lee Meyers, *How a 'Rainbow Curriculum' Turned Into Fighting Words*, N.Y. TIMES, Dec. 13, 1992.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Meyers, *supra* note \_\_.

<sup>229</sup> IRVINE, *supra* note \_\_, at 161-163.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Pub. L. 104-193.

<sup>233</sup> Pub. L. 104-199.

<sup>234</sup> Pub. L. 104-193.

<sup>235</sup> *Id.*

<sup>236</sup> A History of Federal Funding for Abstinence-Only-Until-Marriage Programs, SIECUS, available at <http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=1340&nodeid=1>.

the definition of “marriage.” During the same time period, six new states adopted anti-gay curriculum laws.<sup>237</sup> Each of these laws refers to “abstinence until marriage,” rather than using overtly discriminatory terms, like “homosexual” or “heterosexual.”<sup>238</sup> Like most of the anti-gay curriculum laws passed in earlier years, most of these laws have not been repealed or challenged yet.<sup>239</sup>

The legislative debates about abstinence until marriage laws were primarily focused on the prevention of teenage pregnancy and out-of-wedlock childbirth, rather than concerns about the “promotion” of “homosexuality” in schools.<sup>240</sup> But in the congressional debates about the definition of “marriage,” the sponsors of the Defense of Marriage Act dramatically emphasized the lessons that they sought to impart to “the children of America.”<sup>241</sup> By posing a series of rhetorical questions, Representative Charles Canady signaled that the law was designed to channel children into heterosexual relationships:

Should this Congress tell *the children of America* that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex? Should this Congress tell *the children of America* that we as a society believe there is no moral difference between homosexual relationships and heterosexual relationships? Should this Congress tell *the children of America* that in the eyes of the law the parties to a homosexual union are entitled to all the rights and privileges that have always been reserved for a man and a woman united in marriage?<sup>242</sup>

In a legislative report supporting the bill, Representative Canady cautioned his colleagues “against doing anything which might mislead *wavering children* into

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<sup>237</sup> Act of May 9, 2011, ch. 145, §1, 2011 N.D. Sess. Laws 550, 550; Act of May 23, 2006, 2005 Act 445, §§1-3, 2005 Wis. Acts 1643, 1644; Act of May 25, 1999, ch. 241, Art. 2, §1 Minn. Sess. Laws 1920, 1949, amended by Act of May 14, 2013, ch. 74, §2, 2013 Minn. Sess. Laws 405, 405; Act of July 1, 1999, S.B. No. 163, §A, 1999 Mo. Laws 1138, 1140; Act of Mar. 25, 1999, ch. 422, §1, 1999 Va. Acts 543, 544; Act of Dec. 17, 1998, H.B. No. 189, §1, 1998 Ohio Laws 617, 617.

<sup>238</sup> In addition, Mississippi and Utah amended existing anti-gay curriculum laws during this period, adding new language that explicitly discriminates against “homosexuality” or “homosexual activity.” Public Education Curriculum Amendments, ch. 105, §1, 2001 Utah Laws 442, 442; Act of Mar. 31, 1998, ch. 510, §1, 1998 Miss. Laws 609, 610.

<sup>239</sup> In 2013, Minnesota’s voters passed a constitutional amendment legalizing same-sex marriage. *See* Act of May 14, 2013, ch. 74, §2, 2013 Minn. Sess. Laws 405, 405. Because Minnesota no longer defines “marriage” in a discriminatory manner, the state curriculum law’s mandate to “help[] students to abstain from sexual activity until marriage” no longer excludes same-sex marriages. *See* Act of May 25, 1999, ch. 241, Art. 2, §1 Minn. Sess. Laws 1920, 1949. In contrast, the five other states that have passed “abstinence until marriage” laws since 1996 still have laws excluding same-sex couples from marriage.

<sup>240</sup> *See, e.g.*, H.R. Rep. No. 104-725, at 7-8 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2649.

<sup>241</sup> 142 CONG. REC. H7491 (daily ed. July 12, 1996) (statement of Rep. Charles Canady).

<sup>242</sup> *Id.*



perceiving society as indifferent to the sexual orientation they develop,” in order to protect society’s interest “in reproducing itself.”<sup>243</sup>

In 1999, Congress established yet another funding stream for abstinence-until-marriage programs. Initially known as Special Projects of Regional and National Significance—Community-Based Abstinence Education (SPRANS), the program bypassed the states, providing federal grants directly to abstinence education providers.<sup>244</sup> Programs funded under SPRANS were required to conform with the eight-point definition of “abstinence education” in Title V.<sup>245</sup> Unlike other programs, however, SPRANS programs were required to document that they were not only “consistent with,” but also “responsive to,” each of the definition’s eight elements.<sup>246</sup> Under the Bush administration, annual funding for SPRANS programs grew from \$20 million to \$113 million, resulting in annual spending of more than \$170 million on abstinence education programs.<sup>247</sup>

In the Bush administration’s second term, opponents of abstinence education began to push back. A 2004 report commissioned by Representative Henry Waxman (D-CA) found that over two-thirds of SPRANS programs were using curricula with “multiple scientific and medical inaccuracies,” including “misinformation about condoms, abortion, and basic scientific facts.”<sup>248</sup> Three years later, a study mandated by Congress found that Title V programs had no significant impact on young people’s sexual behavior, whether measured by the age of first intercourse or the number of sexual partners.<sup>249</sup> By the time that President Bush left office, nearly half of the states had declined to apply for Title V funding, and the program was scheduled to expire.<sup>250</sup>

In President Obama’s first budget, he proposed to eliminate all federal funding for abstinence education programs, and establish new funding for comprehensive sex education programs.<sup>251</sup> Although he was successful in eliminating AFLA and SPRANS, Congress has refused to eliminate Title V programs.<sup>252</sup> In 2010, the Affordable Care Act extended Title V funding for five years.<sup>253</sup> In 2015, the Medicare

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<sup>243</sup> H.R. REP. NO. 104-664, at 15 n.53 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2919 n.53.

<sup>244</sup> Military Construction Appropriations Act of 2001, Pub. L. 106-246, ch. 4, 114 Stat. 511 (2000).

<sup>245</sup> *Id.*

<sup>246</sup> Notice of Availability of Funds, 65 Fed. Reg. 69562-01 (Nov. 17, 2000).

<sup>247</sup> SIECUS, Spending, *supra* note \_\_.

<sup>248</sup> Minority Staff of H. Comm. on Gov’t Reform, The Content of Federally Funded Abstinence-Only Education Programs (Comm. Print Dec. 2004), at 22.

<sup>249</sup> Mathematica Policy Research Inst., Inc., Impacts of Four Title V, Section 510 Abstinence Education Programs: Final Report (Apr. 2007), <https://www.mathematica-mpr.com/~media/publications/PDFs/impactabstinence.pdf>.

<sup>250</sup> SIECUS, History, *supra* note \_\_.

<sup>251</sup> Heather Boonstra, *Sex Education: Another Big Step Forward—And a Step Back*, 13 GUTTMACHER POL’Y REV. 27 (2010), [https://www.guttmacher.org/sites/default/files/article\\_files/gpr130227.pdf](https://www.guttmacher.org/sites/default/files/article_files/gpr130227.pdf).

<sup>252</sup> *Id.*

<sup>253</sup> Pub. L. 111-148, §2954, 124 Stat. 119, 352 (2010) (codified at 42 U.S.C. 710(d)).

Access and CHIP Reauthorization Act increased Title V funding from \$50 million to \$75 million for an additional two years.<sup>254</sup>

#### D. Recent Challenges

In the last decade, the LGBT movement has begun to chip away at the underpinnings of anti-gay curriculum laws, while lobbying state legislatures for the inclusion of LGBT issues in public school curricula. In 2008, a group of Florida high school students won a lawsuit to establish a gay-straight alliance, overcoming the school board's objection that the group violated the district's "abstinence-only sex education policy,"<sup>255</sup> because same-sex couples could not marry in Florida. In 2011, the California General Assembly adopted the FAIR Education Act, the country's first legislation that affirmatively requires "a study of the role and contributions of . . . lesbian, gay, bisexual, and transgender Americans" in the social science curricula of the state's public schools.<sup>256</sup> In 2012, a group of Minnesota students settled a lawsuit alleging that a local school board's "Sexual Orientation Curriculum Policy"—which prohibited the discussion of "sexual orientation" in classes on any subject—violated Title IX and the Equal Protection Clause.<sup>257</sup> The following year, two students in Utah settled a class action lawsuit claiming that a local school district had violated the First Amendment by removing a children's book, *In Our Mothers' House*, from a school library, based on concerns that the book contained "the advocacy of homosexuality," in violation of the state's curriculum law.<sup>258</sup> Most recently, in 2016, a group of Utah students joined Equality Utah, the state's largest LGBT civil rights organization, in filing a facial challenge to the state's curriculum law.<sup>259</sup>

### III. JUSTICIABILITY: PRIOR ADJUDICATION AND ONGOING ENFORCEMENT

In light of the LGBT movement's recent progress in the United States, many readers will be surprised to learn of the prevalence and persistence of anti-gay curriculum laws. After the invalidation of anti-gay sodomy and marriage laws, the persistence of anti-gay curriculum laws seems anomalous.<sup>260</sup>

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<sup>254</sup> Pub. L. 114–10, §214, 129 Stat. 87, 152 (2015) (codified at 42 U.S.C. 710(d)).

<sup>255</sup> *Gonzalez v. School Board of Okeechobee County*, 571 F.Supp.2d 1257 (S.D. Fla. 2008).

<sup>256</sup> 2011 Cal. Stat. ch. 81, §1, 2011 Cal. Legis. Serv. XXX, XXX, codified at Cal. Educ. Code §51204.5.

<sup>257</sup> Plaintiff-Intervenor's Memorandum in Support of Joint Motion to Approve Proposed Consent Decree, *Doe v. Anoka-Hennepin School District* NO. 11, Nos. 11-CV-01999, 11-CV-02282 (D. Minn.), 2012 WL 1672815.

<sup>258</sup> Universal Settlement and Release of All Claims Against Davis County School District and Its Agents and Employees, *A.W. & C.W. v. Davis School District*, No. 12-CV-242 (D. Utah Jan. 31, 2013).

<sup>259</sup> Amended Complaint, *supra* note \_\_\_\_.

<sup>260</sup> See Ayres & Eskridge, *supra* note \_\_\_\_ ("Many . . . critics find it hard to believe that in 2014 a modern industrial government would have this kind of medieval language in its statutory code.").

This anomaly often prompts two skeptical but useful questions about the enforcement of anti-gay curriculum laws: (1) whether officials still have the *legal authority* to enforce these laws, even though they refer to sodomy and marriage laws that have already been declared unconstitutional; and (2) whether officials still have the *political will* to enforce these laws, after the legalization of same-sex relationships and same-sex marriages. Procedurally, both questions speak to the justiciability of constitutional challenges to anti-gay curriculum laws. If anti-gay curriculum laws were not enforced, then no one would have standing to challenge them,<sup>261</sup> and federal courts would lack jurisdiction to review them.<sup>262</sup>

For the moment, however, officials still have the legal authority to enforce anti-gay curriculum laws, because no court has yet enjoined them from doing so. The available evidence indicates that at least some jurisdictions are still enforcing these laws, even after the invalidation of the sodomy and marriage laws to which they refer.

#### A. Prior Adjudication

Most anti-gay curriculum laws include provisions and terms that explicitly refer to anti-gay sodomy laws and anti-gay marriage laws. In *Lawrence v. Texas*,<sup>263</sup> *United States v. Windsor*,<sup>264</sup> and *Obergefell v. Hodges*,<sup>265</sup> the Supreme Court ruled that anti-gay sodomy and anti-gay marriage laws are unconstitutional. This raises a question akin to *res judicata*: Do state and federal officials still have the legal authority to enforce these provisions of anti-gay curriculum, given that they explicitly refer to unconstitutional laws?<sup>266</sup>

Texas poses this question in a particularly dramatic manner. The Texas curriculum law requires teachers to instruct students that “homosexual conduct is a criminal offense under Section 21.06 of the Penal Code.”<sup>267</sup> Section 21.06 defines oral and anal intercourse as “deviate sexual intercourse” and prohibits “deviate sexual intercourse with another individual of the same sex.”<sup>268</sup> In *Lawrence v. Texas*, the Supreme Court held that Section 21.06 was unconstitutional.<sup>269</sup> After *Lawrence*, does Texas still have the legal authority to rely on Section 21.06 in the state’s curriculum law, by requiring teachers to instruct students that “homosexual conduct is criminal offense under Section 21.06”? Or is the state’s enforcement of this curriculum provision now barred by the Court’s ruling in *Lawrence*?

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<sup>261</sup> See *Spokeo, Inc., v. Robins*, 136 S.Ct. 1540, 1547 (2016).

<sup>262</sup> *Id.* at 1547 (“Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy.”).

<sup>263</sup> 539 U.S. 558 (2003).

<sup>264</sup> 133 S.Ct. 2675.

<sup>265</sup> 135 S.Ct. 2584.

<sup>266</sup> This question may be raised only with respect to the provisions of anti-gay curriculum laws that explicitly rely on sodomy and marriage laws. In addition to these provisions, several states have free-standing anti-gay provisions, which do not rely on the existence of sodomy and marriage laws. See *supra* Parts I.A, I.B. & I.D.

<sup>267</sup> TEXAS HEALTH & SAFETY CODE ANN. §163.002.

<sup>268</sup> TEXAS PENAL CODE ANN. §21.06.

<sup>269</sup> 539 U.S. at 578.

A similar question arises from the relationship between anti-gay curriculum laws and anti-gay marriage laws. For example, Ohio's curriculum law requires teachers to "[s]tress that students should abstain from sexual activity until after marriage,"<sup>270</sup> and "[t]each the potential physical, psychological, emotional, and social side effects of participating in sexual activity outside of marriage."<sup>271</sup> Ohio's marriage law provides that "[a] marriage may only be entered into by one man and one woman,"<sup>272</sup> and "[a]ny marriage between persons of the same sex shall have no legal force or effect in this state."<sup>273</sup> In *Obergefell v. Hodges*, the Supreme Court held that these provisions of Ohio's marriage law are unconstitutional.<sup>274</sup> After *Obergefell*, does the State of Ohio still have the legal authority to rely on these provisions, by teaching students that the term "marriage" does not include persons of the same sex? Or is the state's enforcement of these provisions now barred by the Court's ruling in *Obergefell*? One could ask a nearly identical question about the meaning of the term "marriage" in Section 501(b) of the Social Security Act and the Defense of Marriage Act, in light of the relief granted in *United States v. Windsor*.

Before we delve into the reasoning and the relief granted in *Lawrence*, *Windsor*, and *Obergefell*, it is helpful to recall a few general principles of civil procedure and constitutional law. First, the doctrine of res judicata states that when parties have litigated a claim, and the claim has been adjudicated by a court, it may not be pursued further by the same parties.<sup>275</sup> Second, under the separation of powers doctrine, courts have the power to declare a statute unconstitutional, and to enjoin the statute's enforcement,<sup>276</sup> but they do not have the power to amend or repeal a statute in the state or federal legislative codes.<sup>277</sup> Finally, statutes are generally presumed to be constitutional, until they have been challenged by a party and declared unconstitutional by a court.<sup>278</sup> However logical it may sound, there is no exception for situations in which one statute has been declared unconstitutional, and another statute relies upon it. In each instance, the question is always whether a court has already granted relief by enjoining the enforcement of the challenged law.

With these principles in mind, it becomes easy to see that neither the declaratory nor the injunctive relief granted in *Lawrence*, *Windsor*, and *Obergefell* directly prohibits officials from enforcing anti-gay curriculum laws. None of the issues are res judicata, because the parties in these cases were not students or teachers, and the Supreme Court did not adjudicate the definition of sodomy or marriage in the curriculum of

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<sup>270</sup> OHIO REV. CODE ANN. §3313.6011(C)(1).

<sup>271</sup> §3313.6011(C)(2).

<sup>272</sup> §3101.1(A).

<sup>273</sup> §3101.1(C)(1).

<sup>274</sup> 135 S.Ct. at 2605.

<sup>275</sup> See *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 336 (2005); RESTATEMENT (SECOND) OF JUDGMENTS: RELATION BETWEEN LAW OF RES JUDICATA AND LAW OF PROCEDURE 1 (West 1982).

<sup>276</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 37–45 (4th ed., 2011).

<sup>277</sup> *Steffel v. Thompson*, 415 U.S. 452, 469–70 (1974).

<sup>278</sup> *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 17 (1988); Note, *The Presumption of Constitutionality*, 31 COLUM. L. REV. 1136 (1934).

public schools. In each case, the Court declared that specific applications of the challenge law were unconstitutional, but it could not have repeal nor amend any jurisdiction's law.

In all three cases, the Court spoke in terms of the law's application to the plaintiffs, and to other same-sex couples who were similarly situated. In *Lawrence*, the Court observed that the case had not involved a marriage, or an intimate relationship between minors, but rather “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”<sup>279</sup> In *Windsor*, the Court noted that the challenged law had targeted “same-sex marriages made lawful by the State,”<sup>280</sup> and that “[t]his opinion and its holding are confined to those lawful marriages.”<sup>281</sup> In *Obergefell*, the Court held that state laws against same-sex marriage were “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”<sup>282</sup> On remand, the lower courts entered declaratory judgments and injunctions prohibiting officials from applying the laws to the plaintiffs, and to all same-sex couples who were similarly situated.<sup>283</sup>

Of course, to say that the *relief* was limited is not to say that the *reasoning* was limited. Accordingly, I do not mean to suggest that *Lawrence*, *Windsor*, and *Obergefell* have no bearing on the constitutionality of anti-gay curriculum laws. On the contrary, Part IV argues that anti-gay curriculum laws violate the equal protection principles articulated in these cases. As Justice Scalia acknowledged in his dissenting opinions, the reasoning in *Lawrence* foretold the result in *Windsor*,<sup>284</sup> and the reasoning in *Windsor* foretold the result in *Obergefell*.<sup>285</sup> If federal courts faithfully apply the reasoning of these cases, they will be compelled to strike down anti-gay curriculum laws under the Equal Protection Clause. But it is one thing to say what federal courts *will* do, and

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<sup>279</sup> 539 U.S. at 578.

<sup>280</sup> 133 S.Ct. at 2695.

<sup>281</sup> *Id.* at 2696.

<sup>282</sup> 135 S.Ct. at 2605.

<sup>283</sup> Judgment at 1, *Windsor v. United States*, 833 F.Supp.2d 394 (S.D.N.Y. 2012) (No. 10-Civ.-8435); Final Judgment and Declaratory Judgment and Permanent Injunction at 2-3, *Obergefell v. Kasich*, 2013 WL 3814262 (S.D. Ohio July 22, 2013) (No. 13-cv-501); Final Judgment and Declaratory Judgment and Permanent Injunction at 2-3, *Henry v. Himes*, 14 F.Supp.3d 1036 (S.D. Ohio 2014) (No. 14-cv-129); Final Order and Permanent Injunction, *Tanco v. Haslam*, 7 F.Supp.3d 759 (M.D. Tenn. 2014) (No. 13-cv-01159); Memorandum Opinion on Remand at 1, *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2003 WL 22453791 (Tex. Ct. App. Oct. 30, 2003).

It may be tempting to ask whether the lower courts declared the laws to be “facially” unconstitutional in these cases—effectively declaring that “no set of circumstances exists under which the [laws] would be valid.” *United States v. Salerno*, 481 U.S. 793, 745 (1984). But the Supreme Court has not traditionally applied the Salerno test to plaintiffs challenging facially discriminatory laws under the Equal Protection Clause. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (plurality); Richard Fallon, *Fact and Fiction about Facial Challenges*, 99 CAL. L. REV. 915, 918 (2001); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236, 238 (1994).

<sup>284</sup> *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

<sup>285</sup> *Windsor*, 133 S.Ct. at 2709-2710 (Scalia, J., dissenting).

another to say what they *have* done. For the moment, officials still have the legal authority to enforce anti-gay curriculum laws because no court has enjoined them from doing so.

### *B. Ongoing Enforcement*

But legal authority is not political will. Even if officials still have the authority to enforce anti-gay curriculum laws, they may choose not to do so. To provide a preliminary analysis of the ongoing enforcement of anti-gay curriculum laws, this section surveys the evidence available from administrative regulations, policy guidelines, and curriculum guidelines, as well as anecdotal evidence from local newspapers.

#### *1. Evidence from the States*

To begin this analysis, the section surveys the following evidence from the twenty states that currently have anti-gay curriculum laws: (1) whether the state's education regulations include anti-gay language; (2) whether the state's curriculum guidelines include anti-gay language; and (3) whether the state's curriculum guidelines otherwise exclude LGBT identities by failing to include any non-negative references to sexual orientation, gender identity, or same-sex relationships.

**Table 2. Evidence Regarding State Enforcement of Anti-Gay Curriculum Laws**

<b>State</b>	<b>Education Regulations Contain Anti-Gay Language</b>	<b>Curriculum Guidelines Contain Anti-Gay Language</b>	<b>Curriculum Guidelines Exclude LGBT Identities</b>
Alabama		✓	✓
Arizona	✓		✓
Arkansas			✓
Florida		✓	✓
Illinois			✓
Indiana			✓
Louisiana	✓		✓
Michigan			✓
Mississippi	✓	✓	✓
Missouri			✓
N. Carolina		✓	✓
North Dakota			✓
Ohio	✓		✓
Oklahoma	✓		✓
S. Carolina		✓	✓
Tennessee			✓
Texas	✓	✓	✓
Utah	✓	✓	✓
Virginia			✓
Wisconsin			

Two findings emerge from this evidence. First, in eleven of twenty states, anti-gay language has been codified in the state's education regulations, the state's curriculum guidelines, or both sources. Second, in nineteen of twenty states, the state's education regulations and curriculum guidelines have effectively excluded LGBT people, by failing to include any non-negative references to sexual orientation, gender identity, or same-sex relationships. The first finding indicates that in eleven states, the state's education department has taken at least one concrete step toward enforcing the state's anti-gay curriculum statute. The second finding suggests that even when a statute's anti-gay language is not codified in regulations and guidelines, it may still have a discriminatory impact on the inclusion of LGBT issues in the curriculum of public schools.

It may seem tempting to tease further findings from this evidence, but it may well be misleading. For example, Mississippi, Texas, and Utah are the only three states that have codified anti-gay language in both regulations and guidelines, and nine other states have not codified anti-gay language at all. But states vary widely in the degree to which they have codified educational policies in regulations and guidelines. Although codification is one indicator of a statute's enforcement, the failure to codify does not necessarily indicate a lack of enforcement.

A survey of local news and court filings yields additional, anecdotal evidence of ongoing enforcement from these twenty states. In the last five years, newspapers and courts in these jurisdictions have reported several instances in which public school teachers have been disciplined, suspended, terminated, or pressured to resign for engaging in a wide range of pro-gay speech activities: reading a children's book about two princes marrying each other;<sup>286</sup> teaching students about LGBT bullying;<sup>287</sup> advocating for policies that protect LGBT students;<sup>288</sup> sponsoring the formation of Gay-Straight Alliances;<sup>289</sup> allowing students to publish a pro-gay editorial in the student newspaper;<sup>290</sup> allowing students to put up a display honoring LGBT History Month;<sup>291</sup> and living what one community member claimed was a "questionable lifestyle."<sup>292</sup>

Rather than conducting a more detailed study of the enforcement of anti-gay curriculum laws in all twenty states, the following sections present two case studies from Utah and Wisconsin, as examples strong and weak patterns of enforcement. These case studies help portray a spectrum of enforcement patterns, within which the remaining states are likely to fall.

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<sup>286</sup> Michael Schaub, *Teacher who read gay-themed fairy tale in class resigns after protest*, L.A. TIMES, June 16, 2015; Mark Schultz, *200 fill Orange County school meeting on gay fable*, NEWS & OBSERVER (Chapel Hill), May 15, 2015.

<sup>287</sup> *Beall v. London City School District Board of Education*, 2006 WL 1582447 (S.D. Ohio June 8, 2006).

<sup>288</sup> Megan Rolland, *Former Oklahoma City teacher Joe Quigley says second termination was unfair*, OKLAHOMAN, Jan. 27, 2011; Charles Bassett, *Teacher Backs Gay Policies, Fired by School Board*, NEWS 9 (Oklahoma City), May 12, 2009.

<sup>289</sup> Lauren Davis, *Gay club teacher at Union Co. High School let go; students rally support*, LOCAL 8, WVLT-TV (Knoxville, TN), June 22, 2016; Halley Halloway, *Union County teacher says he was let go after sponsoring LGBT club*, ABC 6, WATE, June 20, 2016.

<sup>290</sup> *Teacher's job on line over "tolerance" column*, ASSOCIATED PRESS, Apr. 23, 2007; Kelly Soderlund, *Woodlan Principal Upset Over Student Editorial Urging Tolerance of Gays*, FORT WAYNE JOURNAL-GAZETTE, Feb. 21, 2007.

<sup>291</sup> Lester Graham, *School sued after firing lesbian teacher*, MICHIGAN RADIO (NPR), Feb. 6, 2013; *Complaint and Jury Request, Johnson v. Corunna Public Schools*, No. 13-CV-10468 (E.D. Mich. 2013), 2013 WL 501424.

<sup>292</sup> Mary Beth Faller, *2 say Paradise Valley High School principal was let go because she is gay*, THE REPUBLIC (Scottsdale, AZ), Mar. 17, 2012.



*a. Utah: Strong Enforcement*

In Utah, a constitutional challenge to the state’s anti-gay curriculum law is pending in federal court. To assess the extent to which the state currently enforces the law, I completed a comprehensive search of the Utah state archives, sought records from all of the state’s forty-one school districts, and conducted a survey of the members of Equality Utah, the state’s leading organization devoted to LGBT rights. This research produced overwhelming evidence of the law’s enforcement.

For more than thirty years, the State Board of Education has warned teachers against “the advocacy of homosexuality” and “the advocacy of sexual activity outside of marriage” in publications about sex education and AIDS education in public schools.<sup>293</sup> These prohibitions are reflected in the Board’s core curriculum standards;<sup>294</sup> training materials for new teachers;<sup>295</sup> resource files for teachers and parents.<sup>296</sup> In the last document, the Board still includes a warning issued by the Attorney General almost thirty years ago, in which he cites “sodomy” as a form of “immorality” or “unchastity” that teachers may not “teach, promote, or condone.”<sup>297</sup>

In addition, the Board has issued an administrative rule that establishes elaborate procedures for local school districts to comply with the state’s “human sexuality” curriculum law.<sup>298</sup> Each district must establish a “curriculum materials review committee” that “includes parents, health professionals, school health educators, and administrators, with at least as many parents as school employees,” in order to review all of the human sexuality instructional materials adopted by the district.<sup>299</sup> The committee may not approve any materials, including guest speakers, unless they comply with the statute’s prohibitions.<sup>300</sup> The district’s superintendent is required to “report educators who willfully violate” the rule to the State Instructional Materials Commission “for investigation and possible discipline.”<sup>301</sup>

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<sup>293</sup> See Charles R. Duke, *A Look at Current State-Wide Text Adoption Procedures* (1985), at 9, <http://files.eric.ed.gov/fulltext/ED254864.pdf>; Utah State Board of Education, *Responsible Health Lifestyles: Teacher Resource File for AIDS Education, Levels 3-12* (1989), at viii, ix (Utah State Archives, Series 84843, Box 5) (on file with author).

<sup>294</sup> Utah State Board of Education, *Core Curriculum Standards Reports* at 9 (Utah State Archives, Series 10728, Box 1) (on file with author); Utah State Board of Education, *Secondary Core Curriculum Standards, Science, Levels 7-12* (1992), at 55-56, <http://files.eric.ed.gov/fulltext/ED383523.pdf>.

<sup>295</sup> Utah State Board of Education, *Human Sexuality Instruction: Health Education, Science, Adult Roles Classes*, <http://www.schools.utah.gov/CURR/healthpe/LawPolicy/Instruction.aspx>.

<sup>296</sup> Utah State Board of Education, *A Resource Guide for Parents and Teachers on Teaching Human Sexuality, High School* (2006), at xi, 13, <http://www.schools.utah.gov/CURR/healthpe/Law-Policy/HighSchool.aspx>; Utah State Board of Education, *A Resource Guide for Parents and Teachers on Teaching Human Sexuality, Junior High School* (2006), at pages 36-37, 40, <http://www.schools.utah.gov/CURR/healthpe/Law-Policy/JuniorHigh.aspx>.

<sup>297</sup> *Id.*

<sup>298</sup> UTAH ADMIN. CODE r277-474.

<sup>299</sup> r277-474-1(B); r277-474-5(C).

<sup>300</sup> r277-474-5(C)(3); r277-474-6.

<sup>301</sup> r277-474-5(C)(5).

If that were not enough, the Board's rule dramatically expands the scope of the statute's prohibitions. In the curriculum statute, the prohibitions against "the advocacy of homosexuality" and "the advocacy of sexual activity outside of marriage" appear in a section titled "Instruction in health," suggesting that they apply only in health education and related courses.<sup>302</sup> But the Board's rule applies to "any course, unit, class, activity or presentation that provides instruction or information to students about sexual abstinence, human reproduction, reproductive anatomy, physiology, pregnancy, marriage, childbirth, parenthood, contraception, or HIV/AIDS and other sexually transmitted diseases."<sup>303</sup> Although the rule notes that these topics are typically addressed in health education and related courses, it explicitly provides that the rule "applies to any course or class in which these topics are the focus of discussion."<sup>304</sup>

Records produced by local school districts confirmed the strong enforcement of the state's statutory and regulatory requirements. Thirty-one school districts produced written policies that directly quoted or specifically cited the State Board's rule against "the advocacy of homosexuality" and "the advocacy of sexual activity outside of marriage."<sup>305</sup> In three districts, the policies prohibited not only "the advocacy of," but also "the acceptance of . . . homosexuality as a desirable or acceptable sexual adjustment or lifestyle."<sup>306</sup> The remaining districts produced policies that did not directly address "the advocacy of homosexuality," but broadly indicated that the district's curriculum was in compliance with the state's requirements.<sup>307</sup>

The survey of Equality Utah's membership yielded specific examples of the law's enforcement.<sup>308</sup> One high school student reported that on the first day of health class, her teacher handed out a document listing topics that could not be discussed, including "homosexuality" and "sexual activity outside of marriage."<sup>309</sup> When another student asked if same-sex marriage would be discussed, the teacher said "No."<sup>310</sup> Another high school student reported that his English teacher had discouraged him from writing a family history report about his gay uncle, who was married to another man.<sup>311</sup> The teacher told him that if he insisted on choosing his uncle, he would have to present his family history only to her after class, unlike the rest of his classmates.<sup>312</sup>

The most dramatic example of the law's enforcement was described in a newspaper article in the *Salt Lake Tribune*.<sup>313</sup> In 2014, the *Salt Lake Tribune* reported that the Canyons School District had "shelved" 315 copies of a custom-edition health

<sup>302</sup> §53A-13-101.

<sup>303</sup> r277-474-1(D).

<sup>304</sup> *Id.*

<sup>305</sup> Summary of GRAMA Responses (on file with author).

<sup>306</sup> South Summit School District, Policy 4002 (2010); Grand County School District, Policy 5931 (2007); Alpine School District, Rule 6068 (1988) (on file with author).

<sup>307</sup> Summary of GRAMA Responses (on file with author).

<sup>308</sup> *See* Amended Complaint, *supra* note \_\_ (incorporating survey results).

<sup>309</sup> *Id.* at 22.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 20.

<sup>312</sup> *Id.*

<sup>313</sup> Paul Rolly, *Utah school district shelves health books because of sex talk*, SALT LAKE TRIBUNE, Feb. 7, 2014.

textbook, purchased at a cost of \$24,000, because they discussed “gay and lesbian partnerships” and other prohibited topics.<sup>314</sup> By conducting anonymous interviews, I was able to obtain a copy of the textbook. The cover reads: “Health: The Basics, Rebecca J. Donatelle, Custom Edition for Canyons School District.”<sup>315</sup> In a chapter on “Building Healthy Relationships and Understanding Sexuality,” a district official had made the following markings, to indicate the specific materials that the district’s review committee had rejected, pursuant to the state’s curriculum law:<sup>316</sup>



\* For most people, commitment is an important ingredient in successful relationships. The major types of committed relationships include marriage and cohabitation. Gays and lesbians seek love, friendship, communication, validation, companionship, and a sense of stability, just as heterosexuals do.

\* Responsible and satisfying sexuality involves good communication, recognition of yourself as a sexual being, understanding sexual structures and functions, and acceptance of your gender identity and sexual orientation.

4. If scientists ever established a genetic basis for homosexual, heterosexual, or bisexual orientation, would that put an end to anti-gay prejudice? Why or why not?

9. Individuals who are sexually attracted to both sexes are identified as  
 a. heterosexual.  
 b. bisexual.  
 c. homosexual.  
 d. intersexual.

It is difficult to imagine more compelling evidence of the enforcement of an anti-gay curriculum law.

*b. Wisconsin: Weak Enforcement*

In Wisconsin, the pattern of enforcement is markedly different. On the books, Wisconsin’s curriculum law facially discriminates against lesbian and gay students by excluding same-sex couples from “marriage”—the only relationships that the curriculum sanctions. But the state’s education regulations and curriculum guidelines provide no evidence that the anti-gay language in the state’s curriculum law have been enforced.

Wisconsin’s curriculum law requires “instruction that . . . presents abstinence from sexual activity as the preferred choice of behavior for unmarried pupils,” and “emphasizes that abstinence from sexual activity before marriage is the only reliable way to prevent pregnancy and sexually transmitted diseases, including [HIV] and [AIDS].”<sup>317</sup> In 2006, the state legislature and Wisconsin voters approved a

<sup>314</sup> *Id.*

<sup>315</sup> REBECCA J. DONATELLE, HEALTH: THE BASICS, CUSTOM EDITION FOR CANYONS SCHOOL DISTRICT (2014) (on file with author).

<sup>316</sup> *Id.* at 146, 162-163.

<sup>317</sup> 2005 Wis. Act 445 §3 (codified at WIS. STAT. ANN. §118.019(2m)).

constitutional amendment declaring that “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.”<sup>318</sup>

Paradoxically, the state later amended the curriculum law to prohibit the use of instructional materials that discriminate against students based on sexual orientation, among other traits.<sup>319</sup> Although the Legislature cautioned that this provision should not be construed to prohibit “instruction on abstinence from sexual activity,”<sup>320</sup> it made no attempt to reconcile this antidiscrimination provision with the state’s anti-gay definition of marriage, which remained on the books. In 2013, the Wisconsin Department of Public Instruction issued curriculum guidelines that included information about sexual orientation, gender identity, and same-sex relationships, and specifically called for the “[i]nclusion of LGBTQ people or issues in school curricula.”<sup>321</sup>

## 2. Evidence from the Federal Government

The most surprising evidence of a government enforcing anti-gay curriculum laws comes from the U.S. Department of Health and Human Services. For the last twenty years, under both Republican and Democratic administrations, the Department has distributed federal block grants for abstinence education programs pursuant to Title V of the Social Security Act, commonly known as Title V.<sup>322</sup> As previously noted, Title V provides an eight-point definition of “abstinence education,” which states must comply with in order to qualify for federal grants.<sup>323</sup> The definition requires states to certify that programs funded under Title V “teach[] abstinence from sexual activity outside *marriage* as the expected standard for all school age children,”<sup>324</sup> “teach[] that a mutually faithful monogamous relationship in context of *marriage*,”<sup>325</sup> and “teach[] that sexual activity outside of the context of *marriage* is likely to have harmful psychological and physical effects.”<sup>326</sup> Under Section 3 of the Defense of Marriage Act, the term “marriage” was defined to include “only a legal union between one man and one woman as husband and wife.”<sup>327</sup>

Shortly after Section 3 was invalidated in *Windsor*, President Obama directed the Department of Justice “to identify every federal law, rule, policy, and practice in which marital status is a relevant consideration, expunge Section 3’s discriminatory

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<sup>318</sup> WIS. CONST. ART. 13, §13.

<sup>319</sup> 2011 Wis. Act 216, §16m (codified at WIS. STAT. ANN. §118.019(2d)).

<sup>320</sup> *Id.*

<sup>321</sup> Wisconsin Department of Public Instruction, *Human Growth & Development: A Resource Guide to Assist School Districts in Policy and Program Development and Implementation* (5th ed. 2014), at 217-224, <https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/hgdedition5.pdf>; Wisconsin Department of Public Instruction, *Safe Schools for Lesbian, Gay, Bisexual, and Transgender Students*, <https://dpi.wi.gov/sspw/safe-schools/lgbt>.

<sup>322</sup> Pub.L. 104–193.

<sup>323</sup> 42 U.S.C. §710(b)(2).

<sup>324</sup> §710(b)(2)(B).

<sup>325</sup> §710(b)(2)(D).

<sup>326</sup> §710(b)(2)(E).

<sup>327</sup> Pub.L. 104–199.

effect, and ensure that committed and loving married couples throughout the country would receive equal treatment.”<sup>328</sup> One year later, the Department of Justice informed the President that “agencies across the federal government have implemented the *Windsor* decision to treat married same-sex couples the same as married opposite-sex couples for the benefits and obligations for which marriage is relevant, to the greatest extent possible under the law.”<sup>329</sup> In response, the Department of Health and Human Services issued rules and guidance about *Windsor*’s impact on the administration of a wide range of federal laws, programs, and organizations.<sup>330</sup> The Department issued specific guidance about *Windsor*’s impact on a number of federal grant programs, encouraging grantees to recognize same-sex spouses as family members, and provide equal services and support to same-sex marriages.<sup>331</sup>

To date, however, the Department has not issued any guidance about *Windsor*’s impact on the administration of “abstinence education” programs under Title V. In 2016, the Department’s Title V funding announcement still warned states that “no funds can be used in ways that contradict the eight A-H components of Section 510(b)(2).”<sup>332</sup> To qualify for these funds, abstinence education providers must provide written assurances that they “understand and agree formally to the requirement of programming to not contradict section 510 (b)(2) A-H elements,” and that they use only materials that “do not contradict section 510(b)(2) A-H elements.”<sup>333</sup>

In fiscal year 2016, the Department distributed more than \$58 million in Title V funds to thirty-six states and two U.S. territories.<sup>334</sup> Two-thirds of these funds were received by the twenty states governed by anti-gay curriculum laws.<sup>335</sup> Unless the Department (or a third party) conducts a comprehensive review of the curricula taught by these grantees, it is impossible to know how many grantees teach abstinence education in a discriminatory manner, excluding same-sex couples from the definition of “marriage.” Given the history of abstinence education programs, and the religious and political affiliations of the organizations that developed them, there are strong reasons to presume that abstinence education providers have not updated these programs to reflect the Supreme Court’s rulings in *Windsor* and *Obergefell*. When third-parties have reviewed the content of abstinence education programs, they have found that these programs systematically ignore and stigmatize same-sex relationships.<sup>336</sup>

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<sup>328</sup> Memorandum from the Attorney General to the President, Implementation of *United States v. Windsor* (2014), at 1, <https://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf>.

<sup>329</sup> *Id.*

<sup>330</sup> Attachment to Memorandum from Attorney General to President, Highlights of Agency Implementation of *United States v. Windsor*, at 2-4.

<sup>331</sup> *Id.*

<sup>332</sup> Title V State Abstinence Education Grant Program, *supra* note \_\_\_\_.

<sup>333</sup> *Id.* at 22.

<sup>334</sup> 2016 Title V State Abstinence Education Program Grant Awards, , *supra* note \_\_\_\_.

<sup>335</sup> *Id.*

<sup>336</sup> *Pride or Prejudice: How Fear-Based Abstinence-Only-Until-Marriage Curricula Present Sexual Orientation*, SIECUS, <http://www.communityactionkit.org/index.cfm?fuseaction=page.viewPage&pageID=1095 &nodeID=3&stopRedirect=1>.

## IV. UNCONSTITUTIONALITY: A DENIAL OF EQUAL PROTECTION OF THE LAWS

The question of constitutionality has hovered over anti-gay curriculum laws from the beginning. In *National Gay Task Force*, the district court suggested that if Oklahoma's law were used to discipline "a teacher who merely advocates equality . . . openly discusses homosexuality . . . [or] assigns for class study articles and books written by advocates of gay rights . . . it would likely not meet constitutional muster."<sup>337</sup> But the Tenth Circuit observed that Oklahoma's "statute does not require that the teacher's public utterance occur in the classroom"—suggesting that if the law had been limited to the classroom, it might have been constitutional.<sup>338</sup>

Although this issue remains unresolved, legal scholars have published only a handful of articles on the constitutionality of anti-gay curriculum laws since *National Gay Task Force* was decided, over twenty years ago.<sup>339</sup> Perhaps because no court has ruled on this question, this literature relies on a wide range of legal theories, many of which conflict with each other, and are based on contested interpretations of the Equal Protection Clause and the Free Speech Clause. For example, authors disagree about whether anti-gay curriculum laws should be subject to heightened scrutiny,<sup>340</sup> "rational review with a bite,"<sup>341</sup> or traditional rational basis review under the Equal Protection Clause.<sup>342</sup> One author claims that "the strongest potential challenge to these statutes would be a teacher's First Amendment claim,"<sup>343</sup> while another concludes that "'no promo homo' laws are likely valid under the First Amendment."<sup>344</sup> In light of these conflicts, the moment is ripe for a thorough analysis of the relevant case law, focused on specific rulings of the Supreme Court.

This Part focuses on the equal protection challenge to anti-gay curriculum laws, rather than the free speech challenge. The equal protection challenge is more straightforward to analyze for both pragmatic and doctrinal reasons. First, the equal protection challenge depends on a single quality that is shared by all anti-gay curriculum laws: the fact that they facially discriminate against lesbian, gay, and bisexual people. By contrast, the free speech challenge depends on the specific meaning and scope of each state's anti-gay curriculum law—issues that vary significantly from one jurisdiction to another.<sup>345</sup>

Second, the equal protection challenge is based on four majority opinions issued by the Supreme Court over the last two decades, which represent a consistent trend in

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<sup>337</sup> *National Gay Task Force*, 1982 WL 31038 at \*13.

<sup>338</sup> *National Gay Task Force*, 729 F.2d at 1274.

<sup>339</sup> Hamed-Troyansky, *supra* note \_\_; Cooley, *supra* note \_\_; Lenson, *supra* note \_\_; Hoshall, *supra* note \_\_; Rodriguez, *supra* note \_\_; McGovern, *supra* note \_\_.

<sup>340</sup> Cooley, *supra* note \_\_, at 1044.

<sup>341</sup> Rodriguez, *supra* note \_\_, at 37.

<sup>342</sup> Lenson, *supra* note \_\_, at 159.

<sup>343</sup> *Id.* at 152.

<sup>344</sup> Hamed-Troyansky, *supra* note \_\_, at 91.

<sup>345</sup> For example, a vagueness or overbreadth analysis would have to begin by interpreting each state's anti-gay curriculum law in light of any relevant judicial opinions, administrative regulations, and legislative history materials. *See* *United States v. Williams*, 553 U.S. 285, 293 (2008).

the Court’s analysis of anti-gay laws: *Romer v. Evans*,<sup>346</sup> *Lawrence v. Texas*,<sup>347</sup> *United States v. Windsor*,<sup>348</sup> and *Obergefell v. Hodges*.<sup>349</sup> In these four landmark rulings, the Court has invalidated every anti-gay law that has come before it, without identifying the level of scrutiny that applies to it. Although two of these cases were primarily analyzed under a due process framework, rather than an equal protection framework,<sup>350</sup> the Court expressly addressed and endorsed the equal protection claims in all four cases.<sup>351</sup> By relying on the principles articulated in these cases, this Part explains why the equal protection challenge against anti-gay curriculum laws is likely to prevail in all federal courts, regardless of what level of scrutiny is applied to them.<sup>352</sup>

#### A. Standing: Injury and Stigma

Before a court will hear a plaintiff’s challenge to an anti-gay curriculum law, it must be persuaded that the plaintiffs have standing to challenge it. To establish standing to challenge a law under the Equal Protection Clause, the Supreme Court has required plaintiffs to show that they have been personally “injured” or “stigmatized” by the law’s enforcement.<sup>353</sup>

In *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, the Court specifically found that anti-gay laws “injure” and “stigmatize” lesbian, gay, and bisexual people. In *Romer*, the Court found that the challenged law “inflicts on [gays and lesbians] immediate, continuing, and real injuries,”<sup>354</sup> and “classifies homosexuals . . . to make them

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<sup>346</sup> 517 U.S. 620 (1996).

<sup>347</sup> 539 U.S. 558 (2003).

<sup>348</sup> 133 S. Ct. 2675 (2013).

<sup>349</sup> 135 S. Ct. 2584 (2015).

<sup>350</sup> *Lawrence*, 539 U.S. at 564; *Obergefell*, 135 S.Ct. at 2597-2602.

<sup>351</sup> *Romer*, 517 U.S. at 635; *Lawrence*, 539 U.S. at 574; *Windsor*, 133 S.Ct. at 2693; *Obergefell*, 135 S.Ct. at 2602-2605.

<sup>352</sup> By focusing on the equal protection challenge, I do not mean to cast doubt on the validity of the free speech challenge. On the contrary, there are several reasons to suspect that anti-gay curriculum laws violate the Free Speech Clause: (1) they may infringe on a student’s “right to receive information or ideas,” *Board of Education Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 866-868 (1982) (plurality); (2) they may infringe on a teacher’s “academic freedom,” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); (3) they may “prescribe what shall be orthodox in politics, . . . religion, or other matters,” *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943); and (4) they may be unconstitutionally vague and overbroad, *Keyishian*, 385 U.S. at 608; *National Gay Task Force*, 729 F.2d at 1274. To date, however, the Supreme Court has not determined whether students or teachers may challenge state curriculum laws under the Free Speech Clause—and if so, what level of scrutiny would apply to such challenges. Only a handful of federal appellate courts have addressed such challenges, and they have disagreed about what standards, if any, should be applied. *Compare* *Arce v. Douglas*, 793 F.3d 968, 983 (9th Cir. 2015) (asking whether curriculum law is “reasonably related to legitimate pedagogical concerns”) *with* *Chiras v. Miller*, 432 F.3d 606, 619-20 (5th Cir. 2005) (holding that curriculum policies cannot be challenged under the Free Speech Clause).

<sup>353</sup> *Allen v. Wright*, 468 U.S. 737, 755-56 (1984).

<sup>354</sup> 517 U.S. at 635.

unequal to everyone else.”<sup>355</sup> In *Lawrence*, the Court found that the challenged law was “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres,”<sup>356</sup> which “demean[ed] the lives of homosexual persons.”<sup>357</sup> In *Windsor*, the Court held that the challenged law had “the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect.”<sup>358</sup> And in *Obergefell*, the Court held that “laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”<sup>359</sup> Finally, in both *Windsor* and *Obergefell*, the Court found that anti-gay marriage laws “humiliate” the children of same-sex couples,<sup>360</sup> by making it “more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives,”<sup>361</sup> and by “instruct[ing] . . . officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.”<sup>362</sup>

The same reasoning applies to anti-gay curriculum laws. By prohibiting or restricting classroom instruction about “homosexuality,” these laws instruct lesbian, gay, bisexual students, and students raised by same-sex couples, that “homosexuality” is too shameful, immoral, or unlawful to be openly discussed.<sup>363</sup> By doing so, these laws deny these students an equal opportunity to learn basic information about themselves and their families—information about the social prevalence and legal status of their own feelings, relationships, identities, and family members.

In some instances, the stigma imposed by anti-gay curriculum laws is explicitly conveyed in the statute itself. In Texas, for example, the law requires instruction that “homosexuality is not a lifestyle acceptable to the general public and homosexual conduct is a criminal offense.”<sup>364</sup> In Oklahoma, the law requires instruction that “homosexual activity” is “primarily responsible” for “the AIDS virus.”<sup>365</sup>

In other instances, the stigma arises from the interplay between the state’s curriculum law and the state’s sodomy law. In Mississippi, the law requires instruction in “the current state law related to . . . homosexual activity,”<sup>366</sup> while defining sodomy as a Class B misdemeanor.<sup>367</sup> In Utah, the law prohibits teachers from using “any means or methods that facilitate or encourage the violation of any state or federal

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<sup>355</sup> *Id.*

<sup>356</sup> 539 U.S. at 575.

<sup>357</sup> *Id.*

<sup>358</sup> 133 S.Ct. at 2696.

<sup>359</sup> 135 S.Ct. at 2602.

<sup>360</sup> 133 S.Ct. at 2694; 135 S.Ct. at 2590.

<sup>361</sup> 133 S.Ct. at 2694.

<sup>362</sup> *Id.* at 2696.

<sup>363</sup> See *Obergefell*, 135 S.Ct. at 2596 (“Until the mid-20th century, . . . [a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken.”).

<sup>364</sup> §163.002.

<sup>365</sup> 70 OKLA. STAT. ANN. §11-103.3.

<sup>366</sup> §37-13-171.

<sup>367</sup> §97-29-59.



criminal law by a minor or an adult,”<sup>368</sup> while defining sodomy as a Class C misdemeanor.<sup>369</sup> To the extent that the state’s sodomy laws are enforced through the state’s curriculum laws, they “demean the lives of homosexual persons”—like the sodomy laws to which they refer.

In seventeen states, the law requires instruction on the benefits of “abstinence from sexual activity outside of marriage,” while defining the term “marriage” to exclude same-sex couples.<sup>370</sup> To the extent that the state’s marriage laws are enforced through the state’s curriculum laws, they impose many of the same stigmas identified in *Windsor* and *Obergefell*: “a stigma upon all who enter into same-sex marriages,”<sup>371</sup> and a stigma on the children of these marriages.<sup>372</sup> In addition, as one lower court explained in another marriage case, these laws impose a stigma on lesbian and gay children, “who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends.”<sup>373</sup>

On top of these insults, anti-gay curriculum laws inflict more tangible injuries. As a pedagogical matter, these laws deny lesbian, gay, and bisexual students the opportunity to learn basic information about their own attractions, relationships, and identities, as heterosexual students do. Likewise, these laws deny the children of same-sex couples the chance to learn about their own family members, as the children of heterosexuals do. Under many of these laws, teachers seem facially prohibited from informing students that “same-sex couples may exercise the fundamental right to marry,” or that “psychiatrists and others [have] recognized that sexual orientation is both a normal expression of human sexuality and immutable,” notwithstanding the Court’s ruling in *Obergefell*.<sup>374</sup>

To make matters worse, anti-gay curriculum laws contribute to bullying and harassment of LGBT students. Research demonstrates that LGBT students are exposed to pervasive bullying in our nation’s schools<sup>375</sup>—and that school-place bullying exposes students to increased risks of school dropout,<sup>376</sup> unemployment,<sup>377</sup>

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<sup>368</sup> §53A-13-101.

<sup>369</sup> §76-5-403.

<sup>370</sup> See *supra* Part I.E.

<sup>371</sup> *Windsor*, 133 S.Ct. at 2696.

<sup>372</sup> *Id.* at 2590; see also *Windsor*, 133 S.Ct. at 2694.

<sup>373</sup> *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1213 (D. Utah 2013).

<sup>374</sup> *Obergefell*, 135 S. Ct. at 2596.

<sup>375</sup> See, e.g., Elise D. Berlan, *Sexual Orientation and Bullying among Adolescents in the Growing Up Today Study*, 46 J. ADOLESCENT HEALTH 366 (2010); Kate L. Collier et al., *Sexual Orientation and Gender Identity/Expression Related Peer Victimization in Adolescence: A Systematic Review of Associated Psychological and Health Outcomes*, 50 J. SEX ROLES 299 (2013); Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools* (GLSEN 2009); Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9–12*, 60 MORBIDITY AND MORTALITY WEEKLY REPORT 1, 11 (2011); Joseph G. Kosciw et al., *2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools* (GLSEN 2016).

<sup>376</sup> Jorge C. Srabstein & Thomas Piazza, *Public Health, Safety and Educational Risks Associated with Bullying Behaviors in American Adolescents*, 20 INT. J. ADOLESCENT MED. HEALTH 223 (2008).

and suicide.<sup>378</sup> Moreover, studies show that when LGBT students attend schools that adopt LGBT-inclusive curricula, they face lower risks of HIV, pregnancy, bullying, and suicide.<sup>379</sup> In some cases, schools have specifically cited anti-gay curriculum policies as justification for failing to protect LGBT students from bullying,<sup>380</sup> or for denying students the right to form LGBT organizations.<sup>381</sup> By making such claims, schools have effectively demonstrated how anti-gay curriculum policies threaten the legal status and well-being of LGBT students.

### B. Classification: Conduct and Status

Once standing is established, the next issue is identifying the class targeted by the challenged laws. In sodomy and marriage cases, states have attempted to avoid equal protection challenges by claiming that anti-gay laws target homosexual conduct, not homosexual status.<sup>382</sup> For example, a state might claim that in an anti-gay curriculum law, the term “homosexuality” refers not to lesbian, gay, or bisexual people, but to sexual activity between two persons of the same sex. Because anyone can engage in such conduct, anti-gay curriculum laws do not discriminate against anyone. By targeting conduct, rather than status, these laws treat everyone alike.

There are two flaws in this argument. First, the distinction between status and conduct is nearly always belied by the text of anti-gay curriculum laws. Unlike sodomy laws, most anti-gay curriculum laws refer broadly to sexual orientation itself, rather than referring specifically to sexual activity between two persons of the same sex. In Arizona, for example, the law refers to “a homosexual life-style”<sup>383</sup>—a term defined to include “the typical way of life of an individual, group, or culture.”<sup>384</sup> In Utah, the law refers to “homosexuality”—a term defined to include “the quality or state of being homosexual,” as well as “sexual activity with another of the same sex.”<sup>385</sup> And nearly all anti-gay curriculum laws refer to “marriage”—a term that includes “the state of being united as spouses in a consensual and contractual relationship recognized by

<sup>377</sup> Sarah Brown & Karl Taylor, *Bullying, Education and Earnings: Evidence from the National Child Development Study*, 27 *ECONOMICS EDUC. REV.* 387 (2008).

<sup>378</sup> Young Shin Kim & Bennett Leventhal, *Bullying and Suicide: A Review*, 20 *INT. J. ADOLESCENT MED. HEALTH* 133 (2008).

<sup>379</sup> Susan M. Blake et al., *Preventing Sexual Risk Behaviors Among Gay, Lesbian, and Bisexual Adolescents: The Benefits of Gay-Sensitive HIV Instruction in Schools*, 91 *AM. J. PUB. HEALTH* 940–46 (2001); Laura A. Szalacha, *Safer Sexual Diversity Climates: Lessons Learned from an Evaluation of Massachusetts Safe Schools Program for Gay and Lesbian Students*, *AM. J. EDUC.* 110, 58–8 (2003).

<sup>380</sup> Plaintiff-Intervenor’s Memorandum in Support of Joint Motion to Approve Proposed Consent Decree, *Doe v. Anoka-Hennepin School District NO. 11*, Nos. 11-CV-01999, 11-CV-02282 (D. Minn.), 2012 WL 1672815.

<sup>381</sup> See, e.g., *Gonzalez v. School Board of Okeechobee County*, 571 F.Supp.2d 1257, 1262 (S.D. Fla. 2008).

<sup>382</sup> §15-716.

<sup>383</sup> “Lifestyle.” Merriam-Webster Unabridged (2017).

<sup>384</sup> §53A-13-101(1)(c)(iii)(A)(II).

<sup>385</sup> “Homosexuality.” Merriam-Webster Unabridged (2017).

law.”<sup>386</sup> By using terms like “lifestyle,” “homosexuality,” and “marriage,” these laws target more than a person’s sexual conduct.

In any event, the Supreme Court has specifically rejected the claim that laws can pass constitutional muster by targeting homosexual conduct rather than homosexual status. Justice O’Connor originally developed this principle in her concurring opinion in *Lawrence v. Texas*, reasoning that because the Texas sodomy law “targeted . . . conduct that is closely correlated with being homosexual,” it was “directed at gay persons as a class.”<sup>387</sup> A majority of the Court expressly adopted Justice O’Connor’s reasoning in *Christian Legal Society v. Martinez*,<sup>388</sup> observing that “our decisions have declined to distinguish between status and conduct in this context.”<sup>388</sup> In *Obergefell v. Hodges*, the Court reaffirmed that laws against same-sex sodomy and same-sex marriage were targeted at “gays and lesbians,”<sup>389</sup> even though they prohibited people of all sexual orientations from engaging in intimacy and marriage with other people of the same sex.

### C. *The Level of Scrutiny*

The next issue is what level of scrutiny applies to anti-gay curriculum laws, given that they discriminate against lesbian, gay, and bisexual people. Traditionally, the Court has considered four factors in determining whether discrimination against a class triggers heightened scrutiny under the Equal Protection Clause: (1) whether the class has a characteristic that “frequently bears [a] relation to ability to perform or contribute to society”;<sup>390</sup> (2) whether the class has been historically “subjected to discrimination”;<sup>391</sup> (3) whether the class exhibits “obvious, immutable, or distinguishing characteristics”;<sup>392</sup> and (4) whether the class is “a minority or politically powerless.”<sup>393</sup> These factors were originally articulated by a plurality of the Court in *Frontiero v. Richardson*,<sup>394</sup> but they have been mentioned by a majority of the Court in subsequent cases.<sup>395</sup>

In the years since *Frontiero*, the Supreme Court has had several opportunities to decide whether the class of lesbian, gay, and bisexual persons satisfies these criteria. It has repeatedly declined to do so. In *Obergefell*, as in *Lawrence*, the Court invalidated anti-gay laws because they excluded lesbian and gay persons from a constitutionally protected right. Because both cases involved laws that infringed upon constitutionally protected rights, the Court was not obliged to decide whether anti-gay laws are subject to heightened scrutiny under the Equal Protection Clause.

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<sup>386</sup> “Marriage.” Merriam-Webster Unabridged (2017).

<sup>387</sup> 539 U.S. at 583 (O’Connor, J., concurring).

<sup>388</sup> 561 U.S. 661, 689 (2010).

<sup>389</sup> 135 S.Ct. at 2604.

<sup>390</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-441 (1985).

<sup>391</sup> *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> 411 U.S. 677, 684-687 (1973).

<sup>395</sup> *See, e.g., Cleburne*, 473 U.S. at 440-441; *Bowen*, 483 U.S. at 602.

In *Obergefell*, however, the Court made several findings that address the traditional criteria used to determine whether a classification warrants heightened scrutiny—findings that support the application of this standard to anti-gay laws. First, the Court described the country’s long history of discrimination against lesbian and gay people in criminal law, government employment, military service, and immigration law.<sup>396</sup> Second, the Court found “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families”<sup>397</sup>—indicating that sexual orientation is not relevant to an individual’s abilities. Finally, the Court declared that “sexual orientation is both a normal expression of human sexuality and immutable.”<sup>398</sup> In light of these findings, one can easily imagine the Court declaring that anti-gay laws are subject to heightened scrutiny under the Equal Protection Clause.

Alternatively, one can just as easily imagine the Court finding that anti-gay curriculum laws are “discriminations of an unusual character,” which require “careful consideration” under the Equal Protection Clause. In *Romer*, the Court held that “the absence of precedent” associated with a particular law “is itself instructive,” because “discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious” to the Equal Protection Clause.<sup>399</sup> In *Windsor*, the Court reaffirmed this principle, holding that “[i]n determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration.”<sup>400</sup> The Court has not clarified whether the “careful consideration” triggered by “discriminations of an unusual character” represents a new form of heightened scrutiny, or a subtle twist in the application of rational basis review.<sup>401</sup> In any event, the Court’s analysis of the laws challenged in *Romer* and *Windsor* applies equally well to anti-gay curriculum laws: History offers few, if any, examples of laws that prohibit or restrict instruction about a class of persons in the curriculum of public schools.<sup>402</sup>

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<sup>396</sup> *Obergefell*, 135 S.Ct. at 2596.

<sup>397</sup> *Id.* at 2600.

<sup>398</sup> *Id.* at 2596.

<sup>399</sup> 517 U.S. at 633.

<sup>400</sup> 133 S.Ct. at 2692.

<sup>401</sup> See Anthony O’Rourke, *Windsor Beyond Marriage*, 55 WM. & MARY L. REV. 2171, 2186-2190 (2014); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 217-218.

<sup>402</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating state law prohibiting the teaching of foreign languages in public or private schools). In more recent years, many states have adopted laws prohibiting teachers from discussing or advocating abortion and contraception in public schools. In one respect, these laws may seem similar to anti-gay curriculum laws: They restrict teachers from informing students of the existence of constitutional rights. But even these laws do not target women in a wholesale manner—e.g., by prohibiting teachers from “promoting” sex equality, or “portraying” women in a positive manner. In contrast to the Court’s equation of homosexual conduct with homosexual status, the Court has not regarded laws targeting abortion or pregnancy as forms of discrimination based on sex. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993); *Geduldig v. Aiello*, 417 U.S. 484, 496-497 & n.20.

But it hardly matters. After all, the Court has managed to invalidate four anti-gay laws in the last twenty years without identifying the level of scrutiny that applies to them. In *Romer v. Evans*, the Court found that an anti-gay law did not bear “a rational relationship to a legitimate governmental purpose,”<sup>403</sup> which is the standard terminology of rational basis review. In both *Lawrence* and *Windsor*, the Court found that no “legitimate” interest justified the harms inflicted by anti-gay laws, without specifying a level of scrutiny.<sup>404</sup> And in *Obergefell*, the Court found that anti-gay marriage laws violated the “fundamental right to marry,” again without specifying a level of scrutiny.<sup>405</sup> In light of these rulings, one can just as easily imagine the Court a third option: Rather than specifying a level of scrutiny, the Court can strike down anti-gay curriculum laws by applying the principles articulated in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.

#### D. The State’s Interests

Rather than attempting to parse the level of scrutiny applied in *Lawrence*, *Windsor*, or *Obergefell*,<sup>406</sup> this Part proceeds under the analytical framework that the Court claimed to be applying in *Romer*: At the very least, anti-gay curriculum laws must satisfy rational basis review.<sup>407</sup> Under this standard, laws “must bear a rational relationship to a legitimate governmental purpose,”<sup>408</sup> and “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>409</sup>

Historically, state legislatures have the following concerns to justify the adoption of anti-gay curriculum laws: (1) the promotion of moral disapproval of homosexual conduct; (2) the promotion of children’s heterosexual development; (3) the prevention of sexually transmitted infections; and (4) the federalist tradition that grants states broad authority to regulate public schools. As this Section explains, the first and second interests do not qualify as “legitimate,” under the principles articulated in *Romer*, *Lawrence*, *Windsor*. The third and fourth interests are legitimate, but anti-gay curriculum laws are not rationally related to either of them.

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<sup>403</sup> 517 U.S. at 635.

<sup>404</sup> *Lawrence*, 539 U.S. at 578; *Windsor*, 133 S.Ct. at 2696.

<sup>405</sup> 135 S.Ct. at 2602, 2605.

<sup>406</sup> See, e.g., Carpenter, *supra* note \_\_, at 217-218; Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

<sup>407</sup> *But see, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759, 760 (2011) (arguing that “commentators have correctly discerned a new rational basis with bite standard” in *Romer*). My argument does not depend on the premise that *Romer* actually applied traditional rational basis review. Rather, my claim is that anti-gay curriculum laws cannot satisfy the principles articulated in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*—whatever one chooses to call them.

<sup>408</sup> *Romer*, 517 U.S. at 635.

<sup>409</sup> *Id.* at 634.

### 1. *Moral Disapproval*

First, states could argue that anti-gay curriculum laws promote moral disapproval of homosexual conduct. In Alabama and Texas, for example, the law affirmatively requires teachers to instruct students that “homosexuality is not a lifestyle acceptable to the general public.”<sup>410</sup> These provisions were adopted shortly after the Supreme Court held, in *Bowers v. Hardwick*, that Georgia’s sodomy law was justified by “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.”<sup>411</sup>

But of course, *Bowers* has been overruled.<sup>412</sup> And on three occasions, the Court has rejected the claim that moral disapproval of homosexual conduct is sufficient to justify anti-gay laws. In *Romer*, the State of Colorado sought to justify the challenged law by invoking the state’s interest in protecting “the contours of social and moral norms,”<sup>413</sup> and defended “the validity of legislating on the basis of moral judgment.”<sup>414</sup> The Court held that the challenge law was “inexplicable by anything but animus toward the class it affects.”<sup>415</sup> In *Lawrence*, the State of Texas argued that the challenged law “the State’s long-standing moral disapproval of homosexual conduct.”<sup>416</sup> Overruling *Bowers*, the Court held that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>417</sup> Finally, in *Windsor*, the Court observed that Congress had offered moral justifications for the challenged law—“moral disapproval of homosexuality,” “a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality,” and “an interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.”<sup>418</sup> The Court held that the law was “motivated by an improper animus”—an “avowed purpose . . . to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages.”<sup>419</sup> In each case, the Court explicitly found that the injuries inflicted by the challenged anti-gay laws were not justified by any “legitimate” interests.<sup>420</sup>

### 2. *Children’s Heterosexual Development*

Second, states could argue that anti-gay curriculum laws promote children’s heterosexual development. In Utah, for example, the state’s curriculum law prohibits school employees from doing anything that would “support or encourage criminal

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<sup>410</sup> ALA. CODE §16-40A-2; TEX. HEALTH & SAFETY CODE ANN. §85.007 & §163.002.

<sup>411</sup> 478 U.S. 186, 196 (1986).

<sup>412</sup> *Lawrence*, 539 U.S. at 578.

<sup>413</sup> Petitioner’s Brief at 40, 1995 WL 310026.

<sup>414</sup> Petitioner’s Reply Brief at 16 n.27, 1995 WL 466395.

<sup>415</sup> *Romer*, 517 U.S. at 632.

<sup>416</sup> Respondent’s Brief at 42, 2003 WL 470184.

<sup>417</sup> *Lawrence*, 539 U.S. at 577.

<sup>418</sup> *Windsor*, 133 S.Ct. at 2693.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 2696; *Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 632.

conduct by students, teachers, or volunteers” because “school employees . . . serve as examples to their students.”<sup>421</sup> To justify this law, the Legislature argued that “steps need to be taken to . . . prevent and discourage peer pressured, directed, or encouraged premature self-identification with a non-heterosexual orientation.”<sup>422</sup>

To be sure, the Supreme Court has recognized that states may regulate public schools based on the premise that “a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.”<sup>423</sup> But in *Obergefell*, the Court specifically found that “sexual orientation is a normal expression of human sexuality and immutable.”<sup>424</sup> Whatever one thinks of this finding,<sup>425</sup> it destroys the factual and moral predicate for the state’s aspirations. If homosexuality is “immutable,” then it cannot be deterred; if homosexuality is “normal,” there is no reason to try.

In any event, the Court’s rejection of moral disapproval in *Romer*, *Lawrence*, and *Windsor* forecloses this argument, too. After all, the state’s interest in promoting children’s heterosexual development is nothing more than a thinly-veiled moral objection to homosexuality itself. Because states do not have a legitimate interest in promoting moral disapproval of homosexuality, they do not have an interest in encouraging children to be heterosexual, or discouraging them from being lesbian, gay, or bisexual. When objections to children’s homosexuality are articulated in these terms, they represent a desire to minimize the number of people who become lesbian, gay, and bisexual—and thus, the number of people who will someday be lesbian, gay, and bisexual. To the extent that this objection betrays a fantasy of “a world without any more homosexuals in it,”<sup>426</sup> it is a paradigm of “animus toward the class.”<sup>427</sup>

### 3. Sexually Transmitted Infections

Third, states could argue that anti-gay curriculum laws are rationally related to the state’s interest in promoting “public health”—namely, the prevention of HIV/AIDS and other sexually transmitted infections. In Oklahoma, for example, teachers must instruct students that “engaging in homosexual activity . . . is now known to be primarily responsible for contact with the AIDS virus.”<sup>428</sup> And in

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<sup>421</sup> Act of Apr. 30, 1996, ch. 10, §§1-2, 1996 Utah Laws 2nd Sp. Sess. (codified at UTAH CODE ANN. §53A-13-101(4)(a)).

<sup>422</sup> Legislative History and Intent Language for S.B. 1003, S.J., 51st Leg., 2d Spec. Sess. 1231, 1232 (Utah Apr. 17, 1996) (on file with author).

<sup>423</sup> *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

<sup>424</sup> *Obergefell*, 135 S.Ct. at 2596.

<sup>425</sup> See, e.g., Jessica Clarke, *Against Immutability*, 125 YALE L.J. 1 (2015); Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

<sup>426</sup> Cf. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOCIAL TEXT 18, 25 (1991).

<sup>427</sup> *Romer*, 530 U.S. at 632.

<sup>428</sup> 70 OKLA. STAT. ANN. §11-103.3.

Arizona, teachers are prohibiting from providing “instruction which . . . [s]uggests that some methods of sex are safe methods of homosexual sex.”<sup>429</sup>

In both *Bowers* and *Lawrence*, the parties and amici sharply disputed whether sodomy laws were rationally related to the prevention of HIV/AIDS and other sexually transmitted infections.<sup>430</sup> In *Bowers*, the majority did not rely on this interest while upholding the law; in *Lawrence*, the majority did not discuss this interest while invalidating the law.<sup>431</sup> The Court’s silence on this subject is significant—especially given the *Lawrence* Court’s invalidation of an anti-gay law. In order to reach this result, the Court must have concluded that the state’s interest in public health—like the state’s interest in public morals—was not sufficient to justify the sodomy law’s “intrusion into the personal and private life of the individual.”<sup>432</sup>

Shortly after *Lawrence* was decided, the Kansas Supreme Court relied on *Lawrence* to unanimously reject a public health justification for an anti-gay sodomy law.<sup>433</sup> In *State v. Limon*, a gay teenager had been sentenced to a prison term of 206 months, and required to register as a “persistent sexual offender,” for engaging in “consensual oral contact with the genitalia” of another male teenager.<sup>434</sup> Under the state’s law, if the defendant had engaged in consensual sex with a female teenager, he would have received a sentence of only thirteen to fifteen months and would not have been required to register as a sex offender.<sup>435</sup> In defense of Limon’s sentence, the State argued that homosexual conduct posed a higher risk of HIV infection than heterosexual conduct.<sup>436</sup> By discouraging minors from engaging in homosexual conduct, the State claimed, the law was protecting minors from exposure to HIV risk.<sup>437</sup>

But as the Kansas Supreme Court explained, the connection between same-sex intimacy and HIV risk is exceptionally weak.<sup>438</sup> Echoing the petitioner’s brief in *Lawrence*, the court listed three examples of the law’s over- and under-inclusiveness. First, “the risk of transmission of the HIV infection through female to female contact is negligible,” while “the gravest risk of sexual transmission for females in through heterosexual intercourse.”<sup>439</sup> Second, “[t]here is a near-zero chance of acquiring the HIV infection through the conduct which gave rise to this case, oral sex between

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<sup>429</sup> ARIZ. REV. STAT. ANN. §15-716(C).

<sup>430</sup> Petitioner’s Brief at 37, 1985 WL 667939; Brief for Texas Physicians Resource Council et al. as Amici Curiae Supporting Respondent at 6, 2003 WL 367566. *See also* Respondent’s Brief at 27, 1986 WL 720442; Respondent’s Brief at 17, 2003 WL 1098835.

<sup>431</sup> *Bowers*, 478 U.S. at 196; *Lawrence*, 539 U.S. at 578.

<sup>432</sup> *Lawrence*, 539 U.S. at 578.

<sup>433</sup> *State v. Limon*, 122 P.3d 22, 36 (Kan. 2005).

<sup>434</sup> *Id.* at 24.

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* at 36. While the State’s argument could have been framed in terms of other sexually transmitted diseases, the argument’s weaknesses are aptly illustrated by the example of HIV.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*



males, or through cunnilingus.”<sup>440</sup> Finally, even “the risk of HIV transmission during anal sex with an infected partner is the same for heterosexuals and homosexuals.”<sup>441</sup> For these reasons, the court concluded, the State’s public health claims did “not satisfy . . . the rational basis test.”<sup>442</sup>

In anti-gay curriculum laws, the link between homosexual conduct and sexually transmitted infections is even weaker than in anti-gay sodomy laws. Unlike the sodomy laws challenged in *Lawrence* and *Limon*, most anti-gay curriculum laws do not specify the types of sexual activity that they seek to deter. By using terms like the “homosexual lifestyle,” “homosexuality,” and “marriage,” anti-gay curriculum laws sweep in a “way of life,” a “quality or state of being,” and a “contractual relationship recognized by law”—far more than oral and anal intercourse between two persons of the same sex.<sup>443</sup>

But among this argument’s many fallacies, the law’s inclusion of “female to female contact” may be the most irrational. It reveals that the conception of “public health” advanced by anti-gay laws is not only anti-gay but anti-girl. For girls, the so-called “homosexual lifestyle” is significantly (indeed, vastly) more healthy than its heterosexual counterpart. To the extent that girls engage in same-sex intimacy, rather than opposite-sex intimacy, they face dramatically lower risks of HIV and other sexually transmitted infections<sup>444</sup>—not to mention pregnancy,<sup>445</sup> rape, sexual assault, and intimate partner abuse.<sup>446</sup> By any measure, these are prevalent and significant public health risks, and reducing them has the potential to transform women’s lives. In this respect, anti-gay curriculum laws are wholly irrational: In the name of “public health,” they specifically discourage girls from engaging in low-risk behavior.<sup>447</sup>

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<sup>440</sup> *Id.* at 37.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> See *supra* Part IV.B.

<sup>444</sup> See, e.g., George F. Lemp et al., *HIV Seroprevalence and Risk Behaviors Among Lesbians and Bisexual Women in San Francisco and Berkeley, California*, 85 AM. J. PUB. HEALTH 1549, 1549 (1995).

<sup>445</sup> Ironically, state legislatures have often cited the prevention of pregnancy and out-of-wedlock childbirth when adopting anti-gay curriculum laws. See, e.g., Ark. Code Ann. § 6-18-703(d)(3); Ind. Code Ann. § 20-30-5-13; Ohio Rev. Code Ann. § 3313.6011; Mo. Stat. Ann. § 170.015. Needless to say, states cannot logically invoke concerns about teenage pregnancy and out-of-wedlock childbirth to justify the anti-gay provisions of AIDS and sex education laws—even if these concerns justify other provisions of these laws. See *Limon*, 122 P.3d at 37 (“The legislative history reveals that the concern of conferees was more focused upon teenage pregnancy. Obviously, this public health risk is not addressed through this legislation.”).

<sup>446</sup> See, e.g., Patricia Tjaden et al., *Comparing Violence Over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants*, 14 VIOLENCE & VICTIMS 413 (1999).

<sup>447</sup> By noting these fallacies, I do not mean to deny that there are any correlations between certain same-sex sexual activities and the risk of transmitting HIV or other sexually transmitted infections. But it would be only by passing legislation focused on same-sex conduct between males—specifically, on the receptive role in unprotected anal intercourse between males—that a state’s curriculum law could find even a conceivable footing in the realities of HIV risk. See Teresa J. Finlayson et al., *HIV Risk, Prevention, and Testing Behaviors Among Men Who Have Sex with Men*, 60 MORBIDITY & MORTALITY WEEKLY REPORT 1 (2011).

#### 4. *The State's Authority to Regulate Public Schools*

Finally, states could argue that anti-gay curriculum laws are a valid exercise of the state's traditional authority to regulate public schools—specifically, the authority to prescribe the curriculum in public schools.<sup>448</sup> The Supreme Court has recognized this tradition in a long line of cases. Among other things, the Court has acknowledged that schools must have the authority “to prescribe the curriculum for its public schools,”<sup>449</sup> to determine “what manner of speech in the classroom . . . is inappropriate,”<sup>450</sup> and to refuse to sponsor any speech “that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order.”<sup>451</sup>

At the same time, however, the Court has consistently held that the state's authority to regulate public schools must be discharged “within the limits of the Bill of Rights.”<sup>452</sup> The leading cases are familiar, but they offer instructive examples in this regard. In *West Virginia v. Barnette*, the Court held that the state could not require schoolchildren to recite the Pledge of Allegiance and salute the American flag.<sup>453</sup> In *Tinker v. Des Moines Independent School District*, the Court held that schools could not prohibit students from wearing black armbands to protest the Vietnam War.<sup>454</sup> In *Epperson v. Arkansas*, the Court held that a state could not prohibit the teaching of Darwin's theory of evolution in public schools.<sup>455</sup> And in *Edwards v. Aguillard*, the Court held that a state could not require the teaching of creationism in public schools.<sup>456</sup> In first of these cases, the Court explained: “The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”<sup>457</sup>

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<sup>448</sup> See Legislative History and Intent Language for S.B. 1003, S.J., 51st Leg., 2d Spec. Sess. 1231, 1232 (Utah Apr. 17, 1996) (“this legislation presupposes and reasserts the importance of state and local control over public education”) (on file with author); Louisiana Legislative History File, H.B. 484, Hearing of Louisiana Senate Committee on Education, June 25, 1987, at 3 (“[O]ur founding fathers did not intend for education to be a federal matter, they intended it to be a matter for the states”) (on file with author).

<sup>449</sup> *Epperson v. Arkansas*, 393 U.S. 97, 197 (1968).

<sup>450</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>451</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

<sup>452</sup> 319 U.S. 624, 637 (1943).

<sup>453</sup> *Id.*

<sup>454</sup> 393 U.S. 503 (1969).

<sup>455</sup> 393 U.S. 97 (1968).

<sup>456</sup> 482 U.S. 578 (1987).

<sup>457</sup> *Barnette*, 319 U.S. at 637. Although *Barnette*, *Tinker*, *Epperson*, and *Edwards* were decided under the First Amendment, rather than the Fourteenth Amendment, this distinction cannot help states defend anti-gay curriculum laws. The First Amendment constrains the States only because it is incorporated through the Due Process Clause, see *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 8 (1947); *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), which stands alongside the Equal Protection

*E. Applying Equal Protection Principles to Curriculum and Funding Laws*

There is only one sense in which an equal protection challenge would require the Supreme Court to break new ground: To date, the Court has not had an opportunity to review any state's curriculum law under the Equal Protection Clause. This paucity of cases reinforces the conclusion that anti-gay curriculum laws are "discriminations of an unusual character," which are "unprecedented in this Court's jurisprudence."<sup>458</sup> But the Court's wait may soon be over, because a similar challenge is underway in Arizona.

In *Arce v. Douglas*, the Ninth Circuit held that if a state curriculum law were "motivated by a discriminatory purpose," then it would violate the Equal Protection Clause.<sup>459</sup> In this case, the Arizona legislature had adopted a law that prohibited led to the elimination of the Mexican American Studies (MAS) program in Tucson's public schools.<sup>460</sup> Although the law did not facially target this program, it prohibited the state's public schools from offering any classes that "(1) are designed primarily for pupils of a particular ethnic group," or (2) "advocate ethnic solidarity instead of the treatment of pupils as individuals."<sup>461</sup> Pursuant to this law, the state's superintendent required the Tucson school district "to remove all MAS instructional materials from K-12 classrooms."<sup>462</sup>

A group of Mexican American students challenged the law under the Equal Protection Clause.<sup>463</sup> Although the parties agreed that the law was adopted for the purpose of targeting the MAS program, and that it directly led to the elimination of that program, the district court sua sponte granted summary judgment to the defendants on the plaintiffs' equal protection challenge.<sup>464</sup> Notwithstanding the parties' stipulations, the district court found that the students had not proved that the law was motivated by a discriminatory purpose.<sup>465</sup> The Ninth Circuit reversed, holding that students had alleged a valid claim under the Equal Protection Clause.<sup>466</sup> The superintendent did not petition for certiorari, and the case is proceeding to trial in the district court.<sup>467</sup>

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Clause in the Fourteenth Amendment. For this reason, the Fourteenth Amendment places meaningful limits on the state's authority "to prescribe the curriculum for its public schools." *Epperson*, 393 U.S. at 197.

<sup>458</sup> See *infra* Part IV.C.

<sup>459</sup> 793 F.3d 968, 976 (9th Cir. 2015).

<sup>460</sup> *Id.* at 973. (quoting Ariz. Rev. Stat. §15-112(A)).

<sup>461</sup> *Id.* (quoting Ariz. Rev. Stat. §15-112(A)).

<sup>462</sup> *Id.* at 975.

<sup>463</sup> *Id.* at 973.

<sup>464</sup> *Id.*; see also *Acosta v. Huppenthal*, 2013 WL 871892 \*17 & n.13 (D. Ariz. Mar. 8, 2013).

<sup>465</sup> *Acosta*, 2013 WL 871892 at \*14.

<sup>466</sup> *Arce*, 793 F.3d at 976.

<sup>467</sup> Email from Erwin Chemerinsky, Counsel for Plaintiffs-Appellants, to Author, Nov. 18, 2016 (on file with author).

The Ninth Circuit's judgment must be correct. If a discriminatory curriculum law were not subject to the Equal Protection Clause, the resulting immunity would produce absurd results. Imagine, for example, that Arizona had adopted a law that expressly prohibited schools from teaching "Mexican-American Studies," while permitting them to teach "Anglo-American Studies." The Supreme Court would have no trouble finding that such a law violated the Equal Protection Clause.<sup>468</sup> Even if a curriculum law discriminated based on disability, rather than race or national origin or race, the Court would find that the law was "inexplicable by anything but animus toward the class that it affects," and lacked "a rational relationship to legitimate state interests."<sup>469</sup>

The Ninth Circuit's judgment is consistent with the Supreme Court's often expressed view that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges,"<sup>470</sup> and the Court's warnings that schools may determine "what manner of speech" is appropriate in classrooms<sup>471</sup> and when speech advocates "irresponsible sex."<sup>472</sup> Now that the Supreme Court has invalidated anti-gay sodomy and anti-gay marriage laws, the state may no longer presume the criminality or "irresponsibility" of same-sex relationships. In the wake of *Lawrence* and *Obergefell*, anti-gay curriculum laws must stand or fall by themselves, as one of the last remaining forms of discrimination against lesbian, gay, and bisexual people.

Although the Equal Protection Clause applies only to the States, there is little doubt that the same equal protection principles apply to the federal government's administration of "abstinence education" block grants under Title V of the Social Security Act. In *Windsor*, the Court held that DOMA's definition of "marriage" violated the Fifth Amendment's Due Process Clause, which "contains within it the prohibition against denying to any person the equal protection of the laws."<sup>473</sup> Although the Court has often upheld government funding programs under the Free

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<sup>468</sup> In *Board of Education v. Pico*, six Justices endorsed a similar analysis and result under the Free Speech Clause. Writing for three justices, Justice Brennan hypothesized two scenarios in which public schools would violate the Free Speech Clause by removing books from school libraries: "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration." 457 U.S. at 870-871. In his concurring opinion, then-Justice Rehnquist wrote, "I can cheerfully concede all of this." *Id.* at 907. Rather than objecting to Justice Brennan's analysis, he distinguished the present case from the hypotheticals on factual grounds. *Id.*

<sup>469</sup> *Romer*, 530 U.S. at 632.

<sup>470</sup> *Hazelwood*, 484 U.S. at 272.

<sup>471</sup> *Fraser*, 478 U.S. at 683.

<sup>472</sup> *Hazelwood*, 484 U.S. at 272.

<sup>473</sup> *Windsor*, 133 S.Ct. at 2695 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-218 (1995)).

Speech Clause,<sup>474</sup> it has left no doubt that they may violate the equal protection guarantees of the Fifth or Fourteenth Amendment, depending on whether they are governed by federal or state law.<sup>475</sup>

#### CONCLUSION

Until recently, the LGBT movement had confronted a vast array of official policies and practices that facially discriminated against LGBT people: laws governing marriage, adoption, and sexual relationships, and policies discriminating in immigration, military service, and public employment.<sup>476</sup> During this period, it would have been difficult, if not impossible, for LGBT advocates to bring successful challenges to anti-gay curriculum laws. In the years before *Lawrence*, anti-gay curriculum laws could have been upheld as a way to deter criminal conduct. Before *Obergefell*, they could have been upheld as a way to deter premarital and extramarital sex.

Now that sodomy and marriage laws have been invalidated, the discriminatory language in anti-gay curriculum laws can no longer be justified by reference to these other laws. Instead, this language must now be justified on its own terms—as a way of specifically targeting the identities, relationships, families, and educational opportunities of lesbian, gay, and bisexual students. Although no court has had an opportunity to address this issue, the answer provided by the Supreme Court’s jurisprudence is clear. States may not injure and stigmatize lesbian, gay, and bisexual children, for the same reasons that they may not injure and stigmatize lesbian, gay, and bisexual people of any age.

Now that LGBT advocates have the legal opportunity to challenge anti-gay curriculum laws, they have a moral obligation to seize it. Across the country, LGBT students continue to report alarmingly high levels of bullying, harassment, and suicide. Studies demonstrate that the inclusion of LGBT issues in curriculum will help reduce these risks, bolstering the health, safety and well-being of LGBT students. By challenging one of the country’s last bastions of state-sponsored homophobia, advocates can begin to integrate LGBT youth into the communities—as well as the curricula—of our nation’s public schools.

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<sup>474</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (upholding federal regulations prohibiting federally-funded family planning projects from “advocating” abortion as a method of family planning).

<sup>475</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–218 (1995) (invalidating federal funding program under Fifth Amendment); *Zobel v. Williams*, 457 U.S. 55, 60-64 (1982) (invalidating state funding program under Fourteenth Amendment). In a federal challenge to the anti-gay provisions of Title V, plaintiffs would seek to enjoin the Department from applying DOMA’s definition of “marriage” in the administration of Title V grants. In *Windsor*, the Court held that DOMA’s definition of marriage was motivated by a discriminatory purpose. *Windsor*, 133 S.Ct. at 2696; *Obergefell*, 135 S.Ct. at 2597.

<sup>476</sup> *Obergefell*, 135 S.Ct. at 2596.