ANTI-GAY CURRICULUM LAWS

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Since the Supreme Court's invalidation of anti-gay marriage laws, scholars and advocates have been debating the LGBT movement's near-term strategies and priorities. This Article joins that conversation by developing the framework for a national campaign to repeal or invalidate anti-gay curriculum laws—statutes that prohibit or restrict the discussion of homosexuality in public schools. Anti-gay curriculum laws expose LGBT students to stigmatization and bullying and they are far more prevalent than scholars and advocates have recognized. In the existing literature, these provisions are called "no promo homo" laws and are said to 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 a federal law that governs the annual distribution of $75 million for abstinence-education programs. Grounded in moral disapproval and anti-gay animus, these laws plainly violate the Constitution's equal protection guarantees under the Supreme Court's landmark rulings in Romer v. Evans, Lawrence v. Texas, Windsor v. United States, *and* Obergefell v. Hodges. *Yet federal and state officials will retain the legal authority to enforce these laws unless and until courts enjoin them from doing so. Challenging anti-gay curriculum laws is a necessary and important step toward establishing the legal equality of LGBT people and creating a safe environment for LGBT students in the nation's public schools.*

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INTRODUCTION

Since the Supreme Court's invalidation of anti-gay marriage laws, scholars and advocates have been debating what issues and strategies the LGBT movement should prioritize next.[1] This Article joins that dialogue by proposing a national campaign to repeal or invalidate anti-gay curriculum laws—statutes that prohibit or restrict the discussion of homosexuality in public schools.[2] Some of these laws require teachers to instruct students that "homosexual conduct is a criminal offense,"[3] that "homosexuality is not a lifestyle acceptable to the general public,"[4] or that "homosexual activity . . . is . . . primarily responsible for contact with the AIDS virus."[5] Others prohibit teachers from "promot[ing]"[6] homosexuality or suggesting that "some methods of sex are safe methods of homosexual sex."[7] Still others require teachers to "teach honor and respect for monogamous heterosexual marriage"[8] or emphasize "the benefits of monogamous heterosexual marriage."[9] Nearly all of these laws require teachers to emphasize "abstinence from sexual activity before

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1. See, e.g., Carlos A. Ball, Introduction: The Past and the Future, *in* After Marriage Equality: The Future of LGBT Rights (Carlos A. Ball ed., 2016); Rebecca Isaacs, Opinion, Op-Ed: The LGBT Movement After Marriage, Advocate (June 12, 2014), http://www.advocate.com/commentary/2014/06/12/op-ed-lgbt-movement-after-marriage [http://perma.cc/JH6J-2KWP]; Urvashi Vaid et al., What's Next for the LGBT Movement?, Nation (June 27, 2013), http://www.thenation.com/article/whats-next-lgbt-movement/ (on file with the *Columbia Law Review*).

2. This Article uses the term "anti-gay," rather than "anti-LGBT," because it develops a facial challenge to laws that discriminate against "homosexuality," the "homosexual lifestyle," 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 deals with laws that discriminate simultaneously against each of these aspects of LGBT people's lives. 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, or that they are applied against transgender people in a discriminatory manner. Rather, I use these terms to accurately reflect the text of the relevant statutes, which is a necessary step in articulating a facial challenge.

3. Ala. Code § 16-40A-2(c)(8) (LexisNexis 2012); Tex. Health & Safety Code Ann. § 163.002(8) (West 2017); see also id. § 85.007(b)(2) ("[M]aterials in the education programs intended for persons younger than 18 years of age must . . . state that homosexual conduct . . . is a criminal offense . . . .").

4. Ala. Code § 16-40A-2(c)(8); Tex. Health & Safety Code Ann. § 163.002(8); see also id. § 85.007(b)(2) ("[M]aterials in the education programs intended for persons younger than 18 years of age must . . . state that homosexual conduct is not an acceptable lifestyle . . . .").

5. Okla. Stat. Ann. tit. 70, § 11-103.3(D) (West 2013).

6. Ariz. Rev. Stat. Ann. § 15-716(C)(1) (2014).

7. Ariz. Rev. Stat. Ann. § 15-716(C)(3).

8. 105 Ill. Comp. Stat. Ann. 5/27-9.1(c)(2) (West 2012).

9. Fla. Stat. § 1003.46(2)(a) (2017).

marriage" while excluding same-sex relationships from the definition of "marriage."[10]

Now that anti-gay sodomy and marriage laws have been declared unconstitutional, anti-gay curriculum laws are anachronistic—remnants of a time in which governmental discrimination against LGBT people was lawful and rampant. Yet these laws are still on the books,[11] some jurisdictions are still enforcing them,[12] and no court has had an opportunity to determine whether they are constitutional.[13] This Article develops the framework for a nationwide campaign to eliminate them.

The scope of this campaign will be broader than others have anticipated.[14] 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.[15] These labels are catchy, but they are imprecise in this context: They use a single provision that appears in only one state's curriculum law to describe a wide variety of provisions that exist in the curriculum

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10. See infra section I.E.

11. See infra Part I.

12. See infra Part III.

13. See infra Part II.

14. In the literature on this subject, scholars and advocates have called for the judicial invalidation or legislative repeal of "no promo" or "don't say gay" laws in fewer than ten states. See, e.g., Amanda Harmon Cooley, Constitutional Representations of the Family in Public Schools: Ensuring Equal Protection for All Students Regardless of Parental Sexual Orientation or Gender Identity, 76 Ohio St. L.J. 1007, 1009 (2015) (nine states); Ronny Hamed-Troyansky, Erasing "Gay" from the Blackboard: The Unconstitutionality of "No Promo Homo" Education Laws, 20 U.C. Davis J. Juv. L. & Pol'y 85, 90 (2016) (eight states); Leora Hoshall, Afraid of Who You Are: No Promo Homo Laws in Public School Sex Education, 22 Tex. J. Women & L. 219, 222 (2013) (seven states); Jillian Lenson, Litigation Primer Attacking State "No Promo Homo" Laws: Why "Don't Say Gay" Is Not O.K., 24 Tul. J.L. & Sexuality 145, 147 (2015) (nine states); Madelyn Rodriguez, See No Evil, Hear No Evil, Speak No Evil; Stemming the Tide of No Promo Homo Laws in American Schools, Mod. Am., Spring 2013, at 29, 31–32 (2013) (eight states); Ashley E. McGovern, Note, 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, 467 (2012) (seven states); #DontEraseUs: A Campaign to End Anti-LGBT Curriculum Laws, Lambda Legal, http://www.lambdalegal.org/dont-erase-us [http://perma.cc/HR27-6R8Y] (last visited July 27, 2017) (eight states); "No Promo Homo" and "Don't Say Gay" Laws, Trevor Project, http://www.thetrevorproject.org/pages/no-promo/ [http://perma.cc/YB8J-X5B6] (last visited July 27, 2017) (eight states); "No Promo Homo" Laws, Gay, Lesbian & Straight Educ. Network, http://www.glsen.org/learn/policy/issues/nopromohomo [http://perma.cc/HF9L-B7D6] [hereinafter GLSEN] (last visited Aug. 2, 2017) (eight states). By contrast, this Article calls for the invalidation or repeal of twenty state laws and one federal law. See infra note 23 and accompanying text.

15. See Brian Barrett & Arron Bound, A Critical Discourse Analysis of No Promo Homo Policies in US Schools, 51 Educ. Stud. 267, 267 (2015); Cooley, supra note 14, at 1018–24; Hamed-Troyansky, supra note 14, at 89; Hoshall, supra note 14, at 221; Lenson, supra note 14, at 147; Rodriguez, supra note 14, at 29; McGovern, supra note 14, at 467; Trevor Project, supra note 14; GLSEN, supra note 14.

laws of many states.[16] 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,[17] the reasons they were adopted,[18] and the reasons they should be invalidated.[19]

This Article introduces a new label—"anti-gay curriculum laws"—to clear up the confusion surrounding this subject. 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 health-education, HIV-education, and sex-education curricula in public schools.

As this more precise definition makes clear, anti-gay curriculum laws are more prevalent than previously recognized. While scholars and advocates have claimed that "no promo homo" laws exist in seven,[20] eight,[21] or nine[22] states, a comprehensive survey shows that anti-gay curriculum laws actually exist in twenty states.[23] More than 25 million children—nearly half of all school-aged children in the United States—are

16. This new usage of "no promo homo" differs from the original usage of the phrase, which was coined by Nan Hunter and popularized by William Eskridge. See Nan D. Hunter, Identity, Speech, and Equality, 79 Va. L. Rev. 1695, 1702–03 (1993); see also William N. Eskridge, Jr., No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review, 75 N.Y.U. L. Rev. 1327, 1329 (2000) [hereinafter Eskridge, No Promo Homo]; infra notes 38–45 and accompanying text.

17. See supra note 14.

18. Most authors assert that anti-gay curriculum laws are based on "animus" without discussing the historical reasons that the laws were adopted. See, e.g., Cooley, supra note 14, at 1048; Hamed-Troyansky, supra note 14, at 114 (citing "animus" or "discomfort"); Lenson, supra note 14, at 159; Rodriguez, supra note 14, at 37–38; McGovern, supra note 14, at 485.

19. See infra Part IV.

20. E.g., Hoshall, supra note 14, at 222; McGovern, supra note 14, at 467.

21. E.g., Hamed-Troyansky, supra note 14, at 90; Rodriguez, supra note 14, at 31-32; Ian Ayres & William Eskridge, Opinion, U.S. Hypocrisy over Russia's Anti-Gay Laws, Wash. Post (Jan. 31, 2014), http://www.washingtonpost.com/opinions/us-hypocrisy-over-russias-anti-gay-laws/2014/01/31/3df0baf0-8548-11e3-9dd4e7278db80d86_story.html?utm_term=.2f3fb6348497 [http://perma.cc/3HRU-LWBC]; Lambda Legal, supra note 14; Trevor Project, supra note 14; GLSEN, supra note 14.

22. E.g. Cooley, supra note 14, at 1014; Lenson, supra note 14, at 147.

23. See Ala. Code § 16-40A-2(c)(8) (LexisNexis 2012); Ariz. Rev. Stat. Ann. § 15-716(C) (2014); Ark. Code Ann. § 6-18-703(d)(3) (2013); Fla. Stat. § 1003.46(2)(a) (2016); 105 Ill. Comp. Stat. Ann. 5/27-9.1(c)(1)–(3) (West 2012); Ind. Code §§ 20-30-5-13, 20-34-3-17(a) (2015); La. Stat. Ann. § 17:281(A)(3)–(4) (2013); Mich. Comp. Laws Ann. § 380.1507(1)–(2) (West 2013); Miss. Code Ann. § 37-13-171(1)–(2) (2013); Mo. Rev. Stat. § 170.015(1) (2015); N.C. Gen. Stat. § 115C-81(e1)(4)(e) (2015); N.D. Cent. Code § 15.1-21-24 (2011); Ohio Rev. Code Ann. § 3313.6011(A)–(C) (West 2012); Okla. Stat. Ann. tit. 70, § 11-103.3(D)–(E) (West 2013); S.C. Code Ann. § 59-32-30(A) (2016); Tenn. Code Ann. § 49-6-1304 (2016); Tex. Health & Safety Code Ann. §§ 85.007(b), 163.002(1), (8) (West 2017); Utah Code Ann. § 53A-13-101(1)(b)(i)(A)–(c)(iii)(A) (LexisNexis 2016); Va. Code Ann. § 22.1-207.1 (2016); Wis. Stat. § 118.019(2m)(c)–(d) (2016).

attending public schools in these twenty states.[24] In nine of these states, teachers are affirmatively required to teach anti-gay curricula in all public schools.[25] In the other eleven, teachers may choose between offering students an anti-gay curriculum or providing no health, sex, or HIV education at all.[26]

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."[27] In seventeen states, curriculum laws require emphasis on "abstinence from sexual activity until marriage," while still defining the term "marriage" in a way that excludes same-sex unions.[28] 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.[29] 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 $59 million to thirty-five states and two U.S. territories to support abstinence education programs under Title V.[30] Two-thirds of these funds were received by states currently governed by anti-gay curriculum laws.[31]

This Article proceeds in five parts. Part I introduces a new typology of anti-gay curriculum laws. It identifies five types of anti-gay provisions

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24. See Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics: Table 203.20. Enrollment in Public Elementary and Secondary Schools, by Region, State, and Jurisdiction: Selected Years, Fall 1990 Through Fall 2025 (2016), http://nces.ed.gov/programs/digest/d15/tables/dt15_203.20.asp [http://perma.cc/3JUL-U5X2].

25. Ind. Code §§ 20-30-5-13, 20-34-3-17(a); Miss. Code Ann. § 37-13-171; N.C. Gen. Stat. § 115C-81; N.D. Cent. Code § 15.1-21-24; Ohio Rev. Code Ann. § 3313.6011; Okla. Stat. Ann. tit. 70, § 11-103.3; S.C. Code Ann. § 59-32-30(A); Tenn. Code Ann. § 49-6-1304; Utah Code Ann. § 53A-13-101. For a summary of sex- and HIV-education laws by state, see SIECUS State Profiles Fiscal Year 2016, Sexuality Info. & Educ. Council of the U.S., http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1614 [http://perma.cc/6ZTR-UU92] [hereinafter SIECUS, Profiles FY 2016].

26. Ala. Code § 16-40A-2; Ariz. Rev. Stat. Ann. § 15-716; Ark. Code Ann. § 6-18-703; Fla. Stat. § 1003.46; 105 Ill. Comp. Stat. Ann. 5/27-9.1; La. Stat. Ann. § 17:281; Mich. Comp. Laws Ann. § 380.1507; Mo. Rev. Stat. § 170.015; Tex. Health & Safety Code Ann. §§ 85.007, 163.002; Va. Code Ann. § 22.1-207.1; Wis. Stat. § 118.019. For a summary of sex- and HIV-education laws by state, see SIECUS, Profiles FY 2016, supra note 25.

27. See Fla. Stat. § 1003.46(2)(a) (emphasis added); 105 Ill. Comp. Stat. Ann. 5/27-9.1(c)(2) (emphasis added); N.C. Gen. Stat. § 115C-81 (requiring teachers to emphasize "faithful monogamous *heterosexual* relationship[s]") (emphasis added). See generally infra section I.D (providing statutory language of "promo hetero" laws).

28. See infra section I.E.

29. 42 U.S.C. § 710(d) (2012).

30. See 2016 Title V State Abstinence Education Program Grant Awards, U.S. Dep't of Health & Human Servs. (June 2, 2016), http://www.acf.hhs.gov/fysb/resource/2016-title-v-grant-awards [http://perma.cc/4FEU-9NNH].

31. See id.

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, drawing on an original survey of state legislative histories and local newspaper archives. Most of these laws were passed in the late 1980s and early 1990s, during a period of national hysteria about the HIV 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 same-sex marriage. Regardless of when they were passed, these laws were intended to deter minors from developing same-sex attractions, establishing same-sex relationships, or identifying as lesbian, gay, or bisexual.[32]

Part III addresses two questions that are commonly asked about the enforcement of anti-gay curriculum laws, 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 do so. 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 legislatures repeal anti-gay curriculum laws or courts invalidate them, state and federal officials retain the legal authority to continue enforcing them. The available evidence suggests that at least some jurisdictions may still be enforcing these laws, even after the Supreme Court's invalidation of anti-gay sodomy and marriage laws.[33]

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.[34] Based on the principles articulated in these cases, this Part explains why anti-gay curriculum 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

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32. See Clifford J. Rosky, Fear of the Queer Child, 61 Buff. L. Rev. 607, 608–09 (2013) [hereinafter Rosky, Fear] (arguing that anti-LGBT policies grew primarily out of fears that exposure to homosexuality would make children more likely to develop or express same-sex attractions or otherwise deviate from traditional gender norms).

33. See infra section III.B.

34. See Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); Lawrence v. Texas, 539 U.S. 558, 564 (2003); Romer v. Evans, 517 U.S. 620, 623 (1996).

of public schools. The first and second interests do not qualify as legitimate, and the third and fourth interests are not rationally related to anti-gay curriculum laws.[35] 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.

This 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 repeal or invalidate anti-gay curriculum laws.

Public schools represent a vital institution in our democracy, laying the foundations of citizenship.[36] But across the country, our public schools have been failing LGBT youth, who report alarming levels of bullying, isolation, and suicide.[37] 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 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 the equal protection of LGBT people of every 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 private or public homosexual activity."[38] 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.[39]

This original usage of "no promo homo" allowed Hunter, Eskridge, and later scholars to identify important shifts that took place in anti-gay rhetoric during the 1970s. Before that era, anti-gay rhetoric had relied primarily on the rhetoric of predation and disgust, invoking the specter

35. See *Windsor*, 133 S. Ct. at 2694; *Lawrence*, 539 U.S. at 571; *Romer*, 517 U.S. at 631–32.

36. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

37. See infra notes 406–410 and accompanying text.

38. Hunter, supra note 16, at 1702–03.

39. Eskridge, No Promo Homo, supra note 16, at 1356–61.

of the "homosexual child molester."[40] During the 1970s, anti-gay rhetoric developed "more abstract," "less personal" appeals[41]—new claims about the spread of homosexuality through the subtler dynamics of indoctrination, role modeling, and public approval.[42] 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.[43]

More recently, however, scholars and advocates have begun to use the phrase "no promo homo" to refer specifically to anti-gay curriculum laws.[44] This new usage is understandable, because anti-gay curriculum laws are among the country's last remaining "no promo homo" laws.[45] But the new usage is also problematic, because many anti-gay curriculum laws do not fit the "no promo homo" model. As a result, 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 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, (4) Promo Hetero, and (5) Abstinence Until "Marriage."

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."[46]

Louisiana's law is similar, but the law's scope is ambiguous. In Louisiana, "[n]o sex education course offered in the public schools of the state shall utilize any sexually explicit materials depicting male or fe-

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40. Id. at 1328–29; Hunter, supra note 16, at 1697; Rosky, Fear, supra note 32, at 639–40.

41. Eskridge, No Promo Homo, supra note 16, at 1365.

42. Rosky, Fear, supra note 32, at 641–57.

43. See Eskridge, No Promo Homo, supra note 16, at 1331, 1338 ("But the old arguments do not disappear; they remain as foundational layers over which new arguments intellectually sediment.").

44. See supra note 15 and accompanying text.

45. See infra section I.B.

46. S.C. Code Ann. § 59-32-30(A)(5) (2016).

male homosexual activity."[47] Because of the ambiguity of the term "depicting," it is not clear whether this limitation applies to verbal descriptions, as well as graphic depictions.[48] It is clearly a "don't show gay" law; it may also be a "don't say gay" law.[49]

B. *No Promo Homo*

Despite the popularity of the term "no promo homo," there is only one state that prohibits teachers from "promoting" homosexuality in health-, sex-, or HIV-education courses. Arizona law prohibits teachers from offering any "instruction which . . . [p]romotes a homosexual life-style," "[p]ortrays homosexuality as a positive alternative life-style," or "[s]uggests that some methods of sex are safe methods of homosexual sex."[50]

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 infections.[51] In both Alabama and Texas, sex-education courses must include "[a]n emphasis . . . that homosexuality is not a lifestyle acceptable to the general public."[52] In addition, both

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47. La. Stat. Ann. § 17:281(A)(3) (2013).

48. See Depict, Webster's Third New International Dictionary 605 (Philip Babcock Gove ed., 1981) (defining "depict" as "1a: to form a likeness of by drawing or painting; b: to represent, portray, or delineate in other ways than in drawing or painting . . . to portray in words: describe"). The Louisiana Supreme Court often relies on legislative history to interpret ambiguous statutory terms. See, e.g., Theriot v. Midland Risk Ins., 694 So. 2d 184, 186 (La. 1997). During a legislative committee hearing, the sponsor of the Louisiana's law argued that under this provision, "you can't use any material that talks about homosexual conduct." Audio tape 1 of 2: Hearing of Louisiana Senate Education Committee, at 1:29–1:46 (June 25, 1987) (statement of Rep. Alphonse J. Jackson) (on file with the *Columbia Law Review*).

49. In recent years, the Tennessee and Missouri legislatures have rejected "don't say gay" bills. See S.B. 234, 2013 Gen. Assemb., 108th Reg. Sess. (Tenn. 2013); H.B. 2051, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); S.B. 49, 2011 Gen. Assemb., 107th Reg. Sess. (Tenn. 2011).

50. Ariz. Rev. Stat. Ann. § 15-716(C) (2014). Utah adopted a similar law in 2001, but it was repealed in 2017. Public Curriculum Amendments, ch. 105, § 1(c)(iii)(A)(II), 2001 Utah Laws 442, 442 (prohibiting "the advocacy of homosexuality" in health instruction), repealed by Health Education Amendments, S.B. 196, 62d Leg., Gen. Sess. (Utah 2017).

51. Ala. Code § 16-40A-2(c)(8) (LexisNexis 2012); Miss. Code Ann. § 37-13-171(2)(e) (2013); Okla. Stat. Ann. tit. 70, § 11-103.3(D)(1) (West 2013); Tex. Health & Safety Code Ann. §§ 85.007(b)(2), 163.002(8) (West 2017).

52. Ala. Code § 16-40A-2(c)(8); Tex. Health & Safety Code Ann. § 163.002(8); see also Tex. Health & Safety Code Ann. § 85.007(b)(2) ("[M]aterials in the education programs intended for persons younger than 18 years of age must . . . state that homosexual conduct is not an acceptable lifestyle . . . .").

states require sex education to include "[a]n emphasis . . . that homosexual conduct is a criminal offense under the laws of this state."[53]

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."[54] In Texas, it is a crime to engage in "deviate sexual intercourse with another individual of the same sex."[55]

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."[56] Mississippi still criminalizes sodomy as "the detestable and abominable crime against nature."[57]

Rather than portraying same-sex intimacy as immoral or criminal, Oklahoma portrays it as inherently dangerous—"primarily responsible for contact with the AIDS virus."[58] Under Oklahoma's HIV-education law, all public schools are required to "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 subjection is the only method of preventing the spread of the virus.[59]

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. 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."[60] While this law is less specific than Oklahoma's, it presumes and implies that same-sex intimacy is inherently dangerous.[61]

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53. Ala. Code § 16-40A-2(c)(8); see also Tex. Health & Safety Code Ann. §§ 85.007(b)(2), 163.002(8) (resembling the Alabama statute).

54. Ala. Code § 13A-6-64.

55. Tex. Penal Code Ann. § 21.06 (West 2012) invalidated by Lawrence v. Texas, 539 U.S. 558 (2003). The enforceability and constitutionality of these provisions are analyzed in Parts III and IV.

56. Miss. Code Ann. § 37-13-171(2)(e); see also Act of July 29, 1995, ch. 534, § 3, 1995 N.C. Sess. Laws 1931, 1932 (requiring instruction on AIDS to include "the current legal status" of "homosexual acts"), repealed by Act of Aug. 26, 2006, ch. 264, § 54(b), 2006 N.C. Sess. Laws 1302, 1303.

57. Miss. Code Ann. § 97-29-59.

58. Okla. Stat. Ann. tit. 70, § 11-103.3(D)(1) (West 2013).

59. Id. § 11-103.3(D)(1)–(2).

60. Ariz. Rev. Stat. Ann. § 15-716(C) (2014).

61. In this respect, North Carolina's and South Carolina's curriculum laws are similar to Arizona's. See N.C. Gen. Stat. § 115C-81(e1)(4)(e) (2015) (requiring that schools teach "that a mutually faithful monogamous heterosexual relationship in the context of

D. *Promo Hetero*

Three states specifically require the promotion of "heterosexual" relationships. 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."[62] In Illinois, sex-education classes "shall teach honor and respect for monogamous *heterosexual* marriage."[63] 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 . . . ."[64]

E. *Abstinence Until "Marriage"*

The last group of anti-gay curriculum provisions is by far the largest and the most frequently overlooked.[65] Seventeen states require teachers to emphasize the benefits of abstinence from sexual activity outside of marriage,[66] while defining the term "marriage" to exclude same-sex couples.[67]

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marriage is the best lifelong means of avoiding sexually transmitted diseases, including HIV/AIDS"); S.C. Code Ann. § 59-32-30(A)(5) (2016) (limiting instruction on "homosexual relationships" to "the context of instruction concerning sexually transmitted diseases").

62. Fla. Stat. § 1003.46(2)(a) (2016) (emphasis added).

63. 105 Ill. Comp. Stat. Ann. 5/27-9.1(c)(2) (emphasis added).

64. N.C. Gen. Stat. § 115C-81(e1)(4)(e) (emphasis added). Some authors have identified North Carolina's law as a "no promo homo" law. See Cooley, supra note 14, at 1015; Lenson, supra note 14, at 150 & n.29. Although the laws in Illinois and Florida are similar, they have not previously been identified as "no promo homo" laws. California adopted a similar law in 1988, but it was repealed in 2003. Act of Sept. 24, 1988, ch. 1337, § 2(b)(6), 1988 Cal. Stat. 4425, 4426 (requiring that course material and instruction shall teach "respect for monogamous heterosexual marriage"), repealed by Act of Oct. 1, 2003, ch. 650, § 10, 2003 Cal. Stat. 4984, 4989.

65. Because these laws have not previously been identified as "no promo homo" or "don't say gay" laws, the literature on this subject does not reveal the precise reasons that they have been overlooked. Most likely, scholars and advocates have overlooked these laws because they incorrectly presumed that the enforcement of these laws has already been prohibited by the Supreme Court's rulings in *Windsor* and *Obergefell*. In fact, state and federal agencies still have the legal authority to enforce anti-gay curriculum laws, even after the invalidation of anti-gay marriage laws. See infra section III.A.

66. This group includes eight of the eleven states already mentioned, as well as nine additional states: Ala. Code § 16-40A-2(a)(2) (LexisNexis 2012); Ark. Code Ann. § 6-18-703(d)(3) (2013); Fla. Stat. § 1003.46(2)(a); Ind. Code §§ 20-30-5-13, 20-34-3-17(a) (2017); La. Stat. Ann. § 17:281(4) (2013); Mich. Comp. Laws Ann. § 380.1507 (West 2013); Miss. Code Ann. § 37-13-171(2)(f) (2013); Mo. Rev. Stat. § 170.015 (2015); N.C. Gen. Stat. § 115C-81(4)(a); N.D. Cent. Code § 15.1-21-24 (2015); Ohio Rev. Code Ann. § 3313.6011(C)(1) (West 2012); S.C. Code Ann. § 59-32-30(A); Tenn. Code Ann. § 49-6-1304 (2016); Tex. Health & Safety Code Ann. §§ 85.007, 163.002 (West 2017); Utah Code Ann. § 53A-13-101(1) (LexisNexis 2016); Va. Code Ann. § 22.1-207.1 (2016); Wis. Stat. § 118.019 (2016).

67. Ala. Const. art. I, § 36.03; Ark. Const. amend. 83; Fla. Const. art. I, § 27; La. Const. art. 12, § 15; Mich. Const. art. I, § 25; Miss. Const. § 263A; Mo. Const. art. I, § 33;

The details of abstinence-until-marriage provisions vary, but they typically require teachers to emphasize one of the following themes in sex-education materials: (1) "the social, psychological, and physical health gains to be realized by abstaining from sexual activity before and outside of marriage";[68] (2) "abstinence from sexual activity before marriage [as] the only reliable way to prevent pregnancy and sexually transmitted diseases, including human immunodeficiency virus and acquired immunodeficiency syndrome";[69] or (3) "abstinence from sexual activity outside of marriage as the expected standard for all school age children."[70]

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 instruct students that same-sex relationships are not officially sanctioned, because they do not fall within the state's definition of "marriage."[71]

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—

N.C. Const. art. XIV, § 6; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; S.C. Const. art. XVII, § 15; Tenn. Const. art. XI, § 18; Tex. Const. art. I, § 32; Utah Const., art. I, § 29; Va. Const. art. I, § 15-A (2006); Wis. Const. art. XIII, § 13; Ala. Code § 30-1-19 (LexisNexis 2016); Ark. Code Ann. § 9-11-109 (2015); Fla. Stat. § 741.212; Ind. Code § 31-11-1-1 (2017); La. Stat. Ann. § 86; Mich. Comp. Laws Ann. § 551.1 (West 2005); Miss. Code Ann. § 93-1-1(2); Mo. Rev. Stat. § 451.022 (2001); N.C. Gen. Stat. § 51-1.2 (West 2015); N.D. Cent. Code § 14-03-01 (2009); Ohio Rev. Code Ann. § 3101.01 (West 2011); S.C. Code Ann. § 20-1-15 (2014); Tenn. Code Ann. § 36-3-113 (2014); Tex. Fam. Code Ann. § 2.001 (West 2006); Utah Code Ann. § 30-1-4.1 (LexisNexis 2013); Va. Code Ann. § 20-45.2; Wis. Stat. § 765.01.

68. N.D. Cent. Code § 15.1-21-24; see also Ohio Rev. Code Ann. § 3313.6011; Va. Code Ann. § 22.1-207.1.

69. Wis. Stat. § 118.019; see also Ark. Code Ann. § 6-18-703(d)(3); Ind. Code §§ 20-30-5-13(2), 20-34-3-17(a); Mich. Comp. Laws Ann. § 380.1507; Mo. Rev. Stat. § 170.015; Tex. Health & Safety Code Ann. § 85.007(b)(1).

70. Ind. Code § 20-30-5-13(1); see also Fla. Stat. § 1003.46(2)(a); La. Stat. Ann. § 17:281; Mich. Comp. Laws Ann. § 380.1507; Mo. Rev. Stat. § 170.015; Tex. Health & Safety Code Ann. § 85.007.

71. The constitutionality of these provisions is analyzed in Parts III and IV.

> (A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
> (B) teaches abstinence from sexual activity outside *marriage* as the expected standard for all school age children;
> (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-*wedlock* pregnancy, sexually transmitted diseases, and other associated health problems;
> (D) teaches that a mutually faithful monogamous relationship in context of *marriage* is the expected standard of human sexual activity;
> (E) teaches that sexual activity outside of the context of *marriage* is likely to have harmful psychological and physical effects;
> (F) teaches that bearing children out-of-*wedlock* is likely to have harmful consequences for the child, the child's parents, and society;
> (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
> (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.[72]

According to guidance issued by the Department of Health and Human Services, "no funds can be used in ways that contradict the eight A-H components of Section 510(b)(2)."[73]

One month after Title V was signed into law, it was followed by the Defense of Marriage Act (DOMA).[74] Under Section 3 of DOMA, the term "marriage" was defined to include "only a legal union between one man and one woman as husband and wife" in all federal laws.[75] In *United States v. Windsor*, the Supreme Court held that Section 3 unconstitutionally discriminated against same-sex couples in "lawful marriages."[76] Yet in the years since *Windsor*, the Department of Health and Human Services has continued to enforce Title V's definition of "abstinence education," without offering any guidance about how the definition's references to "marriage" and "wedlock" should be interpreted.[77]

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72. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. § 710 (2012)) (emphasis added).

73. See Admin. for Children & Families, Dep't of Health & Human Servs., Title V State Abstinence Education Grant Program: Combined FY 2016 and FY 2017 Applications 5, http://ami.grantsolutions.gov/files/HHS-2016-ACF-ACYF-AEGP-1131_1.pdf [http://perma.cc/EBN8-ECF5] (last visited July 26, 2017).

74. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2012)), invalidated by United States v. Windsor, 133 S. Ct. 2675 (2013).

75. Id.

76. 133 S. Ct. at 2696. The issue of how *Windsor* bears on the constitutionality of Title V's definition of abstinence education is addressed in Parts III and IV.

77. See infra notes 357–367 and accompanying text.

* * *

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

TABLE 1. TYPOLOGY OF ANTI-GAY CURRICULUM LAWS[78]

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)					✓

78. For citations to relevant statutory provisions, see infra Appendix at Table A.

F. *Alternative Typologies*

In the literature on this subject, others 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).[79] This typology has two drawbacks. 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 affirmatively 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).[80] This distinction is accurate, but it is not relevant in construing anti-gay curriculum laws or determining whether they are constitutional. As explained in Part III, only legislatures have the authority to define terms that appear in statutes. Courts can enjoin the enforcement of statutes, but they cannot repeal or amend them.[81] As a result, it does not matter whether a jurisdiction's anti-gay provisions appear within the jurisdiction's curriculum law or within the jurisdiction's other statutes, such as sodomy or marriage laws. Wherever they appear, these provisions govern the meaning of the jurisdiction's curriculum law, unless and until a court enjoins the jurisdiction from enforcing them.

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

Anti-gay curriculum laws have not received specific attention from historians. This Part recovers the history of these laws from state legislative and local newspaper archives in the twenty states in which they were adopted. It situates the adoption of these laws in broader context by placing them on 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 HIV education and abstinence

79. See Lenson, supra note 14, at 147.

80. Barrett & Bound, supra note 15, at 275.

81. See infra notes 302–303 and accompanying text.

education, which played especially significant roles in the adoption of anti-gay curriculum laws.[82]

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. The second details the wave of anti-gay curriculum laws adopted in the late 1980s and early 1990s in response to early demands for HIV education in public schools. The third describes 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. *The Country's First Anti-Gay Curriculum Law, 1978–1986*

The country's first anti-gay curriculum law was adopted by the Oklahoma Legislature on April 6, 1978.[83] In the legislative record, it was known as H.B. 1629, introduced by Mary Helm and John Monks, two of the state's most prominent conservative legislators.[84] 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.[85]

1. *Anita Bryant.* — Anita Bryant was a beauty queen and popular singer from Oklahoma.[86] By the 1970s, she was living in Miami, where she served as a well-known advertiser and spokeswoman for Florida orange juice.[87]

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82. See infra sections II.B.1–.C.

83. Act of Apr. 14, 1978, ch. 189, 1978 Okla. Sess. Laws 381.

84. See 3 Proud Heritage: People, Issues, and Documents of the LGBT Experience 1137 (Chuck Steward ed., 2015); see also Record of Legislative History, H.R. 36, 36th Leg., 2d Reg. Sess. (Okla. 1978) (on file with the *Columbia Law Review*). For information on Senator Helm and Representative Monks, see infra note 111.

85. See, e.g., Glen Elsasser, Gay-Rights Advocacy Wins Test: Law Punishing Oklahoma Teachers Invalidated, Chi. Trib., Mar. 27, 1985, at 3 (on file with the *Columbia Law Review*); Aaron Epstein, Gay Rights Law Before High Court, Phila. Inquirer, Jan. 15, 1985, at A4 (on file with the *Columbia Law Review*); Linda Greenhouse, Supreme Court Roundup; 4-to-4 Vote Upholds Teachers on Homosexual Rights Issue, N.Y. Times, Mar. 27, 1985, at A23 (on file with the *Columbia Law Review*); Charles T. Jones, Judge Upholds State Boards' Ability to Fire Gay Teachers, Daily Oklahoman (June 30, 1982), http://newsok.com/article/1988632 [http://perma.cc/34QL-N2EE]; see also infra notes 97–98 and accompanying text.

86. Dudley Clendinen & Adam Nagourney, Out for Good: The Struggle to Build a Gay Rights Movement in America 292–93 (1999); William N. Eskridge, Jr., Dishonorable Passions: Sodomy Laws in America, 1861–2003, at 210–11 (2008) [hereinafter Eskridge, Dishonorable Passions].

87. See supra note 86.

On January 18, 1977, Miami-Dade County adopted a local ordinance prohibiting discrimination based on "sexual preference."[88] In response, Bryant launched the "Save Our Children" movement, a highly organized and publicized campaign to repeal the ordinance by popular vote.[89]

Although the ordinance banned discrimination in employment, housing, and public accommodations, Bryant's campaign was especially focused on the employment of "homosexual schoolteachers."[90] 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 life-style."[91] Protesting that "homosexuals . . . do not have the right to influence our 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."[92]

Bryant's campaign against "homosexual recruitment" was remarkably successful. Only six months after the gay rights ordinance was adopted, it was repealed in a two-to-one landslide.[93] In the meantime, Bryant's work had attracted national headlines and won support from conservative leaders.[94] On the night of her victory, Bryant promised to "carry our fight against similar laws throughout the nation."[95]

2. *John Briggs.* — John Briggs was a California state senator. Shortly after Bryant's victory, Briggs announced his plan to bring the Save Our Children campaign to California.[96] Within a few months, Briggs submitted a ballot initiative to California's Attorney General.[97]

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88. Clendinen & Nagourney, supra note 86, at 297; Eskridge, Dishonorable Passions, supra note 86, at 210; Fred Fejes, Gay Rights and Moral Panic: The Origins of America's Debate on Homosexuality 2, 69 (2008).

89. Clendinen & Nagourney, supra note 86, at 292–93, 296–99; Eskridge, Dishonorable Passions, supra note 86, at 210–11.

90. Clendinen & Nagourney, supra note 86, at 292–93, 296–99; Eskridge, Dishonorable Passions, supra note 86, at 210–11; see also Anita Bryant, The Anita Bryant Story: The Survival of Our Nation's Families and the Threat of Militant Homosexuality 113–20 (1977).

91. Bryant, supra note 90, at 114.

92. Clendinen & Nagourney, supra note 86, at 292 (internal quotation marks omitted) (quoting Anita Bryant); see also Dennis A. Williams, Homosexuals: Anita Bryant's Crusade, Newsweek, Apr. 11, 1977, at 39 (on file with the *Columbia Law Review*).

93. Clendinen & Nagourney, supra note 86, at 308; Eskridge, Dishonorable Passions, supra note 86, at 212.

94. See Clendinen & Nagourney, supra note 86, at 300 (citing support from U.S. Senator Jesse Helms); id. at 306 (citing support from the Reverend Jerry Falwell); Eskridge, Dishonorable Passions, supra note 86, at 211 (citing support from Governor Reuben Askew).

95. Clendinen & Nagourney, supra note 86, at 309 (internal quotation marks omitted) (quoting Anita Bryant).

96. Id. at 365; see also Randy Shilts, The Mayor of Castro Street: The Life and Times of Harvey Milk 160 (1982) [hereinafter Shilts, The Mayor of Castro Street].

97. Cal. Initiative 155, School Teachers—Homosexual Acts or Conduct (1977), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1323&context=ca_ballot_inits

Proposition 6, which became known as the Briggs Initiative, allowed school districts to suspend, dismiss, and deny employment to "any person who has engaged in public homosexual activity or public homosexual conduct."[98] Although the terms "public homosexual activity" and "public homosexual conduct" sound similar, the initiative provided separate definitions for the two terms.[99] "Public homosexual activity" was defined to include any act of oral or anal intercourse performed "upon any other person of the same sex, which is not discreet and not practiced in private."[100] In contrast, "public homosexual conduct" was defined 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."[101]

When a teacher was charged with engaging in "public homosexual activity or public homosexual conduct," the initiative required school boards to consider the following factors "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) the extenuating or aggravating circumstances . . . ; and (4) whether the conduct included acts, words or deeds, of a continuing or comprehensive nature which would tend to encourage, promote, or dispose schoolchildren toward private or public homosexual activity or private or public homosexual conduct.[102]

During his campaign, Briggs closely identified himself with Anita Bryant and justified 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.[103] 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

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(on file with the *Columbia Law Review*) [hereinafter Cal. Initiative 155]; Shilts, The Mayor of Castro Street, supra note 96, at 219.

98. Cal. Prop. 6, School Employees. Homosexuality 29 (defeated 1978), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1837&context=ca_ballot_props (on file with the *Columbia Law Review*) [hereinafter Cal. Prop. 6].

99. Id.

100. Id.; see also Cal. Penal Code § 286(a) (2016) (defining the crime of sodomy); id. § 288a(a) (defining "oral copulation").

101. Cal. Prop. 6, supra note 98, at 29.

102. Id. at 41.

103. Cal. Initiative 155, supra note 97, at 4; Clendinen & Nagourney, supra note 86, at 377; Shilts, The Mayor of Castro Street, supra note 96, at 238–39.

want to be a public homosexual, to entice young impressionable children into their lifestyle."[104]

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,[105] 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,"[106] it could be applied to speech that occurred outside of the classroom, or even outside of school. Seizing on these scenarios, opponents argued that "[y]ou don't have to be gay to be fired!"; "[y]ou just have to: [e]xpress an unpopular opinion" or "[s]peak out on human rights."[107] In a prominent op-ed, former California Governor and future President 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."[108] Although early polls indicated that the initiative was likely to pass, it was defeated by a margin of 58% to 42% on November 7, 1978.[109]

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 Anita Bryant's home state during the same period. 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.[110] The bill was sponsored by Senator Mary Helm and Representative John Monks, advocates for the John Birch Society and leading opponents of the Equal Rights Amendment (ERA).[111]

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104. Fejes, supra note 88, at 183 (internal quotation marks omitted) (quoting John Briggs).

105. Cal. Prop. 6, supra note 98, at 29.

106. Id.

107. Vote No on 6 Poster, Box Turtle Bulletin, http://www.boxturtlebulletin.com/btb/wp-content/uploads/2013/11/YouDontHaveToBeGay.jpg [http://perma.cc/W6ZU-DD7Z] (last visited July 27, 2017).

108. Ronald Reagan, Opinion, Two Ill-Advised California Trends, L.A. Herald-Examiner, Nov. 1, 1978, at A-19 (on file with the *Columbia Law Review*).

109. Hunter, supra note 16, at 1704.

110. Act of Apr. 14, 1978, ch. 189, 1978 Okla. Sess. Laws 381.

111. See Judy Fossett, Opponent of Equal Rights Amendment Aiming Campaign at "Grass Roots," Daily Oklahoman (Jan. 15, 1982), http://newsok.com/article/1970474 [http://perma.cc/553E-82LA]; John Greiner, Muskogee's John Monks Faces 2 Foes in Primary for House District 14 Seat, Daily Oklahoman (Aug. 26, 1984), http://newsok.com/article/2079320 [http://perma.cc/TG3D-V4ZN]; Mike Hammer, Teacher Firings Allowed: Bill Hits Homosexuals, Daily Oklahoman, Feb. 8, 1978, at 1 (on file with the *Columbia Law Review*); Steven V. Roberts, Prospects for Equal Rights Dim as Drive Fails in Key States, N.Y. Times (Mar. 21, 1979), http://www.nytimes.com/1979/03/21/archives/prospects-for-equal-rights-plan-dim-as-drive-fails-in-key-states.html (on file with the *Columbia Law Review*); Howard Witt, Far Right's Paranoia Seeping into Mainstream, Chi. Trib. (June 4, 1995),

H.B. 1629 sailed through the Oklahoma Legislature with little debate.[112] On February 7, it was adopted by the House in an 88-2 vote.[113] 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 this way."[114]

After the bill passed the House, Senator Helm invited Anita Bryant—"Oklahoma's most famous woman"—to address her colleagues.[115] On February 21, Bryant delivered a brief speech to the Oklahoma Senate, in which she claimed that Americans wanted to return to the moral values "which our forefathers fought and died for."[116] Although she recognized that "we cannot legislate morality," she added that Americans wanted to "stop legislating immorality," to a round of applause.[117] In her view, H.B. 1629 was "not an attempt to legislate morality, but a defense against pro-homosexuality bills."[118]

On March 15, H.B. 1629 was adopted by the Senate in a 42-0 vote.[119] In presenting the bill, Senator Helm explained that "it would head off a threat to the children of Oklahoma."[120] In response to a question from one of her colleagues, she acknowledged that teachers could already be dismissed for "moral turpitude."[121] 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

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http://articles.chicagotribune.com/1995-06-04/news/9506040267_1_state-legislatures-new-world-order-anti-government-campaigns [http://perma.cc/MGY7-54UK].

112. Hammer, supra note 111, at 1.

113. Id.; see also Act of Apr. 14, 1978, ch. 189.

114. Hammer, supra note 111, at 1.

115. John Greiner, Anita's Plea to Senate: Don't Legislate Immorality, Daily Oklahoman, Feb. 22, 1978, at 1 (on file with the *Columbia Law Review*).

116. Id.

117. Id.

118. During Bryant's address, members of the University of Oklahoma's Gay Activist Alliance rallied outside the Capitol. Id.; see also Gays Rally Out in Cold, Daily Oklahoman, Feb. 22, 1978, at 1 (on file with the *Columbia Law Review*). To prepare for Bryant's address, the Senate had taken "special steps" to ensure that the gallery was filled with Bryant's supporters, allowing each Senator to distribute four gallery passes. Greiner, supra note 115. The resulting crowd included "several Senate and state employees, some lobbyists, and many visitors," as well as "women wearing 'Ws' on their blouses, which they said stood for the Association of Ws, or Women Who Want To Be Women." Id. This group, which was also known as "the Four Ws," was an anti-ERA organization founded by women of the Church of Christ during the 1970s, as a "sister organization to Phyllis Schafly's Eagle Forum." Ruth Murray Brown, For a "Christian America": A History of the Religious Right 36–39, 64–65 (2002). Although the Ws were primarily focused on defeating the ERA, id. at 39–43, 63–67, they "were able to use the unpopularity of homosexuality to good effect as a recruiting tool in their fight against the ERA," id. at 86–87.

119. Act of Apr. 14, 1978, ch. 189, 1978 Okla. Sess. Laws 381; Senate OKs Bill to Fire Homosexual Teachers, Daily Oklahoman, Mar. 16, 1978, at 32 (on file with the *Columbia Law Review*) (indicating the unanimous passage of H.B. 1629 in the Senate).

120. Senate OKs Bill to Fire Homosexual Teachers, supra note 119.

121. Id.

homosexual activity" in general.[122] "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."[123]

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"[124] and speech that was "of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct."[125] 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 (NGTF) filed a class action lawsuit challenging the constitutionality of H.B. 1629.[126] Two years later, a federal judge upheld H.B. 1629 by interpreting it narrowly—to apply only when a teacher's public homosexual activity or conduct caused a "substantial and material disruption of the school."[127] 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 substantial and material disruption of the school."[128]

Near the end of his ruling, however, the judge issued a warning that proved prescient. Throughout the proceedings, the plaintiff had claimed that the statute was "overbroad" because it applied to a wide range of protected speech activities.[129] Based on his narrow interpretation of the law, the judge found that "many of plaintiff's fears are unwarranted."[130] In particular, he reassured the plaintiffs that:

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

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122. Id.

123. Id. (internal quotation marks omitted) (quoting Senator Helm).

124. Act of Apr. 14, 1978, ch. 189, § 1(A)(2).

125. Id. § 1(C)(4).

126. See Paul Wenske, Gays Challenging State Teacher Law, Daily Oklahoman, Oct. 14, 1980 (on file with the *Columbia Law Review)* (discussing the class action to be filed in federal court); Paul Wenske, Teacher Law Challenged: Suit Filed, Daily Oklahoman, Oct. 15, 1980 (on file with the *Columbia Law Review)* (confirming that the lawsuit was filed and supported by the National Gay Task Force); see also Eskridge, Dishonorable Passions, supra note 86, at 226 (describing NGTF's initiation of the lawsuit).

127. Nat'l Gay Task Force v. Bd. of Educ., No. CIV-80-1174-E, 1982 WL 31038, at *3 (W.D. Okla. June 29, 1982).

128. Id.

129. Id. at *4.

130. Id. at *13.

> 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.[131]

The judge warned, however, that if any of these interpretations were incorrect, then the law would likely be unconstitutional: "If, under the Act, a school board could declare a teacher unfit for doing any of the foregoing . . . it would likely not meet constitutional muster."[132]

In 1984, a divided panel of the Tenth Circuit found that H.B. 1629 was unconstitutionally overbroad.[133] Although the court upheld the law's provision that applied to "public homosexual activity," it struck down the provision that applied to "public homosexual conduct."[134] Under the latter, 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 . . . . [135]

By way of example, the court explained that a teacher could 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."[136] Although the court acknowledged that the law required a finding that the teacher's conduct had an "adverse effect" on students, it noted that the law did not require "a material and substantial disruption" or even that "the teacher's public utterance occur in the classroom."[137] A dissenting judge argued that because "[s]odomy 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."[138]

The Tenth Circuit's ruling was sharply criticized in Oklahoma. The following day, *The Daily Oklahoman* condemned it as a "[f]urther erosion

131. Id.
132. Id.
133. Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1274 (10th Cir. 1984).
134. Id. at 1273–74.
135. Id. at 1274.
136. Id.
137. Id. at 1275.
138. Id. at 1276 (Barrett, J., dissenting).

of the nation's moral environment" that threatened to "driv[e] more families to enroll their children in private institutions."[139] 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."[140] A week later, the Oklahoma House of Representatives adopted a resolution urging the Oklahoma Attorney General to "assume control" of the local school board's 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."[141]

On appeal to the U.S. Supreme Court, six Justices voted to grant certiorari.[142] At oral 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."[143] Although many of the Justices focused on procedural issues, Chief Justice Burger seemed keen to defend the law on the merits, as a legitimate attempt to prevent the spread of homosexuality from teachers to students. He asked the school board's attorney whether the state could "prohibit a school teacher from smoking in the classroom"[144] in light of "the *role model* factor."[145] The board's attorney agreed, "in light of the crucial value orientation function which public schools and public school teachers, who obviously act as *role models* to impressionable youth, are called upon to fulfill."[146] Quoting an opinion by Justice Frankfurter, the board's attorney explained: "[I]n the classroom . . . the 'law of *imitation* operates . . . .'"[147]

Representing National Gay Task Force, law professor Laurence Tribe claimed that H.B. 1629 violated the First Amendment because "this law in effect tells teachers, you had better shut up about this subject, or if you

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139. Boost for Permissiveness, Daily Oklahoman, Mar. 16, 1984, at 12 (on file with the *Columbia Law Review*).

140. Id.

141. H.R. 1054, 39th Leg., 2d Reg. Sess., 1984 Okla. Sess. Laws 1238, 1239.

142. See Eskridge, Dishonorable Passions, supra note 86, at 226; see also Papers of Harry A. Blackmun, Library of Congress, box 699, folder 5 (Bd. of Educ. v. Nat'l Gay Task Force, No. 83-2030) [hereinafter Blackmun Papers] (on file with the *Columbia Law Review*); Papers of William J. Brennan, Jr., Library of Congress, box I.611, folder 4 (Bd. of Educ. v. Nat'l Gay Task Force, No. 83-2030) [hereinafter Brennan Papers] (on file with the *Columbia Law Review*). Many thanks to Professor Eskridge for sharing photocopies of the Brennan and Blackman papers.

143. Audio Recording of Oral Argument at 22:44, Bd. of Educ. v. Nat'l Gay Task Force, 470 U.S. 903 (1985) (No. 83-2030), http://www.oyez.org/cases/1984/83-2030 (transcript on file with the *Columbia Law Review*).

144. Id. at 05:06.

145. Id. at 05:31 (emphasis added).

146. Id. at 20:05 (emphasis added).

147. Id. at 28:10 (quoting Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) (emphasis added)).

talk about it, you had better be totally hostile to homosexuals."[148] Again, the Chief Justice asked whether "a legislature is entitled to take into account the reality . . . that teachers in schools, particularly grade school and high school level, are role models for the pupils?"[149] Tribe answered by referring to Ronald Reagan's critique of the Briggs Initiative:

> [W]hen 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.[150]

Justice Powell had not participated in the oral argument because he was recovering from surgery.[151] When the remaining Justices met to discuss the case, they were evenly divided.[152] The Chief Justice, who was determined to uphold the law, asked his colleagues to have the case reargued after Justice Powell returned. They declined.[153] On March 26, 1985, the Supreme Court announced, in a one-sentence opinion, that the judgment of the Tenth Circuit was "affirmed by an equally divided Court."[154]

5. *A Clash of Two Movements.* — The Save Our Children campaigns launched by Bryant and Briggs marked a turning point in the development of two movements—gay liberation and the religious right. During the late 1960s, both movements experienced political rebirths that sparked significant gains in the decade that followed.

The religious right began to reenter U.S. politics during this period, establishing a sprawling network of grassroots organizations across the United States.[155] Sparked by fears of a "sexual revolution," organizations like the Christian Crusade, the John Birch Society, and the Eagle Forum began mobilizing local residents to protect what later became known as

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148. Id. at 52:13.

149. Id. at 44:32.

150. Id. at 44:49.

151. See Eskridge, Dishonorable Passions, supra note 86, at 227; see also Phillip Hager, Justices Affirm Ruling Upholding Gay Teachers' Rights, L.A. Times (Mar. 27, 1985), http://articles.latimes.com/1985-03-27/news/mn-20077_1_gay-rights-case [http://perma.cc/425L-UZ36].

152. Eskridge, Dishonorable Passions, supra note 86, at 227; Blackmun Papers, supra note 142, at 1–3; Brennan Papers, supra note 142, at 1–3.

153. Eskridge, Dishonorable Passions, supra note 86, at 227; Brennan Papers, supra note 142, at 1–2.

154. Bd. of Educ. v. Nat'l Gay Task Force, 470 U.S. 903, 903 (1985) (per curiam).

155. See generally Seth Dowland, Family Values and the Rise of the Christian Right (2015); William Martin, With God on Our Side: The Rise of the Religious Right in America (1996); Steven P. Miller, The Age of Evangelicalism: America's Born-Again Years (2014); Daniel K. Williams, God's Own Party: The Making of the Christian Right (2010) [hereinafter Williams, God's Own Party].

"family values."[156] Throughout the nation, these groups attracted members, media, and resources by launching campaigns on a long list of topics related to children, sexuality, and sex—abortion, contraception, feminism, homosexuality, pornography, school prayer, and sex education.[157]

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.[158] As sociologist Janice Irvine has explained, opponents of sex education widely circulated "depravity narratives" that relied on "distortion, innuendo, hyperbole, or outright fabrication" to help foster "a climate of sexual suspicion in which sex educators might well be molesters . . . ."[159] 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.[160] 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.[161] Although these claims were false, they provoked emotional responses that were difficult to dispel.[162] By the late 1960s, controversies about sex education had divided communities in close to forty states.[163]

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

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156. See Janice M. Irvine, Talk About Sex: The Battles over Sex Education in the United States 44–47 (2002) [hereinafter Irvine, Talk About Sex] (describing the origins and activities of the Christian Crusade and the John Birch Society). See generally Dowland, supra note 155 (documenting how evangelicals and conservatives developed "family values" as a political agenda during the 1970s); Martin, supra note 155 (documenting the rise of the Christian Crusade, Concerned Women for America, the Eagle Forum, Focus on the Family, the John Birch Society, and the Moral Majority during the 1960s and 1970s).

157. See generally Dowland, supra note 155; Martin, supra note 155; Miller, supra note 155; Williams, God's Own Party, supra note 155.

158. See Irvine, Talk About Sex, supra note 156, at 41 ("The opposition's attacks on sex education were most significant and have enormous importance for several reasons beyond the immediate impact on the field. . . . [They] proved to the emerging Right the power of sexual politics and sexual speech in provoking volatile local battles to further their goals."); Jeffrey P. Moran, Teaching Sex: The Shaping of Adolescence in the 20th Century 186 (2000) ("[T]he sex education controversies of the late 1960s were crucial events in the development of the religious right. . . . [They] demonstrated to the political right the usefulness of social issues in mobilizing not only fundamentalists and culturally conservative Catholics but also previously apolitical evangelicals . . . ."); see also Alexandra M. Lord, Condom Nation: The U.S. Government's Sex Education Campaign from World War I to the Internet 141–42 (2010) (claiming that a 1968 battle over sex education in Anaheim, California "reflected a broader shift in American politics, the rise of what has often been called the Christian or Religious Right").

159. Irvine, Talk About Sex, supra note 156, at 54, 58.

160. Id. at 54–55.

161. Id. at 59.

162. Id. at 56.

163. Id. at 60.

resisting arrest, sparking a series of public protests.[164] In the wake of these demonstrations, gay students across the county began organizing on college campuses and taking legal action,[165] and the gay liberation movement rapidly mobilized.[166] By the end of 1977, sodomy laws had been repealed in twenty states, and antidiscrimination laws protecting lesbians, gay men, and bisexuals had been adopted in more than forty municipalities.[167]

In response to the rapid gains of the gay liberation movement, religious conservatives began to subtly transform anti-LGBT rhetoric during the 1970s. 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.[168] 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.[169]

By the late 1970s, figures like Anita Bryant, John Briggs, and Mary Helm were ideally positioned to draw upon depravity narratives about sex education to 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 compulsory "homosexual education" in public schools.

B. *The HIV Epidemic Triggers a Wave of Anti-Gay Curriculum Laws, 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 HIV epidemic.[170] By the late 1980s, these developments brought about a paradigm shift in sex-education

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164. See Hunter, supra note 16, at 1702 & n.33.

165. See, e.g., Gay All. of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); 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. v. Bonner, 367 F. Supp. 1088 (D.N.H.), aff'd, 509 F.2d 652 (1st Cir. 1974); Gay Activists All. v. Bd. of Regents, 638 P.2d 1116 (Okla. 1981).

166. See generally Martin Duberman, Stonewall (1993) (providing a firsthand account of the Stonewall riots and the birth of the modern gay rights movement).

167. William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 328–37, 356–61 (1999).

168. Eskridge, No Promo Homo, supra note 16, at 1340; Rosky, Fear, supra note 32, at 618–32.

169. Eskridge, No Promo Homo, supra note 16, at 1328–29, 1365; Rosky, Fear, supra note 32, at 635–57.

170. See infra sections II.B.1–II.B.2.

debates,[171] which inspired many states to adopt new sex-education and HIV-education laws.[172] In more than a dozen states, these new laws included anti-gay language.[173] The inclusion of such language reflected a national backlash against the gay liberation movement, as well as a specific backlash against the adoption of inclusive anti-bullying curricula in urban schools.

1. *Abstinence Education.* — The religious right burst onto the national political landscape in 1980, claiming an influential role in the election of Ronald Reagan.[174] The following year, President Reagan signed the Adolescent and Family Life Act (AFLA), which sought to promote abstinence among adolescents.[175] Although AFLA was designed as an antiabortion law, it established the first source of federal funding for abstinence-education programs[176]—programs designed "to prevent adolescent sexual relations"[177] by "developing strong family values"[178] rather than providing family-planning services.[179] In a significant departure, AFLA's sponsors presented abstinence education as an alternative to comprehensive sex education, rather than a rejection of sex education itself.[180] In response to AFLA's funding, religious conservatives began to develop a new industry of abstinence-education programs.[181] In this period, the debate began to shift from *whether* sex education should be taught to *which* curriculum should be offered.[182]

2. *HIV Education.* — The spread of HIV further consolidated support for abstinence-education programs.[183] During the early 1980s, thousands

171. See infra note 182 and accompanying text.

172. See infra note 200 and accompanying text.

173. See infra note 203 and accompanying text.

174. Dowland, supra note 155, at 14; Martin, supra note 155, at 220; Williams, supra note 155, at 195–96.

175. Pub. L. No. 97–35, 95 Stat. 578 (1981) (codified at 42 U.S.C. § 300z (2012)).

176. Irvine, Talk About Sex, supra note 156, at 93; Lord, Sexuality Info. & Educ. Council of the U.S., The Federal Government & Abstinence-Only-Until-Marriage Programs, Cmty. Action Kit, http://www.communityactionkit.org/index.cfm?fuseaction=page.viewPage&pageId=892 [http://perma.cc/3MJF-MC4X] [hereinafter SIECUS, History] (last visited July 27, 2017).

177. 42 U.S.C. § 300z-1(a)(8).

178. Id. § 300z(a)(10)(A).

179. See id. § 300z-3(b)(1) ("No funds provided for a demonstration project for services under this subchapter may be used for the provision of family planning services.").

180. See Irvine, Talk About Sex, supra note 156, at 90–93 (identifying Senator Jeremiah Denton as one of AFLA's cosponsors and quoting his description of what constitutes the "best sex education").

181. See id. at 101.

182. Id. at 94; Moran, supra note 158, at 212–13.

183. Irvine, Talk About Sex, supra note 156, at 89; Lord, supra note 159, at 148 ("[I]t was the AIDS crisis that pushed the [Public Health] Service into developing and implementing the most innovative sex education program ever used in the United States."); see also Moran, supra note 158, at 212–13 ("By the late 1980s, many conservatives recognized that AIDS has transformed the question of whether or not the schools should offer sex education into the question of what *kind* of sex education they should present."); Jonathan Zimmerman, Too

of people died of HIV in the United States,[184] but the syndrome was widely dismissed as a "homosexual" disease.[185] Throughout this period, President Reagan remained silent about the HIV epidemic and prohibited the Surgeon General, C. Everett Koop, from publicly addressing it.[186] By 1985, however, the death toll was rapidly rising, and pressure was mounting on officials to act.[187]

In February 1986, President Reagan authorized the Surgeon General to issue a report to the public on AIDS.[188] Given Koop's background as an evangelical Christian and antiabortion activist, the President likely expected him to issue a report in line with the Administration's conservative policies.[189] In October 1986, the Surgeon General shocked his conservative supporters[190] by declaring that "[e]ducation concerning AIDS must start at the lowest grade possible . . . ."[191] In the Surgeon General's view, the spread of HIV had settled the country's debates about sex education and the discussion of homosexuality in public schools: "There is now no doubt that we need sex education in schools and that it

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Hot to Handle: A Global History of Sex Education 118–119 (2015) (describing "the rise of so-called abstinence-only education" between 1986 and 1992).

184. Ctrs. for Disease Control, Acquired Immunodeficiency Syndrome (AIDS) Weekly Surveillance Report 3 (1985), http://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-1985.pdf [http://perma.cc/8L2U-9CCW] (reporting 8,161 known deaths from 1979 to 1985).

185. See Randy Shilts, And the Band Played On: Politics, People, and the AIDS Epidemic, at xxi–xxiii (2007) [hereinafter Shilts, And the Band Played On] ("[T]he. . . news media regarded [AIDS] as a homosexual problem.").

186. Lord, supra note 158, at 140, 148.

187. See Ctrs. for Disease Control, supra note 184, at 3 (depicting an increase from twelve reported cases of HIV in 1979 to 6,571 reported cases of HIV in 1985); Lord, supra note 158, at 148 ("[B]y 1984, . . . the Public Health Service [was] coming under vehement attack for failing to address AIDS aggressively . . . ."). In particular, when the media reported that the actor Rock Hudson had contracted HIV, many Americans became aware of the risk of HIV infection and the scope of the HIV epidemic. See Shilts, And the Band Played On, supra note 185, at xxi, 577–81 ("By October 2, 1985, the morning Rock Hudson died, the word was familiar to almost every household in the Western world. AIDS.").

188. Bernard Weinraub, Reagan Orders AIDS Report, Giving High Priority to Work for Cure, N.Y. Times (Feb. 6, 1986), http://www.nytimes.com/1986/02/06/us/reagan-orders-aids-report-giving-high-priority-to-work-for-cure.html (on file with the *Columbia Law Review*).

189. See Lord, supra note 158, at 145 ("In nominating C. Everett Koop as surgeon general, Reagan believed he had selected someone who shared the views of his most conservative supporters."); Shilts, And the Band Played On, supra note 185, at 587 ("[F]ew in the White House inner circle had any trepidations when Reagan . . . asked Koop to write a report on the AIDS epidemic.").

190. See Lord, supra note 158, at 150–51 (describing how Koop's report "had alienated a great number of his conservative supporters," including prominent conservatives such as William Buckley, Phyllis Schlafly, Robert Novak, and Gary Bauer).

191. C. Everett Koop, Surgeon General's Report on Acquired Immune Deficiency Syndrome 31, http://profiles.nlm.nih.gov/ps/access/QQBDRM.pdf [http://perma.cc/R87Z-Y3XC] (last visited July 27, 2017).

include information on heterosexual and homosexual relationships."[192] In a rebuke to the religious right, he declared that "our reticence in dealing with the subjects of sex, sexual practices, and homosexuality" was preventing "our youth" from receiving "information that is vital to their future health and well-being."[193] "This silence must end," he declared: "We can no longer afford to sidestep frank, open discussions about sexual practices—homosexual and heterosexual."[194] Two years later, Congress took the dramatic step of mailing a summary of the Surgeon General's report to every household in the United States.[195]

Religious conservatives sharply criticized the Surgeon General's report, deriding his HIV-education program as "the teaching of safe sodomy"[196] and suggesting that his report "looks and reads like it was edited by the Gay Task Force."[197] Calling for mandatory HIV testing and the mass quarantine of HIV patients,[198] they claimed that HIV was a form of divine punishment for the sin of homosexual behavior.[199] In the end, however, the religious right was not able to resist the widespread adoption of HIV- and sex-education laws in the United States. By 1990, all fifty states had adopted HIV-education laws and at least forty states had adopted sex-education laws.[200]

3. *Anti-Gay Curriculum Laws.* — Although religious conservatives did not prevent the adoption of HIV- 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 HIV- and sex-

192. Id.

193. C. Everett Koop, Surgeon Gen. of the U.S. Pub. Health Serv., Statement About the Release of the Surgeon General's Report on Acquired Immune Deficiency Syndrome 6 (Oct. 22, 1986), http://profiles.nlm.nih.gov/ps/access/QQBBMW.pdf [http://perma.cc/TQR7-9BN4].

194. Id.

195. See Lord, supra note 158, at 155–59 (noting that eighty-two percent of Americans read at least part of the mailer).

196. Alessandra Stanley, AIDS Becomes a Political Issue, Time, Mar. 23, 1987, at 24 (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting right-wing activist Phyllis Schlafly).

197. Martin, supra note 155, at 250 (internal quotation marks omitted) (quoting Phyllis Schlafly).

198. Linda M. Harrington, Health Officials Criticize Mandatory HIV Tests, Chi. Trib., Sept. 20, 1991 (on file with the *Columbia Law Review*); David L. Kirp, LaRouche Turns to AIDS Politics, N.Y. Times (Sept. 11, 1986), http://www.nytimes.com/1986/09/11/opinion/larouche-turns-to-aidspolitics.html?mcubz=0 (on file with the *Columbia Law Review*); Robert W. Stewart, Dannemeyer Measure Ties U.S. Funds to AIDS Reports, L.A. Times, Aug. 4, 1989 (on file with the *Columbia Law Review*).

199. See Clendinen & Nagourney, supra note 86, at 487–88.

200. See Diane de Mauro, Sex Info. & Educ. Council of the U.S., Sexuality Education 1990: A Review of State Sexuality and AIDS Education Curricula 1, 7 (1990) (noting that thirty-three states mandated HIV education while the remaining seventeen states recommended it, and that twenty-three states mandated sex education while another twenty-three states recommended it).

education laws, rather than opposing the passage of these laws altogether. They were often, though not always, successful.

In 1987 and 1988, nine states adopted anti-gay curriculum laws.[201] Between 1989 and 1996, another seven states adopted them.[202] All told, sixteen states adopted a total of twenty anti-gay sex-education and HIV-education laws in a period of nine years.[203] 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 HIV, a "criminal offense," or sexual activity outside of "marriage." In the last thirty years, only one of these states—California—has repealed all of the anti-gay language contained in its curriculum laws.[204]

Oklahoma was at the forefront of this anti-gay trend, as it had been in the late 1970s. Within months of the Surgeon General's AIDS report,

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201. See Act of Sept. 24, 1988, ch. 1337, § 2, 1988 Cal. Stat. 4425, 4426, repealed by Act of Oct. 1, 2003, ch. 650, § 10, 2003 Cal. Stat. 4984, 4989; Act of June 6, 1988, ch. 88-380, § 15, 1988 Fla. Laws 1996, 2005, amended by Act of May 16, 2002, ch. 387, § 158, 2002 Fla. Laws 3149, 4152; Act of June 26, 1987, Pub. Act 85-680 1987 Ill. 2859, 2859–60, amended by Act of May 22, 2013, Pub. Act 98-0441, 2013 Ill. Laws 5101, 5101–06; Act of Apr. 30, 1987, P.L. 197-1987, §§ 1–2, 1987 Ind. Acts 2279, 2279, amended by Act of Apr. 30, 1993, P.L. 2-1993, § 209, 1993 Ind. Acts 244, 1109; Act of July 20, 1987, No. 904, § 1, 1987 La. Acts 2483, 2484 (current version at La. Stat. Ann. § 17:281 (2013)); Act of May 16, 1988, ch. 512, § 3(7), 1988 Miss. Laws 569, 571 (current version at Miss. Code Ann. § 41-79-5 (2013)); Act of Apr. 24, 1987, ch. 46, § 1(D), 1987 Okla. Sess. Laws 190, 191 (codified at Okla. Stat. Ann. tit. 70, § 11-103.3 (West 2013)); Comprehensive Health Education Act, No. 437, § 3, 1988 S.C. Acts 2911, 2913 (codified at S.C. Code Ann. § 59-32-10 (2004)); Public School Curriculum Amendments, ch. 80, § 1, 1988 Utah Laws 449, 449, amended by Health Education Amendments, S.B. 196, 62d Leg., Gen. Sess. (Utah 2017).

202. See Act of May 21, 1992, No. 92-590, § 2, 1992 Ala. Laws 1216, 1218–19 (codified at Ala. Code § 16-40A-2 (LexisNexis 2012)); Act of June 21, 1991, ch. 269, § 1, 1991 Ariz. Sess. Laws 1392 (current version at Ariz. Rev. Stat. Ann. §15-716 (2014)); Act of Apr. 15, 1993, Act 1173, § 36, 1993 Ark. Acts 1745-A (codified at Ark. Code Ann. § 6-18-703 (2013)); Act of Dec. 31, 1993, No. 335, § 1, 1993 Mich. Pub. Acts 2119, 2123, amended by Revised School Code, No. 289, § 2, 1995 Mich. Pub. Acts 2195, 2260; Act of July 29, 1995, ch. 534, § 3, 1995 N.C. Sess. Laws 1931, 1932 (current version at N.C. Gen. Stat. § 115C-81 (2015)); Act of Apr. 27, 1989, ch. 215, § 1, 1989 Tenn. Pub. Acts 306, 307 (codified at Tenn. Code Ann. § 49-6-1008 (2016)); Human Immunodeficiency Virus Services Act, ch. 1195, § 1, 1989 Tex. Gen. Laws 4854, 4856 (current version at Tex. Health & Safety Code Ann. § 85 (West 2017)).

203. Four states passed two anti-gay curriculum laws during this period. In addition to the laws cited above, supra notes 201 and 202, see Act of June 30, 1989, Pub. Act 86-941, § 1, 1989 Ill. Laws 5660, 5660 (current version at 105 Ill. Comp. Stat. Ann. 5/27-9.1–9.2 (West 2012)); Act of Mar. 5, 1988, P.L. 134-1988, § 3, 1988 Ind. Acts 1763, 1765, amended by Act of Apr. 25, 2005, P.L. 1-2005, § 240, 2005 Ind. Acts 1, 951; Act of Mar. 21, 1991, ch. 14, § 51, 1991 Tex. Gen. Laws 42, 83 (codified at Tex. Health & Safety Code Ann. § 163.001 (West 2017)); Act of Apr. 30, 1996, ch. 10, § 1, 1996 Utah Laws 1872, amended by Student Clubs Amendments, 2007 Utah Laws 481, 487; Act of Apr. 30, 1996, ch. 10, § 2, 1996 Utah Laws 1872, amended by Health Education Amendments, S.B. 196, 62d Leg., Gen. Sess. (Utah 2017).

204. Act of Sept. 24, 1988, ch. 1337, § 2, 1988 Cal. Stat. 4425, 4426, repealed by Act of Oct. 1, 2003, ch. 650, § 10, 2003 Cal. Stat. 4984, 4989.

the Oklahoma Legislature passed H.B. 1476, one of the country's first HIV-education laws.[205] In contrast to H.B. 1629—Oklahoma's first anti-gay curriculum law—H.B. 1476 was adopted by narrow margins after an "emotional" debate.[206] 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."[207] Another objected, "If you really want to stop it, are you going to tell these children that homosexuality is not the way to go?"[208] In response to these objections, newspaper coverage emphasized that "the disease is spreading among heterosexuals" and that "[t]he core curriculum being proposed for Oklahoma schoolchildren stresses the avoidance of homosexual or promiscuous sexual activity, as well as the shared use of needles for intravenous drug use."[209] Although these aspects of the bill mollified some opponents,[210] others still worried that "[t]o some children, the information might be titillating and lead them to want to experiment."[211]

Similar objections were raised in other states. In Louisiana, the sponsor of a sex-education bill sought to clarify that the legislation "does not mandate sex education," "has nothing to do with abortions," and "has nothing to do with homosexuals."[212] In addition, the sponsor noted that under the bill's provisions, "you can't use any material that talks about homosexual conduct."[213] In response, opponents claimed that the bill would allow schools to teach material that explicitly depicted homosexuality, masturbation, and sexual intercourse and portrayed homosexual and heterosexual sex in comparable terms.[214] After reading several passages aloud from a teacher's manual, one opponent declared: "Homosexual

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205. Act of July 1, 1987, ch. 46, § 1, 1987 Okla. Sess. Laws 190, 191 (current version at Okla. Stat. Ann. tit. 70, § 11-103.3.

206. Chris Casteel, Debate on AIDS Education Emotional, Daily Oklahoman, Mar. 18, 1987, at 1 (on file with the *Columbia Law Review*).

207. Id. (quoting Rep. Vikie White).

208. Chris Casteel, House Panel Votes to Require Education on AIDS, Daily Oklahoman, Mar. 12, 1987, at 1 [hereinafter Casteel, House Panel Votes] (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Rep. Frank Pitezel).

209. Jim Killackey, AIDS Classes to Promote Abstinence, Daily Oklahoman, May 19, 1987 (on file with the *Columbia Law Review*); see also Casteel, House Panel Votes, supra note 208; John Greiner, Senate Panel OKs AIDS Education Bill, Daily Oklahoman, Apr. 7, 1987 [hereinafter Greiner, Senate Panel] (on file with the *Columbia Law Review*).

210. See Greiner, Senate Panel, supra note 209.

211. Letter to the Editor, Say No to AIDS Education Bill, Daily Oklahoman, Apr. 6, 1987, at 46 (on file with the *Columbia Law Review*).

212. Audio tape 2 of 3: Hearing of Louisiana House Education Committee on H.B. 484, held by the Louisiana House Education Committee, at 58:53–59:05 (May 20, 1987) (statement of Rep. Alphonse J. Jackson) (on file with the *Columbia Law Review*).

213. Audio tape 1 of 2: Hearing of Louisiana Senate Education Committee on H.B. 484, held by the Louisiana Senate Education Committee, at 1:29–1:36 (June 25, 1987) (statement of Rep. Alphonse J. Jackson) (on file with the *Columbia Law Review*).

214. Id. at 19:00–29:05, 34:45–43:03 (statements of various opponents of H.B. 484).

love is stated as a way that people can have intercourse and not have babies, so now homosexual love is a contraceptive."[215]

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."[216] A similar proposal failed in South Carolina, even as other anti-gay provisions were added to the state's curriculum laws.[217]

Throughout this period, many conservatives continued to resist the adoption of mandatory HIV-education laws. In 1991, Republicans in the Arizona Legislature added several anti-gay provisions to an HIV-education bill, although they remained "vehemently opposed" to it.[218] As the sponsor of these amendments explained: "Many people today still believe that homosexuality is not a positive, or even an alternative, lifestyle . . . . Medical science has shown that there are no safe methods of homosexual sex."[219]

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."[220] In hind-

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215. Id. at 39:52–40:03 (statement of Carol DeLarge, Retired Special Education Teacher, Lafouche Parish).

216. Bill Poovey, House Bill Requires Teaching Homosexuality Is a Crime, Huntsville Times (Ala.), May 1, 1992, at B2 (on file with the *Columbia Law Review*); Bill Poovey, Opponents of Sex Education Bill Stall House to a Crawl, Huntsville Times (Ala.), May 8, 1992, at B2 (on file with the *Columbia Law Review*); see also Phillip Rawls, Bill Changes Sex Education Class Focus, Huntsville Times (Ala.), Feb. 13, 1992, at B2 (on file with the *Columbia Law Review*) (describing the core elements of the House bill, including that "homosexuality is not an acceptable lifestyle and that homosexual conduct is a criminal offense"); Phillip Rawls, Bill Would Make Schools Teach Sexual Abstinence, Huntsville Times (Ala.), Jan. 28, 1992, at B2 (on file with the *Columbia Law Review*) ("Legislation endorsed by Eagle Forum would require that sex education programs in Alabama's schools emphasize abstinence and teach that homosexuality is a crime.").

217. H.R. 107-1909J, 1988 Gen. Assemb., 2d Sess., at 1 (S.C. 1988) (on file with the *Columbia Law Review*) (describing a House amendment to S.B. 546 requiring that "information on homosexuality must present homosexual behavior as unnatural, unhealthy, and illegal and may not include information that promotes the behavior").

218. Mary K. Reinhart, House Backs Bill Requiring AIDS Teaching, Ariz. Daily Star, June 15, 1991 (on file with the *Columbia Law Review*).

219. Id. (internal quotation marks omitted) (quoting Rep. Karen Mills).

220. See Fla. Stat. § 1003.46 (2017) (requiring schools to teach the "benefits of monogamous heterosexual marriage"); 105 Ill. Comp. Stat. Ann. 5/27-9.1(c) (West 2017) (requiring that sex-education courses teach "honor and respect for monogamous heterosexual marriage"); N.C. Gen. Stat. § 115c-81(e1) (2015) (requiring the State Board of Education to develop educational objectives emphasizing "a mutually faithful monogamous heterosexual relationship in the context of marriage"); Act of Sept. 24, 1988, ch. 1337, § 2, 1988 Cal. Stat. 4425, 4426 (requiring that sex education teach "honor

sight, 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 legalization of same-sex marriage was already on the national radar. The first same-sex marriage lawsuits had been filed in the early 1970s,[221] and the issue was litigated periodically throughout the 1980s and 1990s.[222] In the meantime, same-sex couples were performing "marriage" ceremonies, even though the resulting unions were not legally valid.[223] By specifying that they were referring to "heterosexual marriage," some legislatures chose to eliminate any potential ambiguity in state curriculum laws.[224]

4. *Inclusive Curricula.* — Until this period, 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.[225] But in 1984, Congress passed the Equal Access Act, a law that required federally funded schools to provide equal access to extracurricular student clubs.[226] Although Senator Orrin Hatch had introduced the law to support Bible study groups, it served as a bulwark for LGBT student organizations in the coming years.[227]

Shortly after the passage of the Equal Access Act, a Los Angeles teacher founded Project 10, the country's first school program devoted

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and respect for monogamous heterosexual marriage"), repealed by Act of Oct. 1, 2003, ch. 650, § 10, 2003 Cal Stat. 4984, 4989.

221. See Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1188 (Wash. Ct. App. 1974). See generally Michael Boucai, Glorious Precedents: When Gay Marriage Was Radical, 27 Yale J.L. & Human. 1 (2015) (describing early same-sex marriage cases).

222. See Adams v. Howerton, 486 F. Supp. 1119, 1122–24 (C.D. Cal. 1980); Dean v. District of Columbia, 653 A.2d 307, 315–16 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 55–57 (Haw. 1993).

223. See, e.g., Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997) (noting agreement between the parties that female plaintiff's "marriage" to another woman had no legal effect). Thanks to Michael Boucai for this insight.

224. See supra section I.D.

225. See, e.g., Janice M. Irvine, One Generation Post-Stonewall: Political Contests over Lesbian and Gay School Reform, *in* A Queer World 572, 573 (Martin Duberman ed., 1997) [hereinafter Irvine, One Generation Post-Stonewall] (noting that Project 10, the first high school program for gay students, launched in 1985); Moran, supra note 158, at 186–87 (noting that in 1970, "a gay rights group . . . declined to support sex education in the schools, justifiably fearing that sex education would become a vehicle for antihomosexual information"); Who We Are: Improving Education, Creating a Better World, GLSEN, http://www.glsen.org/learn/about-glsen [http://perma.cc/M3C9-XLRF] (last visited July 27, 2017) (noting that the Gay, Lesbian, and Straight Education Network (GLSEN) was established in 1990).

226. Education for Economic Security Act, Pub. L. No. 98-377, §§ 802–805, 98 Stat. 1267, 1302–04 (1984) (codified at 20 U.S.C. §§ 4071–4074 (2012)).

227. James Brooke, To Be Young, Gay and Going to High School in Utah, N.Y. Times (Feb. 28, 1996), http://www.nytimes.com/1996/02/28/us/to-be-young-gay-and-going-to-high-school-in-utah.html (on file with the *Columbia Law Review*).

to supporting lesbian, gay, and bisexual students.[228] The program was founded in response to an incident 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 ten percent 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."[229]

Project 10 drew national media attention and became a popular target of religious conservatives lobbying for the passage of anti-gay curriculum laws. In 1988, the Traditional Values Coalition cited Project 10 as the justification for S.B. 2807—one of two anti-gay curriculum bills that the Traditional Values Coalition sponsored in California that year.[230] The first bill, S.B. 2394, required that in HIV-education classes, "[c]ourse material and instruction shall teach honor and respect for *heterosexual* marriage."[231] The second bill, S.B. 2807, prohibited public schools from operating any "program . . . that encourages or supports any sexual lifestyle that may unduly expose a minor to contracting AIDS, or . . . suggest[s] that such a lifestyle is a positive one."[232] Only the first bill was adopted, after a heated debate about whether it was "an unconstitutional establishment of religious doctrine" and whether it would stigmatize "students whose families do not conform to the 'preferred' lifestyle."[233]

The following year, a similar attack on Project 10 led the Texas Legislature to adopt one of the country's most virulently anti-gay curriculum laws. In two legislative committee hearings, David Muralt, the Texas Director of a conservative religious group known as Citizens for Excellence in Education, proposed an amendment to the state's new HIV-education bill, based on guidelines that had been adopted by a San

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228. 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 Closet: Gay and Lesbian Students, Teachers, and Curricula 9, 10–11 (Karen Harbeck ed., 1992).

229. Id. at 11.

230. Bills, Traditional Values Rep. (Traditional Values Coal., Anaheim, Cal.), July 1988 (on file with the *Columbia Law Review*).

231. Act of Sept. 24, 1988, ch. 1337, § 2, 1988 Cal. Stat. 4425, 4426 (emphasis added), repealed by Act of Oct. 1, 2003, ch. 650, § 10, 2003 Cal. Stat. 4984, 4989; Bills, supra note 230; see also ACLU Attacks the Family—SB 2394, Traditional Values Report (Traditional Values Coal., Anaheim, Cal.), July 1988 (on file with the *Columbia Law Review*).

232. S.B. 2807, 1987–1988 Sess., Legislative Counsel's Digest, at 1 (Cal. 1988) (on file with the *Columbia Law Review*).

233. S. Comm. on Educ., Report on Third Reading of S.B. 2394, 1987–1988 Sess., at 2 (Cal. 1988) (on file with the *Columbia Law Review*); S. Rules Comm., Report on Third Reading of S.B. 2394, 1987–1988 Sess., at 3 (Cal. 1988) (on file with the *Columbia Law Review*).

Antonio school district.[234] Under these guidelines, sex-education programs "shall support sexual abstinence before marriage and fidelity in marriage as the expected standard," "shall not represent homosexuality as a normal or acceptable lifestyle," "and shall not explicitly discuss homosexual practices."[235]

To explain the necessity of these guidelines, Muralt began his testimony by declaring that "Project 10 is on the way to Texas," "because the National Education Association last summer voted two-to-one to adopt Project 10 in all schools in this nation."[236] In Muralt's account, Project 10 was "pioneered by a lesbian, avowed lesbian teacher," and "it has spread now to about a third of the schools in Los Angeles."[237] He argued that by "telling our students in public school that one out of ten of you is a homosexual or a lesbian[,] . . . [Project 10] gives the impression that they were born this way rather than learning the lifestyle."[238] After reading aloud from Project 10 materials, he warned that "homosexual counselors are getting into the public schools . . . and they're really spreading their lifestyle, and it's just counterproductive to what we're trying to do to end AIDS."[239] Muralt's guidelines were not only adopted by the bill's sponsors[240] but also added to other Texas and Alabama HIV-education and sex-education laws in future years.[241]

In addition to state legislatures, local school boards witnessed a number of controversies over the inclusion of "homosexuality" in public

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234. See Audio tape 3 of 4: Hearing of Texas House Committee on Public Health on H.B. 1901, held by the Texas House Committee on Public Health, at 51:37–56:27 (Apr. 17, 1989) [hereinafter Muralt House] (on file with the *Columbia Law Review*) (statement of David Muralt, Texas Director of Citizens for Excellence in Education); Audio tape 2 of 3: Hearing of Texas Senate Committee on Health and Human Services on S.B. 959, held by the Texas Senate Committee on Health and Human Services, at side 2 18:35 (Mar. 28, 1989) [hereinafter Muralt Senate] (on file with the *Columbia Law Review*) (statement of David Muralt, Texas Director of Citizens for Excellence in Education).

235. Muralt House, supra note 234, at 54:45–55:58; Muralt Senate, supra note 234, at 18:44–21:35.

236. Muralt House, supra note 234, at 51:53–52:12.

237. Id. at 52:34–52:52.

238. Id. at 52:18–52:34.

239. Id. at 53:41–53:56.

240. Act of June 1, 1989, ch. 1195, § 1.03, 1989 Tex. Gen. Laws 4854, 4856; see also Amendment No. 1 § 6, 71st Leg., C.S.S.B. No. 959 (Tex. May 23, 1989) (on file with the *Columbia Law Review*). The only omission was the following sentence, which could have been construed to allow teachers to discuss homosexuality in a limited manner: "[The program] . . . shall, when homosexuality is to be discussed, in conjunction with education about sexually transmitted diseases, provide information of a factual nature only, and shall not explicitly discuss homosexual practices." See Muralt House, supra note 234, at 55:28–55:58; Muralt Senate, supra note 234, at 21:20-21:35.

241. See Act of May 21, 1992, No. 92-590, § 2, 1992 Ala. Laws 1216, 1218–19 (codified as amended at Ala. Code § 16-40A-2 (LexisNexis 2012)); Act of Sept. 1, 1991, ch. 14, §§ 36, 51, 1991 Tex. Gen. Laws 42, 63, 83 (codified as amended at Tex. Health & Safety Code Ann. § 163.002 (West 2017)).

school curricula.[242] In 1989, New York City educators began drafting a curriculum known as *Children of the Rainbow*, with the primary goal of teaching first graders to respect the city's many racial and ethnic groups.[243] In a section on the diversity of families, the curriculum 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.[244] Although these passages appeared in only three of the curriculum's 443 pages, one district's school board president called them "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."[245] Playing on historical tensions between racial and sexual minorities, she claimed that the *Rainbow* curriculum would "demean our legitimate minorities, such as Blacks, Hispanics, and Asians, by lumping them together with homosexuals."[246] After a battle between the Board and the Chancellor, the curriculum was shelved and the Chancellor was dismissed, providing a highly publicized, cautionary tale for educators in other districts.[247]

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242. See Irvine, One Generation Post-Stonewall, supra note 225, at 574–82 (summarizing the defeat of efforts to include the teaching of "homosexuality" from multicultural and public health perspectives in public school curricula).

243. See Steven Lee Myers, How a 'Rainbow Curriculum' Turned into Fighting Words, N.Y. Times (Dec. 13, 1992), http://www.nytimes.com/1992/12/13/weekinreview/ideas-trends-how-a-rainbow-curriculum-turned-into-fighting-words.html (on file with the *Columbia Law Review*) [hereinafter Myers, Fighting Words]; see also Irvine, Talk About Sex, supra note 156, at 154–58; Irvine, One Generation Post-Stonewall, supra note 225, at 574–76.

244. Myers, Fighting Words, supra note 243.

245. Id.

246. Irvine, One Generation Post-Stonewall, supra note 225, at 578 (internal quotation marks omitted) (quoting Steven Lee Myers, Queens School Board Suspended in Fight on Gay-Life Curriculum, N.Y. Times (Dec. 2, 1992), http://www.nytimes.com/1992/12/02/nyregion/queens-school-board-suspended-in-fight-on-gay-life-curriculum.html (on file with the *Columbia Law Review*)). As Irvine observes, "the rhetoric of organized opponents polarized these two groups" by pitting "(allegedly white) lesbians and gay men against (allegedly heterosexual) communities of color, separating the intersectional social categories of race and sexuality for political purposes." Irvine, Talk About Sex, supra note 156, at 155; see also Janice M. Irvine, Educational Reform and Sexual Identity, *in* Lesbian, Gay, and Bisexual Identities and Youth: Psychological Perspectives 251, 253–58 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 2001) (analyzing racial dimensions of the controversy over *Children of the Rainbow* in greater detail); Gina Holland, Senate to Vote on Homosexual Education, Sun Herald (Biloxi, Miss.), Mar. 15, 1995, at C1 (quoting a senator's claim that "[t]o add sexual orientation to the list of legitimate minorities who have been discriminated against in my opinion is an affront to all members of those legitimate minorities").

247. Tina Fetner, How the Religious Right Shaped Lesbian and Gay Activism 103 (2008); Peg Byron, New York City Schools Chancellor Fired over AIDS Curriculum, United Press Int'l (Feb. 11, 1993), http://www.upi.com/Archives/1993/02/11/New-York-City-Schools-Chancellor-fired-over-AIDS-curriculum/1214729406800/ (on file with the *Columbia Law Review*); Anthony Hiss, The End of the Rainbow, New Yorker (Apr. 12, 1993),

In Merrimack, New Hampshire, a conservative school board chair sought to capitalize on the conflict over *Children of the Rainbow*, but his effort ultimately 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."[248] 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.[249] In the next election, the chair and his allies were defeated, and the policy was repealed by the new school board.[250]

C. *The Adoption of Abstinence-Until-"Marriage" Laws, 1996–2016*

In 1996, the landscape for federal abstinence education fundamentally shifted when President Clinton signed laws that codified definitions of "abstinence education"[251] and "marriage."[252] At the behest of the religious right, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) established a new stream of $50 million per year in federal funding for abstinence education for a period of five years, which became known as Title V of the Social Security Act.[253] States that chose to accept Title V funds were required to match every four federal dollars with three state-raised dollars and were then responsible for using or distributing the funds.[254] With the exception of California, every state has accepted Title V abstinence-only-until-marriage funds in at least one year since the law was adopted.[255]

During the same period, six states adopted new anti-gay curriculum laws.[256] Each of these laws refers to abstinence until "marriage," rather

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http://www.newyorker.com/magazine/1993/04/12/the-end-of-the-rainbow (on file with the *Columbia Law Review*).

248. Irvine, Talk About Sex, supra note 156, at 162.

249. Id. at 163.

250. Id.

251. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 912, 110 Stat. 2105, 2353–54 (codified as amended at 42 U.S.C. § 710 (2012)).

252. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), invalidated by United States v. Windsor, 133 S. Ct. 2675 (2013).

253. § 912, 110 Stat. at 2353–54.

254. SIECUS, History, supra note 176.

255. Id.

256. See Act of May 25, 1999, ch. 241, art. 2, § 1, 1999 Minn. Laws 1920, 1949, amended by Act of May 14, 2013, ch. 74, § 2, 2013 Minn. Laws 405, 405; Act of July 1, 1999, § A, 1999 Mo. Laws 1138, 1140; Act of May 9, 2011, ch. 145, § 1, 2011 N.D. Laws 550, 550; Act of Dec. 17, 1998, § 1, 1998 Ohio Laws 617, 617; Act of Mar. 25, 1999, ch. 422, § 1, 1999 Va. Acts 543, 544; Act of May 23, 2006, Act No. 445, § 3, 2005 Wis. Sess. Laws 1643, 1644. In addition, in the twenty years since Title V was adopted, eighteen of the twenty states that currently have anti-gay curriculum laws adopted constitutional amendments excluding

than using inherently discriminatory terms, like "homosexual" or "heterosexual."[257] Like most of the anti-gay curriculum laws passed in earlier years, most of these laws have not been repealed or challenged yet.[258]

The legislative debates about abstinence-until-marriage laws were primarily focused on broader concerns about teenage pregnancy and out-of-wedlock childbirth, rather than specific concerns about the "promotion" of "homosexuality" in schools.[259] But there was no question that the sponsors of PRWORA and DOMA shared a deep commitment to promoting the traditional definition of "marriage."[260] And in the congressional debates over DOMA, the bill's sponsors emphasized the lessons that they sought to impart to "the children of America."[261] By posing a series of rhetorical questions, Representative Charles Canady signaled that the law was designed to channel children into heterosexual relationships:

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same-sex couples from the definition of "marriage." See Ala. Const. art. I, § 36.03; Ariz. Const. art. XXX, § 1; Ark. Const. amend. 83, § 1; Fla. Const. art. I, § 27; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Miss. Const. art. 14, § 263A; Mo. Const. art. I, § 33; N.C. Const. art. XIV, § 6; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. II, § 35; S.C. Const. art. XVII, § 15; Tenn. Const. art. XI, § 18; Tex. Const. art. I, § 32; Utah Const., art. I, § 29; Va. Const. art. I, § 15-A; Wis. Const. art. XIII, § 13.

257. 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." Act of Mar. 31, 1998, ch. 510, § 1, 1998 Miss. Laws 609, 610; Public Education Curriculum Amendments, ch. 105, § 1, 2001 Utah Laws 442, 442.

258. In 2013, Minnesota voters passed a constitutional amendment legalizing same-sex marriage. See § 2, 2013 Minn. Laws at 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 § 1, 1999 Minn. Laws at 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.

259. See, e.g., H.R. Rep. No. 104-725, at 7–8 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 2649, 2649.

260. See Carlos A. Ball, Same-Sex Marriage and Children: A Tale of History, Social Science, and Law 47–48 (2014) (observing similarities between the legislative histories supporting PRWORA and DOMA and arguing that PRWORA and DOMA were based on "[t]he same understandings of the proper relationship between social well-being and procreation"); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 223 (2000) (observing that the passage of PRWORA and DOMA "illustrated the national government's continuing investment in traditional marriage"); Priscilla Yamin, American Marriage: A Political Institution 100 (2012) (claiming that both PRWORA and DOMA "responded to political and cultural rifts originating in the 1960s, . . . addressed perceived threats to marriage," and relied on similar pro-marriage rhetoric); Ruthann Robson, Assimilation, Marriage, and Lesbian Liberation, 75 Temp. L. Rev. 709, 795 (2002) ("Taken together, the rhetoric surrounding DOMA and PRWORA establishes the zeal of elected federal officials to exalt marriage.").

261. 142 Cong. Rec. 17,079 (1996) (statement of Rep. Canady).

> 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 woman united in marriage?[262]

In a legislative report supporting the bill, Representative Canady cautioned his colleagues "against doing anything which might mislead *wavering children* into perceiving society as indifferent to the sexual orientation they develop," in order to protect society's interest "in reproducing itself."[263]

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.[264] Programs funded under SPRANS were required to conform with the eight-point definition of "abstinence education" in Title V.[265] 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.[266] Under the George W. Bush Administration, annual funding for SPRANS programs grew from $20 million to $113 million, resulting in annual spending of more than $175 million on abstinence-education programs.[267]

In the Bush Administration's second term, opponents of abstinence education began to push back. In 2004, a report commissioned by Representative Henry Waxman 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."[268] Three years later, a study mandated by Congress

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262. Id. (emphasis added).

263. H.R. Rep. No. 104-664, at 15 n.53 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2919 n.53 (emphasis added) (internal quotation marks omitted) (quoting E.L. Pattullo, Straight Talk About Gays, Commentary, Dec. 1, 1992, at 21, 22–23).

264. See Fiscal Year 2001 Supplemental Appropriations, Pub. L. No. 106-246, tit. II, ch. 4, 114 Stat. 511, 550 (2000).

265. Id.

266. Notice of Availability of Funds, 65 Fed. Reg. 69,562, 69,564 (Nov. 17, 2000).

267. Spending for Abstinence-Only-Until-Marriage Programs (1982-2009), Sexuality Info. & Educ. Council of the U.S., http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1160 [http://perma.cc/S8TB-RS8E] (last visited July 27, 2017).

268. Minority Staff of H.R. Comm. on Gov't Reform, 108th Cong., The Content of Federally Funded Abstinence-Only Education Programs 22 (Comm. Print 2004).

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.[269] 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.[270]

In his first budget proposal, President Obama sought to eliminate all federal funding for abstinence-education programs and establish new funding for comprehensive sex-education programs.[271] Although Congress agreed to eliminate AFLA and SPRANS funding, it has repeatedly refused to eliminate Title V funding.[272] In 2010, the Affordable Care Act extended Title V funding for five years.[273] In 2015, the Medicare Access and CHIP Reauthorization Act increased Title V funding from $50 million to $75 million for an additional two years.[274]

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.[275] 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"

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269. Mathematica Policy Research, Inc., Impacts of Four Title V, Section 510 Abstinence Education Programs: Final Report 59 (2007), http://www.mathematica-mpr.com/~/media/publications/PDFs/impactabstinence.pdf [http://perma.cc/2M5A-LB63].

270. SIECUS, History, supra note 176.

271. Heather D. Boonstra, Sex Education: Another Big Step Forward—And a Step Back, 13 Guttmacher Pol'y Rev. 27, 27 (2010), http://www.guttmacher.org/sites/default/files/article_files/article_files/gpr130227.pdf [http://perma.cc/2ZR7-XAP2].

272. See id. at 28.

273. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2954, 124 Stat. 119, 352 (2010) (codified at 42 U.S.C. § 18001 (2012)).

274. Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, § 214, 129 Stat. 87, 152 (to be codified at 42 U.S.C. § 710(d)). In his first budget proposal, President Trump sought to extend the authorized Title V "Abstinence Education" grant program for two years at $75 million per year. President's Budget Reflects Administration's Values, Sexuality Info. & Educ. Council of the U.S. (May 23, 2017), http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature&FeatureID=2480 [http://perma.cc/VCH7-NYB8].

275. This subsection describes successful challenges to the anti-gay provisions of sex- and HIV-education laws. Over the years, courts have decided many constitutional and statutory challenges to other aspects of these laws. See, e.g., Bowen v. Kendrick, 487 U.S. 589, 622 (1988) (holding that AFLA did not facially violate the Establishment Clause); Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist., No.12CECG02608, 2015 WL 2298565, at *1 (Cal. Sup. Ct. Apr. 28, 2015) (stating that a school district violated state law by failing "to provide comprehensive, medically accurate, objective, and bias-free sexual health and HIV/AIDS prevention education"); Coleman v. Caddo Parish Sch. Bd., 635 So. 2d 1238, 1258 (La. Ct. App. 1994) (holding that a school district violated state law by failing to provide factually accurate sex-education materials).

because same-sex marriage was not legal in Florida.[276] In 2011, California 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" to be included in the curricula of the state's public schools.[277] In 2012, a group of Minnesota students settled a lawsuit alleging that a local school board's "Sexual Orientation Curriculum Policy"—which explicitly prohibited the discussion of "sexual orientation" in classes on any subject—violated Title IX and the Equal Protection Clause.[278] The following year, two students in Utah settled an as-applied challenge to the state's curriculum law, claiming that a local school district had violated the First Amendment by removing *In Our Mothers' House*—a children's book about lesbian parents—from public school libraries.[279]

Most recently, in October 2016, a group of Utah students and Equality Utah, the state's largest LGBT rights organization, filed a facial challenge to Utah's anti-gay curriculum laws.[280] In March 2017, the Utah Legislature responded by repealing the state's statutory prohibition against "the advocacy of homosexuality" in public schools.[281] Shortly

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276. Gonzalez v. Sch. Bd., 571 F. Supp. 2d 1257, 1270 (S.D. Fla. 2008).

277. Cal. Educ. Code § 51204.5 (2017); cf. Iowa Code § 279.50(9)(d)(2) (2017) (requiring human sexuality instructional material to be "free of racial, ethnic, sexual orientation, and gender biases"); Wis. Stat. § 118.019(2d) (2017) (requiring that education programs in human growth and development use instructional methods and materials that do not discriminate against a pupil based upon the pupil's race, gender, religion, sexual orientation, or ethnic or cultural background or against sexually active pupils or children with disabilities); Mass. Dep't of Educ., Massachusetts Comprehensive Health Curriculum Framework 31 (2d ed. 1999), http://www.doe.mass.edu/frameworks/health/1999/1099.pdf [http://perma.cc/EMR7-F48Y] (recommending that human sexuality instruction should "define sexual orientation using the correct terminology (such as heterosexual and gay and lesbian)").

278. Memorandum of Law in Support of Joint Motion to Approve Proposed Consent Decree at 2, 6, Doe v. Anoka-Hennepin Sch. Dist. No. 11, Nos. 11-cv-01999-JNE-SER, 11-cv-02282-JNE-SER (D. Minn. Mar. 5, 2012), 2012 WL 1672815; see also Complaint at 5, Doe v. Anoka-Hennepin Sch. Dist. No. 11, No. 11-cv-01999-JNE-SER (D. Minn. July 21, 2011), 2011 WL 2935040.

279. Universal Settlement and Release of All Claims Against Davis School District and Its Agents and Employees at 1–3, Weber v. Davis Sch. Dist., No. 12-CV-00242-EJF (D. Utah Jan. 31, 2013), http://www.clearinghouse.net/chDocs/public/FA-UT-0001-0002.pdf [http://perma.cc/44Q8-2UYP].

280. See Amended Complaint for Declaratory and Injunctive Relief at 1–4, Equal. Utah v. Utah State Bd. of Educ., No. 2:16-cv-01081-BCW (D. Utah Nov. 15, 2016), 2016 WL 9113536.

281. See Health Education Amendments, S.B. 196, 62d Leg., Gen. Sess. (Utah 2017) (amending Utah Code Ann. § 53A-13-101); Michelle L. Price, Utah Moves to Toss School Ban on 'Advocacy of Homosexuality,' AP News (Feb. 22, 2017), http://apnews.com/7c1c340591d447c7a6a88847847ecd05/utah-moves-toss-school-banadvocacy-homosexuality [http://perma.cc/JN7K-VRCE]; Benjamin Wood, Senate Approves Lifting Ban on 'Advocacy of Homosexuality' in Utah Schools, Salt Lake Trib. (Mar. 1, 2017), http://www.sltrib.com/news/5000707-155/senate-approves-lifting-ban-on-advocacy [http://perma.cc/S2PA-H58D] (reporting that the Utah Senate gave near-

thereafter, the Utah State Board of Education repealed similar language in the state's administrative rules[282] and issued a letter clarifying that discrimination based on sexual orientation and gender identity is prohibited in the state's public schools.[283]

III. JUSTICIABILITY: PRIOR ADJUDICATION AND ONGOING ENFORCEMENT

After the Supreme Court's invalidation of anti-gay sodomy and marriage laws, the prevalence and persistence of anti-gay curriculum laws is anomalous and surprising.[284] This anomaly often prompts two skeptical but instructive questions about the enforcement of anti-gay curriculum laws: (1) whether officials still have the *legal authority* to enforce these laws, even though they often 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, even after the legalization of same-sex intimacy 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,[285] and federal courts would lack jurisdiction to review them.[286]

As this Part explains, however, officials still have the legal authority to enforce anti-gay curriculum laws because no court has yet enjoined them from doing so. By surveying the available evidence from state and federal regulations and guidelines, and from local media coverage and court filings, this Part shows that at least some jurisdictions may still be enforcing these laws, in spite of the Supreme Court's invalidation of anti-gay sodomy and marriage laws.

A. *Prior Adjudication*

Many anti-gay curriculum laws include provisions referring to anti-gay sodomy laws and anti-gay marriage laws. In *Lawrence v. Texas*,[287] *United*

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unanimous approval to end a state ban on the advocacy of homosexuality in public school sex-education classes).

282. See 2017 Utah Bull. 23 (June 1, 2017).

283. E-mail from David Wolf, Assistant Attorney Gen., Utah Attorney Gen.'s Office, to Clifford Rosky, Professor of Law, S.J. Quinney Coll. of Law (Sept. 25, 2017) (on file with the *Columbia Law Review*); Letter from Utah Bd. of Educ. to Local Educ. agencies (Sept. 18, 2017) (on file with the *Columbia Law Review*).

284. See Ayres & Eskridge, supra note 21 ("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 . . . .").

285. See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (explaining that a plaintiff must be seeking "redress for a legal wrong" attributable to the defendant).

286. See id. ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood.").

287. 539 U.S. 558, 578 (2003).

States v. Windsor,[288] and *Obergefell v. Hodges*,[289] the Supreme Court ruled that anti-gay sodomy and anti-gay marriage laws are unconstitutional. This raises a question akin to res judicata[290]: Do state and federal officials still have the legal authority to enforce these provisions of anti-gay curriculum laws, even though they explicitly refer to other laws that have already been declared unconstitutional?[291]

The laws of Texas pose this question in an especially stark manner. The state's curriculum law requires teachers to instruct students that "homosexual conduct is a criminal offense under Section 21.06 [of the] Penal Code."[292] Section 21.06 prohibits "deviate sexual intercourse with another individual of the same sex."[293] In *Lawrence v. Texas*, the Supreme Court ruled that Section 21.06 is unconstitutional.[294] After *Lawrence*, does the state of Texas still have the legal authority to rely on Section 21.06 in the state's curriculum law, by teaching students that "homosexual conduct is a criminal offense under Section 21.06"?[295] Or is the state's enforcement of this curriculum provision barred by the Court's ruling in *Lawrence*?

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"[296] and "[t]each the potential physical, psychological, emotional, and social side effects of participating in sexual activity outside of marriage."[297] Ohio's marriage law provides that "[a] marriage may only be entered into by one man and one woman"[298] and "[a]ny marriage between persons of the same sex shall have no legal force or effect in this state."[299] In *Obergefell v. Hodges*, the Supreme Court ruled that these provisions of Ohio's marriage law are unconstitutional.[300] After *Obergefell*, does the state of Ohio still have the legal authority to rely

288. 133 S. Ct. 2675, 2696 (2013).

289. 135 S. Ct. 2584, 2605 (2015).

290. See infra text accompanying note 301 (defining res judicata).

291. This question may be raised with respect to only 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 sections I.A, I.B, I.D.

292. Tex. Health & Safety Code Ann. § 163.002 (West 2017).

293. Tex. Penal Code Ann. § 21.06 (West 2011). Section 21.01 of the Penal Code defines "deviate sexual intercourse" to include any act of oral or anal intercourse, regardless of whether the participants are consenting adults. Tex. Penal Code Ann. § 21.01.

294. 539 U.S. 558, 578 (2003).

295. Tex. Health & Safety Code Ann. § 163.002.

296. Ohio Rev. Code Ann. § 3313.6011(C)(1) (West 2012).

297. Id. § 3313.6011(C)(2).

298. Ohio Rev. Code Ann. § 3101.01(A) (West 2011).

299. Id. § 3101.01(C)(1).

300. 135 S. Ct. 2584, 2605 (2015).

on these provisions, by teaching students that the state's definition of "marriage" does not include two persons of the same sex? Or is the state's enforcement of this curriculum provision barred by the Court's ruling in *Obergefell*? One could ask a nearly identical question about the meaning of the term "marriage" in Section 510(b) of the Social Security Act and the Defense of Marriage Act, in light of the Court's ruling in *United States v. Windsor*.

Before considering the relief granted by the Court in *Lawrence*, *Windsor*, and *Obergefell*, it is helpful to recall a few general principles of civil procedure and constitutional law. First, under the doctrine of res judicata, 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.[301] Second, under the doctrine of separation of powers, courts have the power to declare statutes unconstitutional and to enjoin the enforcement of statutes,[302] but they do not have the power to amend or repeal the language of statutes.[303] Finally, statutes are generally presumed to be constitutional, until they have been challenged by a party and declared unconstitutional by a court.[304] However logical it may sound, there is no exception to these rules that applies when one statute has been declared unconstitutional and another statute continues to rely upon it. In each case, 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 covered by res judicata, because none of the parties in these cases were students or teachers, and the Supreme Court did not adjudicate the definition of "sodomy" or "marriage" in the context of any jurisdiction's curriculum laws. In each case, the Court declared that specific applications of the challenged law were unconstitutional, but it could not have amended or repealed the definition of "sodomy" or "marriage" contained in any jurisdiction's sodomy or marriage laws.

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301. See San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 336 (2005); Restatement (Second) of Judgments ch. 1 at 1–2 (Am. Law Inst. 1982).

302. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579–80 (2012); Erwin Chemerinsky, Constitutional Law: Principles and Policies 37–45 (5th ed. 2015).

303. See Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."); Wiregrass Metal Trades Council v. Shaw Envtl. & Infrastructure, Inc., 837 F.3d 1083, 1089 (11th Cir. 2016) ("[C]ourts do not have the authority to amend, modify, or revise statutes."); Oliver P. Field, Effect of an Unconstitutional Statute, 1 Ind. L.J. 1, 11 (1926) ("The courts point out that they cannot repeal [unconstitutional] statutes and that the statutes are not absolutely void, but remain on the statute books.").

304. See N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 17 (1988); Note, The Presumption of Constitutionality, 31 Colum. L. Rev. 1136, 1136 (1931).

In all three cases, the Court spoke in terms of the law's application to the plaintiffs before it and to other same-sex couples who were similarly situated. In *Lawrence*, the Court observed that the case did not involve a marriage, or an intimate relationship involving a minor, but rather "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."[305] In *Windsor*, the Court noted that the challenged law had targeted "same-sex marriages made lawful by the State"[306] and that "[t]his opinion and its holding are confined to those lawful marriages."[307] 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."[308] 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.[309]

Of course, I do not mean to suggest that *Lawrence*, *Windsor*, and *Obergefell* have no bearing on the constitutionality of anti-gay curriculum laws. To say that the *relief* granted in *Lawrence*, *Windsor*, and *Obergefell* was limited is not to say that the *reasoning* was limited. On the contrary, Part IV argues that anti-gay curriculum laws violate the equal protection principles articulated by the Supreme Court in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. As Justice Scalia predicted in his dissenting opinions, the reasoning in *Lawrence* foretold the result in *Windsor*;[310] and the reasoning in *Windsor* foretold the result in *Obergefell*.[311] If federal courts faithfully

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

306. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

307. Id. at 2696.

308. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

309. See Lawrence v. State, Nos. 14-99-00109-CR, 14-99-00111-CR, 2003 WL 22453791, at *1 (Tex. Ct. App. Oct. 30, 2003); Final Judgment and Declaratory Judgment and Permanent Injunction at 2–3, Henry v. Himes, 14 F. Supp. 3d 1036 (S.D. Ohio 2014) (No. 1:14-cv-129), 2014 WL 1418395; Final Order and Permanent Injunction at 2, Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014) (No. 3:13-cv-01159), 2014 WL 997525; Final Judgment and Declaratory Judgment and Permanent Injunction at 2–3, Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013); Judgment at 1, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 1:10-civ.-8435), 2012 WL 2019716.

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 (1987). But the Supreme Court has not traditionally applied the *Salerno* standard when plaintiffs have challenged facially discriminatory laws under the Equal Protection Clause. See City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (plurality opinion); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 236, 238 (1994); Richard H. Fallon, Jr., Fact and Fiction About Facial Challenges, 99 Calif. L. Rev. 915, 918 (2011).

310. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

311. *Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting).

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 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*

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 evidence available from state and federal regulations and guidelines, as well as anecdotal evidence from local media coverage and court filings.

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

TABLE 2. EVIDENCE REGARDING STATE ENFORCEMENT OF ANTI-GAY CURRICULUM LAWS[312]

State	Education Regulations Contain Anti-Gay Language	Curriculum Guidelines Contain Anti-Gay Language	Curriculum Guidelines Exclude or Demean LGBT Identities
Alabama		✓	✓
Arizona	✓		✓
Arkansas			✓
Florida		✓	✓
Illinois			✓
Indiana			✓
Louisiana	✓		✓
Michigan			✓
Mississippi	✓	✓	✓
Missouri			✓
North Carolina		✓	✓
North Dakota			✓
Ohio	✓		✓
Oklahoma	✓		✓
South 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, in the state's curriculum guidelines, or in both sources.[313] Second, in eighteen of twenty states, the state's curriculum guidelines have effec-

312. For citations to relevant education regulations and curriculum guidelines, see infra Appendix at Table B.

313. See supra Table 2.

tively excluded LGBT identities by failing to include any nonderogatory references to sexual orientation, gender identity, or same-sex relationships.[314] 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 if a state's guidelines do not contain explicit anti-gay language, they may still have a discriminatory impact on the inclusion of LGBT identities in the curriculum of public schools.

Like the codification of anti-gay language, the exclusion of LGBT identities from state curriculum guidelines likely indicates the enforcement of anti-gay curriculum laws. A survey of the curriculum guidelines in all fifty states reveals a strong correlation between the exclusion of LGBT identities and the presence of anti-gay curriculum laws. In sixteen of the thirty states (53%) that do not have anti-gay curriculum laws, the state's curriculum guidelines include nonderogatory references to sexual orientation, gender identity, or same-sex relationships. By contrast, similar references appear in only two of the twenty states (10%) that have anti-gay curriculum laws.[315]

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 many instances in which public school teachers have been disciplined, suspended, terminated, or pressured to resign for engaging in a wide range of pro-LGBT activities: reading a children's book about two princes marrying each other,[316] teaching students about LGBT bullying,[317] advocating for policies that protect LGBT students,[318] sponsoring the for-

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314. See supra Table 2.

315. See infra Appendix at Table B. It may seem tempting to tease further findings from this evidence, but it may well be misleading. For example, Mississippi and Texas are the only two states that have codified anti-gay language in both regulations and guidelines, while nine other states have not codified anti-gay language at all. Id. But such comparisons are misleading, because 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, a failure to codify does not necessarily indicate a lack of enforcement.

316. See Michael Schaub, Teacher Who Read Gay-Themed Fairy Tale in Class Resigns After Protest, L.A. Times (June 16, 2015), http://www.latimes.com/books/jacketcopy/la-et-jc-teacher-who-read-gay-fairy-tale-resigns-20150616-story.html (on file with the *Columbia Law Review*) (describing a North Carolina elementary school teacher's resignation); Mark Schultz, 200 Fill Orange County School Meeting on Gay Fable, News & Observer (May 15, 2015), http://www.newsobserver.com/news/local/community/chapel-hill-news/article21135498.html [http://perma.cc/Y5A5-BFWG] (noting that new, more restrictive policies were instituted after a teacher read the book to his class).

317. See Beall v. London City Sch. Dist. Bd. of Educ., No. 2:04-CV-290, 2006 WL 1582447, at *3 (S.D. Ohio June 8, 2006) (documenting that a teacher's contract was not renewed).

318. See Charles Bassett, Teacher Backs Gay Policies, Fired by School Board, News 9 (May 12, 2009), http://www.news9.com/story/10349549/teacher-backs-gay-policies-fired-

mation of gay–straight alliances,[319] allowing students to publish pro-gay editorials in the student newspaper,[320] allowing students to put up displays honoring LGBT History Month,[321] and simply living a lesbian "lifestyle."[322]

The following sections present case studies from Utah and Wisconsin as examples of strong and weak enforcement patterns. These case studies demonstrate a broad range of enforcement patterns within which the remaining states are likely to fall.

a. *Utah: Strong Enforcement.* — As previously noted, a lawsuit challenging the constitutionality of Utah's anti-gay curriculum laws was filed in October 2016.[323] Shortly after the lawsuit was filed, I conducted a comprehensive search of the Utah state archives, sought records from each of the state's forty-one school districts, and interviewed the individual plaintiffs in the lawsuit itself, to assess the extent to which the state of Utah has enforced these laws.[324] This research produced overwhelming evidence of the state's ongoing enforcement of anti-gay curriculum laws.

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by-school-board [http://perma.cc/DTL6-4XLF] (describing a teacher who was "fired for pushing anti-discrimination policies for homosexual students"); Megan Rolland, Former Oklahoma City Teacher Joe Quigley Says Second Termination Was Unfair, Oklahoman (Jan. 27, 2011), http://newsok.com/article/3535748 [http://perma.cc/M2ML-UMTN] (describing the procedures used in repeatedly terminating a teacher).

319. See Lauren Davis, Gay Club Teacher at Union Co. High School Let Go; Students Rally Support, Local 8, WVLT-TV (June 22, 2016), http://www.local8now.com/content/news/Gay-club-teacher-at-Union-Co-High-School-let-go-students-rally-support-384025161.html [http://perma.cc/2LPH-JBXY] (noting a teacher's contract was not renewed); Halley Halloway, Union County Teacher Says He Was Let Go After Sponsoring LGBT Club, ABC 6, WATE (June 20, 2016), http://wate.com/2016/06/20/union-county-teacher-says-he-was-let-go-after-sponsoring-lgbt-club/ [http://perma.cc/Q5HZ-XGAS] (same).

320. See Associated Press, Teacher's Job on Line over 'Tolerance' Column, NBC News, http://www.nbcnews.com/id/18268259/ns/us_news-education/t/teachers-job-line-over-tolerance-column/#.WXpmSojytEY [http://perma.cc/Z5AH-ZYNV] (last updated Apr. 23, 2007) (discussing a teacher's suspension); Kelly Soderlund, Woodlan Editorial on Gays Ignites Firestorm, J. Gazette (Fort Wayne, Ind.), Feb. 21, 2007, at 1C, 2C (on file with the *Columbia Law Review*).

321. See Complaint and Jury Request at 8, Johnson v. Corunna Pub. Sch., No. 2:13-CV-10468 (E.D. Mich. 2013), 2013 WL 501424 (discussing a teacher's termination for exercising "First Amendment rights with regard to the Diversity Club"); Lester Graham, School Sued After Firing Lesbian Teacher, Mich. Radio (Feb. 6, 2013), http://michiganradio.org/post/school-sued-after-firing-lesbian-teacher [http://perma.cc/4QYH-4LKG] (noting the teacher's contract was not renewed).

322. Mary Beth Faller, 2 Say Paradise Valley High School Principal Was Let Go Because She Is Gay, Ariz. Republic (Mar. 17, 2012), http://archive.azcentral.com/arizonarepublic/local/articles/2012/03/17/20120317paradise-principal-gay.html [http://perma.cc/D6US-BW7S].

323. See supra notes 280–283 and accompanying text.

324. This research was completed before the complaint was filed. Because I was neither an attorney nor a client, I did not assume any legal or professional duties to represent the plaintiffs' interests. It is worth disclosing, however, that the plaintiffs and their attorneys consulted me as a subject-matter expert throughout the court proceedings, the legislative session, and settlement negotiations. I have previously served as a member

As early as 1985, the Utah State Board of Education began warning teachers against the "advocacy of homosexuality" in publications about sex education and HIV education in public schools.[325] For more than thirty years, this prohibition has been included in all of the Board's core curriculum standards,[326] including training materials for new teachers,[327] parental consent forms,[328] and resource files for teachers and parents that address HIV-education and human-sexuality instruction.[329] In the most recent resource files, published in 2006, the Board included a statement in which the Utah Attorney General identified "sodomy" as a form of "immorality" and "unchastity" that teachers may not "teach, promote, or condone."[330]

In 2000, the State Board issued an administrative rule that established elaborate procedures for local school districts to comply with the state's "human sexuality" curriculum law.[331] Under this rule, each district was required to 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.[332] These committees could not approve any materials, including guest speakers, unless they complied with the statute's prohibitions.[333] The district's superintendent was required to "report educators who willfully violate" the rule to the State Instructional Materials Commission "for investigation and possible discipline."[334]

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of Equality of Utah's Board of Directors, and I am now a member of the organization's Advisory Council, but this position does not include any legal, fiduciary, or professional duties to represent the organization's interests.

325. See Charles R. Duke, A Look at Current State-Wide Text Adoption Procedures 9 (1985), http://files.eric.ed.gov/fulltext/ED254864.pdf [http://perma.cc/3R4F-Y3HP]; Utah State Bd. of Educ., Responsible Healthy Lifestyles: Teacher Resource File for AIDS Education, at viii–ix (1989) (on file with the *Columbia Law Review*).

326. Utah State Office of Educ., Secondary Core Curriculum Standards: Responsible Healthy Lifestyles Health Education 9 (1999) (on file with the *Columbia Law Review*); Utah State Bd. of Educ., Secondary Core Curriculum Standards, Science, Levels 7–12, at 55–56 (1992), http://files.eric.ed.gov/fulltext/ED383523.pdf [http://perma.cc/TAJ3-SFN5].

327. Utah State Office of Educ., Human Sexuality Instruction: Health Education, Science, Adult Roles Classes 4 (on file with the *Columbia Law Review*).

328. See Utah State Office of Educ., Parent/Guardian Consent Form, Human Sexuality Instruction 7 (2008) (on file with the *Columbia Law Review*).

329. See Utah State Bd. of Educ., A Resource Guide for Parents and Teachers on Teaching Human Sexuality, High School 36–37, 40 (2006) [hereinafter High School] (on file with the *Columbia Law Review*); Utah State Bd. of Educ., A Resource Guide for Parents and Teachers on Teaching Human Sexuality, Junior High School, at xi, 13 (2006) [hereinafter Junior High School] (on file with *Columbia Law Review*).

330. High School, supra note 329, at 38; Junior High School, supra note 329, at xi.

331. See 2000-15 Utah Bull. 11–13 (Aug. 1, 2000).

332. Id. at 12–13 (rr. 277-474-1(B); 277-474-5(C)).

333. Id. at 13 (rr. 277-474-5(C)(3); 277-474-6).

334. Id. at 13 (r. 277-474-5(C)(5)).

The Board's rule significantly expanded the scope of the statute's prohibitions. In the curriculum statute, prohibitions against "the advocacy of homosexuality" and "the advocacy of sexual activity outside of marriage" appeared in a section titled "Instruction in health," suggesting that they applied only in health education and related courses.[335] By contrast, the Board's rule applied 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."[336] Although the rule noted that these topics were typically addressed in health education and related courses, it explicitly applied "to any course or class in which these topics are the focus of discussion."[337]

Local school districts have adopted policies that provide additional evidence of the enforcement of the state's anti-gay curriculum laws. Nineteen school districts have policies that quote the State Board's rule against "the advocacy of homosexuality" and "the advocacy of sexual activity outside of marriage."[338] In three districts, the policies prohibit not only "the advocacy of" but also "the acceptance of . . . homosexuality as a desirable or acceptable sexual adjustment or lifestyle."[339] Nearly all of the remaining districts have policies that either specifically cite statutes or rules prohibiting "the advocacy of homosexuality" or otherwise indicate

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335. Utah Code Ann. § 53A-13-101 (LexisNexis 2016). In 2017, the statute's language prohibiting "the advocacy of homosexuality" was repealed in response to the lawsuit challenging Utah's anti-gay curriculum laws. See Health Education Amendments, S.B. 196, 62d Leg., Gen. Sess. (Utah 2017); E-mail from David Wolf, Assistant Attorney Gen., Utah Attorney Gen.'s Office, to Clifford Rosky, Professor of Law, S.J. Quinney Coll. of Law (Sept. 25, 2017) (on file with the *Columbia Law Review*).

336. Utah Admin. Code r. 277-474-1(D) (2017). In 2017, the rule's language prohibiting "the advocacy of homosexuality" was repealed in response to the lawsuit challenging Utah's anti-gay curriculum laws. See 2017-11 Utah Bull. 23–25 (June 1, 2017). The Utah State Board of Education notified local education agencies that curricular policies would need to be revised in light of these recent amendments to Utah Code Ann. § 53A-13-101 and Utah Admin. Code r. 277-474-1(D). See Letter from Utah State Bd. of Educ., to Utah Local Educ. Agency Chairs, Superintendents, and Charter School Adm'rs (Sept. 18, 2017) (on file with the *Columbia Law Review*).

337. Utah Admin. Code r. 277-474-1(D).

338. Daggett Sch. Dist.; Garfield Sch. Dist.; Iron Sch. Dist.; Juab Sch. Dist.; Kane Sch. Dist.; Logan City Sch. Dist.; Millard Sch. Dist.; Morgan Sch. Dist.; Murray Sch. Dist.; Nebo Sch. Dist.; North Sanpete Sch. Dist.; North Summit Sch. Dist.; Park City Sch. Dist.; San Juan Sch. Dist.; South Sanpete Sch. Dist.; Tintic Sch. Dist.; Uintah Sch. Dist.; Washington Sch. Dist.; Wayne Sch. Dist. For a summary of the GRAMA responses, see infra Appendix at Table C. For the GRAMA responses themselves, see the GRAMA Responses Data Set [hereinafter Data Set] (on file with the *Columbia Law Review*). This data set will be available on the *Columbia Law Review* website, www.columbialawreview.org, starting in October 2017.

339. Alpine Sch. Dist.; Grand Cty. Sch. Dist.; Grand Sch. Dist., South Summit Sch. Dist. See infra Appendix at Table C; see also Data Set, supra note 338.

that the district's human-sexuality curriculum complies with all of the state's statutory and regulatory requirements.[340]

The lawsuit filed against the Utah State Board of Education yielded further examples of how the state's curriculum statutes and regulations have been enforced.[341] 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."[342] When another student asked if same-sex marriage would be discussed, the teacher said, "No."[343] 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.[344] 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.[345]

The most dramatic example of Utah's enforcement was described in a newspaper article in the *Salt Lake Tribune*.[346] In 2014, the *Tribune* reported that the Canyons School District had "shelved" 315 copies of a custom-edition health textbook, purchased at a cost of $24,000, because the book discussed "gay and lesbian partnerships" and other prohibited topics.[347] 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."[348] In a chapter

340. Beaver Sch. Dist.; Box Elder Sch. Dist.; Canyons Sch. Dist.; Daggett Sch. Dist.; Davis Sch. Dist.; Duchesne Sch. Dist.; Garfield Sch. Dist.; Grand Sch. Dist.; Iron Sch. Dist.; Jordan Sch. Dist.; Juab Sch. Dist.; Kane Sch. Dist.; Morgan Sch. Dist.; Murray Sch. Dist.; Nebo Sch. Dist.; North Sanpete Sch. Dist.; North Summit Sch. Dist.; Ogden City Sch. Dist.; Piute Sch. Dist.; Provo Sch. Dist.; Rich Sch. Dist.; Salt Lake Sch. Dist.; Sevier Sch. Dist.; South Sanpete Sch. Dist.; South Summit Sch. Dist.; Tintic Sch. Dist.; Tooele Sch. Dist.; Wasatch Sch. Dist.; Washington Sch. Dist.; Wayne Sch. Dist. See infra Appendix at Table A; see also Data Set, supra note 339.

341. See Amended Complaint for Declaratory and Injunctive Relief at 13–15, Equal. Utah v. Utah State Bd. of Educ., No. 2:16-cv-01081-BCW (D. Utah Nov. 15, 2016), 2016 WL 9113536. The defendants, which included the State Board of Education and the school boards representing the districts in which the students attended school, stated they lacked sufficient knowledge and information to either admit or deny either student's allegations. See Defendants' Answer to Plaintiffs' Amended Complaint at 16–17, Equal. Utah v. Utah State Bd. of Educ., No. 2:16-cv-01081-DB (D. Utah Nov. 29, 2016).

342. See Amended Complaint for Declaratory and Injunctive Relief, supra note 283, at 22.

343. Id.

344. Id. at 20.

345. Id.

346. Paul Rolly, Utah School District Shelves Health Books Because of Sex Talk, Salt Lake Trib. (Feb. 7, 2014), http://archive.sltrib.com/story.php?ref=/sltrib/politics/57506243-90/district-books-sexual-policy.html.csp [http://perma.cc/XS5F-XVDG].

347. Id.

348. Rebecca J. Donatelle, Health: The Basics, Custom Edition for Canyons School District (2014) (on file with the *Columbia Law Review*).

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[349]:


The desire to form lasting and committed intimate relationships is shared by most adults, regardless of sexual orientation.

* 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.

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?

* 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.

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 a state's enforcement of an anti-gay curriculum law: a public school's health textbook in which verbal and visual depictions of lesbian, gay, and bisexual people and orientations have been literally marked for deletion by school district officials.

b. *Wisconsin: Weak Enforcement.* — Wisconsin's pattern of enforcement is markedly different from Utah's. On the books, Wisconsin law still facially discriminates against lesbian and gay students by excluding same-sex couples from "marriage"—the only sexual relationships that the state's curriculum law officially sanctions.[350] But the state's education regulations and curriculum guidelines provide no evidence that the anti-gay provisions of the state's curriculum law have ever actually been enforced.

Wisconsin's curriculum law requires instruction that "[p]resents abstinence from sexual activity as the preferred choice of behavior for unmarried pupils" and "[e]mphasizes that abstinence from sexual activity before marriage is the only reliable way to prevent pregnancy and sexually transmitted diseases, including [HIV]."[351] In 2006, the state legislature and Wisconsin voters approved a constitutional amendment declaring that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state."[352]

349. Id. at 146, 162–63 (displaying annotations made by a district official).
350. Wis. Const. art. XIII, § 13.
351. Wis. Stat. § 118.019(2m) (2017).
352. Wis. Const. art. XIII, § 13.

Paradoxically, the legislature later amended the state's curriculum law to prohibit the use of instructional materials that discriminate against students based on sexual orientation, among other traits.[353] Although the legislature cautioned that this provision should not be construed to prohibit "instruction on abstinence from sexual activity,"[354] it made no attempt to reconcile the curriculum law's pro-gay antidiscrimination provision with the state's anti-gay definition of marriage, which remains 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[355] and specifically called for the "[i]nclusion of LGBTQ people or issues in school curricula."[356]

2. *Evidence from the Federal Government.* — The most surprising evidence of the ongoing enforcement of anti-gay curriculum laws comes from the U.S. Department of Health and Human Services. In 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.[357] As previously noted, Title V provides an eight-point definition of "abstinence education" with which states must comply in order to qualify for federal grants.[358] 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,"[359] "teach[] that a mutually faithful monogamous relationship in context of *marriage* is the expected standard of human sexual activity,"[360] and "teach[] that sexual activity outside of the context of *marriage* is likely to have harmful psychological and physical effects."[361] In Section 3 of the Defense of

353. Wis. Stat. § 118.019(2d).

354. Id.

355. Wis. Dep't of Pub. Instruction, Human Growth and Development: A Resource Guide to Assist School Districts in Policy, Program Development, and Implementation 217–24 (5th ed. 2014), http://dpi.wi.gov/sites/default/files/imce/sspw/pdf/hgdedition5.pdf [http://perma.cc/XSH3-2J3S].

356. Safe Schools for Lesbian, Gay, Bisexual, and Transgender Students, Wis. Dep't of Pub. Instruction, http://dpi.wi.gov/sspw/safe-schools/lgbt [http://perma.cc/2M2T-GHH9] (last visited July 27, 2017).

357. See Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, 129 Stat. 87 (codified at 42 U.S.C. § 710(a) (2012)); Protecting Access to Medicare Act of 2014, Pub. L. No. 113-93, 128 Stat. 1040; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Welfare Reform Extension Act of 2003, Pub. L. No. 108-40, 117 Stat. 836; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

358. 42 U.S.C. § 710(b)(2).

359. Id. § 710(b)(2)(B) (emphasis added).

360. Id. § 710(b)(2)(D) (emphasis added).

361. Id. § 710(b)(2)(E) (emphasis added).

Marriage Act, the term "marriage" is defined to include "only a legal union between one man and one woman as husband and wife."[362]

Shortly after the Supreme Court invalidated Section 3 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 effect, and ensure that committed and loving married couples throughout the country would receive equal treatment."[363] 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.[364] As part of this effort, 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 to provide equal services and support to same-sex marriages.[365]

To date, however, the Department has not issued any guidance about *Windsor*'s impact on the funding or administration of "abstinence education" programs under Title V. As recently as 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)."[366] 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."[367]

In fiscal year 2016, the Department distributed more than $59 million in Title V funds to thirty-five states and two U.S. territories.[368] Two-thirds of these funds were received by states that are still governed by anti-gay curriculum laws.[369] Unless the Department (or a third party) conducts a comprehensive review of the curricula taught by these grantees, it will be impossible to know exactly how many grantees are still excluding same-sex couples from the definition of "marriage," thereby teaching abstinence education in a discriminatory manner. In the past, when third parties have reviewed the content of abstinence-education

362. 1 U.S.C. § 7 (2012), invalidated by United States v. Windsor, 133 S. Ct. 2375 (2013).

363. Memorandum from Eric H. Holder, Jr., Attorney Gen., U.S. Dep't of Justice, to Barack Obama, President of the U. S., Implementation of *United States v. Windsor* 1 (June 20, 2014) [hereinafter Holder *Windsor* Memo], http://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf [http://perma.cc/G693-86R4].

364. Highlights of Agency Implementation of *United States v. Windsor* at 2–4, attachment to Holder *Windsor* Memo, supra note 364.

365. Id.

366. Admin. for Children & Families, supra note 73, at 5.

367. Id. at 22.

368. U.S. Dep't of Health & Human Servs., supra note 30.

369. Id.

programs, they have found that these programs systematically ignore and stigmatize same-sex relationships.[370] Given the history of these programs—especially the religious and political affiliations of the organizations that developed them—there is little reason to presume they have been updated to include nonderogatory references to same-sex relationships in response to the Supreme Court's rulings in *Windsor* and *Obergefell*.[371]

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

The question of constitutionality has hovered over anti-gay curriculum laws since they were first adopted. 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."[372] However, 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.[373]

More than twenty years later, this question remains unresolved. To date, no court has had an opportunity to address it. Meanwhile, legal scholars have published a handful of articles on the constitutionality of anti-gay curriculum laws.[374] This literature relies on a range of conflicting legal theories, some of which are based on sharply 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,[375] "rational review with a bite,"[376] or traditional rational basis review.[377] One author claims that "the strongest potential challenge to these statutes would be a teacher's First

370. See, e.g., Sexuality Info. & Educ. Council of the U.S., Pride or Prejudice: How Fear-Based Abstinence-Only-Until-Marriage Curricula Present Sexual Orientation, Cmty. Action Kit, http://www.communityactionkit.org/index.cfm?fuseaction=page.viewPage&pageID=1095&nodeID=3&stopRedirect=1 [http://perma.cc/M8P5-GCZD] (last visited July 27, 2017).

371. My own survey of state statutes, regulations, and curriculum guidelines did not identify any states that have updated these policies in response to *Windsor* or *Obergefell*. See supra section III.B and sources cited therein.

372. Nat'l Gay Task Force v. Bd. of Educ., No. CIV-80-1174-E, 1982 WL 31038, at *13 (W.D. Okla. June 29, 1982), rev'd, 729 F.2d 1272 (10th Cir. 1984).

373. Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1272, 1275 (10th Cir. 1984).

374. See, e.g., Cooley, supra note 14; Hamed-Troyansky, supra note 14; Hoshall, supra note 14; Lenson, supra note 14; Rodriguez, supra note 14; McGovern, supra note 14.

375. Cooley, supra note 14, at 1044.

376. Rodriguez, supra note 14, at 37.

377. Lenson, supra note 14, at 159.

Amendment claim,"[378] while another concludes that "'no promo homo' laws are likely valid under the First Amendment."[379] 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 relevant to a national campaign against anti-gay curriculum laws for both pragmatic and doctrinal reasons. First, the equal protection challenge targets a single quality 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.[380] Second, the equal protection challenge is based on a consistent trend in the Court's analysis of anti-gay laws. In four rulings issued over the last two decades—*Romer v. Evans*,[381] *Lawrence v. Texas*,[382] *United States v. Windsor*, [383] and *Obergefell v. Hodges*[384]—the Court has invalidated every anti-gay law that has come before it, without specifying the level of scrutiny that applies to such laws. Although the Court primarily analyzed two of these cases under a due process framework, rather than an equal protection framework,[385] the Court expressly endorsed the equal protection claims brought in all four cases.[386] By relying on the principles articulated in these cases, this Part explains why the equal protection challenge is likely to prevail in all jurisdictions, regardless of what level of scrutiny is applied to anti-gay curriculum laws.[387]

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378. Id. at 152; see also Nancy Tenney, Note, The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment, 60 Brook. L. Rev. 1599, 1605 (1995).

379. Hamed-Troyansky, supra note 14, at 91.

380. 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 first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.").

381. 517 U.S. 620 (1996).

382. 539 U.S. 558 (2003).

383. 133 S. Ct. 2675 (2013).

384. 135 S. Ct. 2584 (2015).

385. See *Obergefell*, 135 S. Ct. at 2597–602; see also *Lawrence*, 539 U.S. at 564.

386. See *Obergefell*, 135 S. Ct. at 2602–05; *Windsor*, 133 S. Ct. at 2693; *Lawrence*, 539 U.S. at 574; *Romer*, 517 U.S. at 635.

387. 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," Bd. of Educ. v. Pico, 457 U.S. 853, 866–68 (1982) (plurality opinion); (2) they may infringe on a teacher's "academic freedom," see Garcetti v. Ceballos, 547 U.S. 410, 425 (2006); Keyishian v. Board

A. *Standing: Injury and Stigma*

Before a court will hear a 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.[388]

In *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, the Court specifically found that anti-gay laws "injure" and "stigmatize" lesbian, gay, and bisexual people.[389] In *Romer*, the Court found that the challenged law "inflicts on [gays and lesbians] immediate, continuing, and real injuries" and "classifies homosexuals . . . to make them unequal to everyone else."[390] In *Lawrence*, the Court found that the challenged law "demean[ed] the lives of homosexual persons" and was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[391] 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."[392] 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."[393] Additionally, in both *Windsor* and *Obergefell*, the Court found that anti-gay marriage laws "humiliate" the children of same-sex couples[394] 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."[395]

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of Regents, 385 U.S. 589, 603 (1967); (3) they may "prescribe what shall be orthodox in politics, . . . religion, or other matters," W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); and (4) they may be unconstitutionally vague and overbroad, *Keyishian*, 385 U.S. at 608; Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1272, 1274 (10th Cir. 1984). 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 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 curriculum policies cannot be challenged under the Free Speech Clause).

388. See Allen v. Wright, 468 U.S. 737, 755–56 (1984).

389. *Obergefell*, 135 S. Ct. at 2602–05; *Windsor*, 133 S. Ct. at 2693; *Lawrence*, 539 U.S. at 574; *Romer*, 517 U.S. at 635.

390. *Romer*, 517 U.S. at 635.

391. *Lawrence*, 539 U.S. at 575.

392. *Windsor*, 133 S. Ct. at 2696.

393. *Obergefell*, 135 S. Ct. at 2602.

394. Id. at 2590; see also *Windsor*, 133 S. Ct. at 2694.

395. *Windsor*, 133 S. Ct. at 2694; see also id. at 2696 ("DOMA instructs all federal 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.").

The same reasoning applies to anti-gay curriculum laws. By restricting classroom instruction about "homosexuality," these laws instruct lesbian, gay, and bisexual students, and students raised by same-sex couples, that "homosexuality" is too shameful, immoral, or unlawful to be discussed on the same terms that heterosexuality is discussed.[396] 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 teachers to instruct students that "homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense."[397] In Oklahoma, the law requires teachers to instruct students that "homosexual activity" is "primarily responsible" for contact with "the AIDS virus."[398]

In other instances, the stigma arises from the interplay between a state's curriculum law and its sodomy or marriage laws. Mississippi, for example, requires instruction in "the current state law related to . . . homosexual activity,"[399] while defining sodomy as "the detestable and abominable crime against nature," punishable by a term of imprisonment up to ten years.[400] Similarly, Utah prohibits teachers from using "any means or methods that facilitate or encourage the violation of any state or federal criminal law by a minor or an adult,"[401] while defining sodomy as a Class B misdemeanor.[402] To the extent that a state's curriculum laws enforce these unconstitutional provisions, they too "demean the lives of homosexual persons," like the sodomy laws to which they refer.

The same reasoning applies to the seventeen states that require instruction on the benefits of "abstinence from sexual activity outside of marriage," while defining the term "marriage" to exclude same-sex couples.[403] To the extent that the states' curriculum laws enforce these unconstitutional provisions, they impose many of the same stigmas identified in *Windsor* and *Obergefell*: "a stigma upon all who enter into same-sex marriages"[404] and a stigma on all children raised in such marriages.[405] Moreover, as one lower court explained in another marriage case, these laws impose a related stigma on lesbian and gay children,

396. 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.").

397. Tex. Health & Safety Code Ann. § 163.002 (West 2017).

398. Okla. Stat. Ann. tit. 70, § 11-103.3 (West 2013).

399. Miss. Code Ann. § 37-13-171 (2016).

400. Miss. Code Ann. § 97-29-59 (2014).

401. Utah Code Ann. § 53A-13-101 (LexisNexis 2016).

402. Utah Code Ann. § 76-5-403 (LexisNexis 2012).

403. See supra section I.E.

404. United States v. Windsor, 133 S. Ct. 2675, 2681 (2013).

405. Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015); see also *Windsor*, 133 S. Ct. at 2694.

"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."[406]

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 different-sex couples do. Under many of these laws, teachers appear to be facially prohibited from instructing students that same-sex couples may exercise "the fundamental right to marry," notwithstanding the Court's ruling in *Obergefell*.

To make matters worse, anti-gay curriculum laws contribute to the bullying and harassment of LGBT students. In recent years, studies have shown that LGBT students are exposed to pervasive bullying in our nation's schools[407]—and that such bullying exposes students to increased risks of school dropout,[408] unemployment,[409] and suicide.[410] To date, no studies have specifically focused on the relationship between bullying and anti-gay curriculum laws, but the circumstantial evidence is substantial. Research demonstrates that when LGBT students attend schools that have not adopted LGBT-inclusive curricula, they face higher risks of HIV, pregnancy, bullying, and suicide.[411] In some cases, school officials have specifically cited anti-gay curriculum policies as justification for failing to

406. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1213 (D. Utah 2013).

407. See, e.g., Emily A. Greytak et al., Gay, Lesbian & Straight Educ. Network, Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools 18–19 (2009), http://www.glsen.org/sites/default/files/Harsh%20Realities.pdf [http://perma.cc/VG7S-Q8L6]; Joseph G. Kosciw et al., Gay, Lesbian & Straight Educ. Network, 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools, at xvi–xvii (2016), http://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report_0.pdf [http://perma.cc/ZF85-3JW9]; Elise D. Berlan et al., Sexual Orientation and Bullying Among Adolescents in the Growing Up Today Study, 46 J. Adolescent Health 366, 368 (2010); Kate L. Collier et al., Sexual Orientation and Gender Identity/Expression Related Peer Victimization in Adolescence: A Systematic Review of Associated Psychosocial and Health Outcomes, 50 J. Sex Res. 299, 299 (2013); Laura Kann et al., Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9–12, Morbidity & Mortality Wkly. Rep., June 10, 2011, at 1, 9, http://www.cdc.gov/mmwr/pdf/ss/ss6007.pdf [http://perma.cc/QL2J-CLRU].

408. See Jorge C. Srabstein & Thomas Piazza, Public Health, Safety and Educational Risks Associated with Bullying Behaviors in American Adolescents, 20 Int'l J. Adolescent Med. & Health 223, 229 (2008).

409. See Sarah Brown & Karl Taylor, Bullying, Education and Earnings: Evidence from the National Child Development Study, 27 Econ. Educ. Rev. 387, 388 (2008).

410. Young Shin Kim & Bennett Leventhal, Bullying and Suicide: A Review, 20 Int'l J. Adolescent Med. & Health 133, 151 (2008).

411. 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, 944 (2001).

protect LGBT students from bullying or for denying students the right to form LGBT organizations. [412] 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 plaintiffs establish standing, they must identify the class of persons targeted by anti-gay curriculum laws. Until now, this Article has presumed that anti-gay curriculum laws are properly characterized as "anti-gay" because they facially discriminate against lesbian, gay, and bisexual people. By prohibiting teachers from talking about "homosexuality," for example, these laws discriminate on the basis of sexual orientation, treating lesbian, gay, and bisexual people as immoral, dangerous, or inferior.

Yet in sodomy and marriage cases, states have attempted to sidestep this analysis by claiming that anti-gay laws target homosexual conduct, not homosexual status.[413] 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 any particular class. 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 the concept of 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*"[414]—a term defined to include "the typical *way of life* of an individual, group, or culture."[415] In Alabama, the law refers to "homosexuality"[416]—a term defined to include "the quality or *state of being* homosexual," as well as "sexual activity with another of the same sex."[417] 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

412. Complaint ¶¶ 118, 123, Doe v. Anoka-Hennepin Sch. Dist. No. 11, No. 11-CV-01999 (D. Minn. July 21, 2011), 2011 WL 2935040; see also Gonzalez v. Sch. Bd., 571 F. Supp. 2d 1270 (S.D. Fla. 2008).

413. See, e.g., Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Texas argues . . . that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct.").

414. Ariz. Rev. Stat. Ann. § 15-716(c) (2016) (emphasis added).

415. Lifestyle, Merriam-Webster, http://www.merriam-webster.com/dictionary/lifestyle [http://perma.cc/8CKL-Y77G] (last visited July 27, 2017) (emphasis added).

416. Ala. Code § 16-40A-2(c)(8) (LexisNexis 2012) (emphasis added).

417. Homosexuality, Merriam-Webster, http://www.merriam-webster.com/dictionary/homosexuality [http://perma.cc/5KF6-ZK5X] (last visited July 27, 2017) (emphasis added).

recognized by law."[418] By using terms like "life-style," "homosexuality," and "marriage," these laws target a "way of life" and "state of being," in addition to 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 toward gay persons as a *class*."[419] A majority of the Court expressly adopted Justice O'Connor's reasoning in *Christian Legal Society v. Martinez*, observing that "our decisions have declined to distinguish between status and conduct in this context."[420] In *Obergefell v. Hodges*, the Court reaffirmed that laws against same-sex sodomy and same-sex marriage were targeted at "gays and lesbians,"[421] even though they prohibited everyone (that is, people of all sexual orientations) from engaging in intimacy with and marrying persons of the same sex.

C. *The Level of Scrutiny*

Next, plaintiffs will have to address which level of scrutiny applies to anti-gay curriculum laws, given that they discriminate against lesbian, gay, and bisexual people. The Supreme Court has traditionally 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";[422] (2) whether the class has been historically "subjected to discrimination"; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics"; and (4) whether the class is "a minority or politically powerless."[423] In the years since these factors were originally articulated, the Court has had several opportunities to decide whether classifications based on sexual orientation satisfy them. It has repeatedly declined to do so.

In *Obergefell*, however, the Court made several findings suggesting that heightened scrutiny should apply 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,

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418. Marriage, Merriam-Webster, http://www.merriam-webster.com/dictionary/marriage [http://perma.cc/MM49-XNNZ] (last visited July 27, 2017) (emphasis added).

419. 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (emphasis added).

420. 561 U.S. 661, 689 (2010) (citing *Lawrence*, 539 U.S. at 575).

421. 135 S. Ct. 2584, 2604 (2015).

422. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (internal quotation marks omitted) (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

423. Lyng v. Castillo, 477 U.S. 635, 638 (1986); see also Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (citing *Lyng*, 477 U.S. at 638).

and immigration law.[424] Second, the Court found "powerful confirmation from the law itself that gays and lesbians can create loving, supportive families"[425]—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."[426] 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 applying another standard. In *Romer*, the Court reasoned 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.[427] In *Windsor*, the Court reaffirmed this principle, holding that "[i]n determining whether a law is motived by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration."[428] The Court has not clarified whether "careful consideration" represents a new form of heightened scrutiny or a subtle twist in the application of rational basis review.[429] 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 have prohibited or restricted instruction about a class of persons in the curriculum of public schools.[430]

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424. *Obergefell*, 135 S. Ct. at 2596.

425. Id. at 2600.

426. Id. at 2596.

427. Romer v. Evans, 517 U.S. 620, 633 (1996) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)).

428. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting *Romer*, 517 U.S. at 633).

429. See Dale Carpenter, *Windsor* Products: Equal Protection from Animus, 2013 Sup. Ct. Rev. 183, 217–18; Anthony O'Rourke, *Windsor* Beyond Marriage: Due Process, Equality & Undocumented Immigration, 55 Wm. & Mary L. Rev. 2171, 2186–90 (2014).

430. Courts have invalidated the few laws that may serve as analogies, casting further doubt on the validity of anti-gay curriculum laws. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (invalidating a state law that prohibited the teaching of foreign languages in public or private schools).

Since the 1970s, many states have adopted sex- and HIV-education 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 the class of women in a wholesale manner—for example, 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. Compare Christian Legal Soc'y v. Martinez, 561 U.S. 661, 689 (2010) (declining to distinguish between homosexual conduct and homosexual status), with Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) (distinguishing between opposition to abortion and sex-based animus or intent), and Geduldig v. Aiello, 417 U.S.

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,"[431] which is the traditional terminology of traditional 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.[432] And in *Obergefell*, the Court found that anti-gay marriage laws violated the "fundamental right to marry," again without specifying a level of scrutiny.[433] In light of these rulings, one can just as easily imagine the Court analyzing anti-gay curriculum laws under a third framework: Rather than specifying a level of scrutiny, the Court can strike down these laws by applying the principles articulated in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.

D. *The State's Interests*

Rather than debating whether the Court applied heightened scrutiny in *Lawrence*, *Windsor*, or *Obergefell*,[434] this section proceeds under the minimum standard that the Supreme Court articulated in *Romer*: At the very least, all laws must satisfy rational basis review.[435] Under this standard, laws "must bear a rational relationship to a legitimate governmental purpose,"[436] and "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[437]

Historically, state legislatures have cited 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

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484, 496–97 & n.20 (1974) (holding that exclusion based on pregnancy does not constitute discrimination based on sex, absent evidence that pregnancy-based exclusion is a pretext for sex discrimination).

431. 517 U.S. at 635.

432. *Windsor*, 133 S. Ct. at 2696; Lawrence v. Texas, 539 U.S. 558, 578 (2003).

433. Obergefell v. Hodges, 135 S. Ct. 2584, 2602, 2605 (2015).

434. See, e.g., Carpenter, supra note 429, at 197, 201–02; see also Laurence H. Tribe, *Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1916–17 (2004).

435. 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.

436. *Romer*, 517 U.S. at 635.

437. Id. at 634 (emphasis omitted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

second interests do not qualify as "legitimate" under the principles articulated in *Romer*, *Lawrence*, and *Windsor*. The third and fourth interests are legitimate, but anti-gay curriculum laws are not rationally related to them.

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."[438] 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."[439]

But *Bowers* has been overruled.[440] And on three occasions, the Court has rejected the claim that anti-gay laws can be justified by moral disapproval of homosexual conduct. In *Romer*, the state of Colorado sought to defend "the validity of legislating on the basis of moral judgment,"[441] arguing that the challenged law was justified by the state's interest in protecting "the contours of social and moral norms."[442] The Court rejected this claim, holding that the challenged law was "inexplicable by anything but animus toward the class it affects."[443] In *Lawrence*, the state of Texas argued that the challenged law was justified by "the State's long-standing moral disapproval of homosexual conduct."[444] 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."[445] Finally, in *Windsor*, the Court noted that Congress had offered several 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."[446] Rejecting these justifications, the Court held that the law was "motived by an improper animus"—an "avowed purpose . . . to impose a disadvantage,

438. Ala. Code § 16-40A-2(c)(8) (LexisNexis 2012); Tex. Health & Safety Code Ann. §§ 85.007(b)(2), 163.002(8) (West 2017).

439. 478 U.S. 186, 196 (1986), overruled by Lawrence v. Texas, 539 U.S. 558, 578 (2003).

440. *Lawrence*, 539 U.S. 558, 578.

441. Reply Brief of Petitioners at 16 n.27, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 466395.

442. Brief for Petitioners at 40, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 310026.

443. *Romer*, 517 U.S. at 632.

444. Brief for Respondents at 41, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 470184.

445. *Lawrence*, 539 U.S. at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

446. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (internal quotation marks omitted) (quoting H.R. Rep. No. 104-664, at 12–13 (1996)).

a separate status, and so a stigma upon all who enter into same-sex marriages."[447] In each case, the Court explicitly found that the injuries inflicted by the challenged anti-gay laws were not justified by any "legitimate" interests.[448]

2. *Children's Sexual 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 conduct by students, teachers, or volunteers" because "school employees . . . serve as examples to their students."[449] 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."[450]

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."[451] Moreover, the Court has acknowledged that "schools must teach by example the shared values of a civilized social order."[452] But the Court's rejection of moral disapproval as a basis for anti-gay laws in *Romer*, *Lawrence*, and *Windsor* forecloses states from asserting a specific interest in the promotion of *heterosexuality* among minors, or among persons of any age. By itself, the state's interest in promoting heterosexuality is nothing more than a thinly veiled moral objection to homosexuality. 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

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447. Id.

448. Id. at 2696; *Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 632. In response to this analysis, states might try to distinguish anti-gay curriculum laws from the laws invalidated in *Romer*, *Lawrence*, and *Windsor* on the ground that anti-gay curriculum laws apply only to minors, whereas sodomy and marriage laws regulate the conduct of consenting adults. In *Lawrence*, the Court emphasized that "the present case does not involve minors," 539 U.S. at 578, and in *Windsor*, the Court emphasized that "this opinion and its holding are confined to . . . lawful marriages," 133 S. Ct. at 2696—marriages that necessarily did not involve minors. But especially in light of the Court's analysis in *Windsor*, it seems hard to imagine the Court distinguishing curriculum laws on this ground. Once the Court concludes that "moral disapproval of homosexuality," id. at 2693, is the same thing as "the purpose . . . to disparage and to injure" same-sex couples, id. at 2696, it can no longer accept this interest as a legitimate justification for discrimination against persons of any age. Long before *Romer*, *Lawrence*, and *Windsor*, the Court recognized that "a bare . . . desire to harm a politically unpopular group" cannot qualify as a "legitimate" interest under the Equal Protection Clause. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

449. Utah Code Ann. § 53A-13-101(4)(a) (LexisNexis 2016).

450. S. Journal, 51st Leg., 2d Sess., at 1243 (Utah 1996).

451. Ambach v. Norwick, 441 U.S. 68, 78–79 (1979).

452. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

homosexuality are articulated in these terms, they represent a desire to minimize the number of people who become lesbian, gay, and bisexual. To the extent that this objection betrays a fantasy of "a world without any more homosexuals in it,"[453] it is a paradigm of "animus"—"a bare . . . desire to harm a politically unpopular group."[454]

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 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."[455] And in Arizona, teachers are prohibited from providing "instruction which . . . [s]uggests that some methods of sex are safe methods of homosexual sex."[456]

In both *Bowers* and *Lawrence*, the parties and amici sharply disputed whether sodomy laws were rationally related to the prevention of HIV and other sexually transmitted infections.[457] In *Bowers*, the majority did not rely on this state interest while upholding the law; in *Lawrence*, the majority did not discuss this state interest while invalidating the law.[458] The Court's silence on this subject is significant—especially in *Lawrence*, given the Court's invalidation of an anti-gay law. In order to reach this result, the *Lawrence* Court must have concluded that the state's interest in public health—like the state's interest in public morals—did not justify the sodomy law's "intrusion into the personal and private life of the individual."[459]

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.[460] 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.[461] Under the state's sodomy

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453. Eve Kosofsky Sedgwick, How to Bring Your Kids Up Gay, 29 Soc. Text 18, 25 (1991) (referring to this "Western fantasy" as "overarching" and "hygienic").

454. Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

455. Okla. Stat. Ann. tit. 70, § 11-103.3(D)(1) (West 2013).

456. Ariz. Rev. Stat. Ann. § 15-716(C)(3) (2014).

457. Brief for Texas Physicians Resource Council et al. as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 367566; Brief for Petitioner at 37, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939; see also Reply Brief at *17, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 1098835; Brief for Respondent at *27, *Bowers*, 478 U.S. 186 (No. 85-140), 1986 WL 720442.

458. *Lawrence*, 539 U.S. at 578; *Bowers*, 478 U.S. at 196.

459. *Lawrence*, 539 U.S. at 578.

460. State v. Limon, 122 P.3d 22, 36 (Kan. 2005).

461. Id. at 24–25.

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.[462] In defense of this disparity, the State argued that homosexual conduct posed a higher risk of HIV infection than heterosexual conduct.[463] By discouraging minors from engaging in homosexual conduct, the State claimed, the law was protecting minors from exposure to HIV risk.[464]

But as the Kansas Supreme Court explained, the connection between same-sex intimacy and HIV risk is exceptionally weak.[465] Echoing the petitioner's brief in *Lawrence*, the court listed three examples of the law's over- and underinclusiveness. 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 is through heterosexual intercourse."[466] 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 males, or through cunnilingus."[467] Finally, even "the risk of HIV transmission during anal sex with an infected partner is the same for heterosexuals and homosexuals."[468] For these reasons, the court concluded, the State's public health claims did "not satisfy . . . the rational basis test."[469]

In cases challenging anti-gay curriculum laws, the link between homosexual conduct and sexually transmitted infections is even weaker than in cases challenging 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.[470]

But among this argument's many fallacies, the law's inclusion of "female to female contact" may be the most irrational.[471] 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) healthier than its heterosexual counterpart. To the

462. Id. at 25.

463. Id. at 36–37. While the State's argument could have been framed in terms of other sexually transmitted infections, the argument's weaknesses are aptly illustrated by the example of HIV.

464. Id.

465. Id.

466. Id.

467. Id. at 37.

468. Id.

469. Id.

470. See supra section IV.B.

471. *Limon*, 122 P.3d at 36.

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[472]—not to mention pregnancy,[473] rape, sexual assault, and physical abuse.[474] 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.[475]

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 broad authority to regulate public schools—specifically, the power to prescribe the curriculum in public schools.[476] In a long line of cases, the Supreme Court has acknowledged that states have the authority "to prescribe the curriculum for its public schools,"[477] to determine "what manner of speech in the classroom . . . is inappropriate,"[478] 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.'"[479]

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472. 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).

473. 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) (2013); Ind. Code § 20-30-5-13 (2017); Mo. Rev. Stat. § 170.015(1) (2015); Ohio Rev. Code Ann. § 3313.6011(C)(3) (West 2012). Needless to say, states cannot logically invoke concerns about teenage pregnancy and out-of-wedlock childbirth to justify the anti-gay provisions of HIV- 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.").

474. 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, 421 (1999).

475. 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, Morbidity & Mortality Wkly. Rep., Oct. 28, 2011, at 1, 11.

476. See, e.g., S. Journal, 51st Leg., 2d Spec. Sess., at 1231 (Utah 1996) (on file with the *Columbia Law Review*) ("[T]his legislation presupposes and reasserts the importance of state and local control over public education.").

477. Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

478. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

479. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (quoting *Fraser*, 478 U.S. at 683).

But public education is not the only domain in which states have traditionally enjoyed broad authority to legislate and conflicts have arisen between state sovereignty and the Fourteenth Amendment. In *United States v. Lopez*, the Court recognized that the Constitution gives states broad authority to regulate in the domains of "criminal law" and "family law," as well as in "local elementary and secondary schools."[480] Yet before and after *Lopez*, the Court has maintained that states must respect the individual rights guaranteed by the Fourteenth Amendment, even within these traditional domains of state power.[481] In *Lawrence* and *Obergefell*, the Court struck down anti-gay criminal and marriage laws, in spite of the deference that state legislatures have traditionally received in the domains of criminal and family law.[482]

The Court's jurisprudence leaves no reason to presume that state legislatures have broader authority to regulate within public schools than in these other traditional domains of state power. On the contrary, the Court has long held that a state's authority to regulate public schools must be discharged "within the limits of the Bill of Rights."[483] The leading cases are familiar, but they offer instructive examples in this regard. In *West Virginia v. Barnette*, the Court held that states could not require schoolchildren to recite the Pledge of Allegiance and salute the American flag.[484] In *Brown v. Board of Education*, the Court held that states could not segregate public schools based on race, even if they provided school facilities that were otherwise equal.[485] In *Tinker v. Des Moines Independent School District*, the Court held that public schools could not prohibit students from wearing black armbands to protest the Vietnam War.[486] In *Epperson v. Arkansas*, the Court held that states could not ban the teaching of Darwin's theory of evolution in public schools.[487] And in *Edwards v. Aguillard*, the Court held that states could not require the

480. 514 U.S. 549, 564–65 (1995).

481. See, e.g., United States v. Windsor, 133 S. Ct. 2675, 2691 (2013) ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons; but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" (citation omitted) (first quoting Loving v. Virginia, 388 U.S. 1, 12 (1967); then quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975))); *Loving*, 388 U.S. at 7 ("While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, . . . the State does not contend . . . that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so . . . ." (citing Maynard v. Hill, 125 U.S. 190 (1888))).

482. Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015); Lawrence v. Texas, 539 U.S. 558, 578 (2003).

483. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

484. Id. at 642.

485. 347 U.S. 483, 493 (1954).

486. 393 U.S. 503, 514 (1969).

487. 393 U.S. 97, 109 (1968).

teaching of creationism in public schools.[488] In *Barnette*, the 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.[489]

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

There is one sense in which an equal protection challenge to anti-gay curriculum laws would require the Supreme Court to break new ground: Although the Court has twice invalidated state curriculum laws under the Establishment Clause,[490] it has not had an opportunity to review any state's curriculum law under the Equal Protection Clause. Among other things, this dearth of cases reinforces the conclusion that anti-gay curriculum laws are "discriminations of an unusual character."[491] But the Court's wait may soon be over, because a similar challenge is currently pending in Arizona.

In *Arce v. Douglas*, the Ninth Circuit noted that if a state curriculum law were "motivated by a discriminatory purpose," it would violate the Equal Protection Clause.[492] In this case, the Arizona Legislature had adopted a law that led to the elimination of the Mexican American Studies (MAS) program in Tucson's public schools.[493] Although the law did not facially target this program, it prohibited the state's public schools from offering any classes that (1) "[a]re designed primarily for pupils of a particular ethnic group" or (2) "[a]dvocate ethnic solidarity instead of the treatment of pupils as individuals."[494] Pursuant to this law, the state's superintendent required the Tucson school district "to remove all MAS instructional materials from K-12 classrooms."[495]

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488. 482 U.S. 578, 596–97 (1987).

489. *Barnette*, 319 U.S. at 637. Although *Barnette*, *Tinker*, *Epperson*, and *Edwards* were decided under the specific guarantees of 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. Bd. of Educ., 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 Clause in the Fourteenth Amendment. For this reason, the Fourteenth Amendment places meaningful limits on a state's authority "to prescribe the curriculum for its public schools." *Epperson*, 393 U.S. at 107.

490. *Edwards*, 482 U.S. at 597; *Epperson*, 393 U.S. at 107.

491. Romer v. Evans, 517 U.S. 620, 633 (1996) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)); see also supra section IV.C.

492. 793 F.3d 968, 977 (9th Cir. 2015).

493. Id. at 973.

494. Id. (quoting Ariz. Rev. Stat. Ann. § 15-112(A) (2011)).

495. Id. at 975.

A group of Mexican American students challenged the law under the Equal Protection Clause.[496] 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.[497] Notwithstanding the parties' stipulations, the district court found that the students had not proved that the law was motivated by a discriminatory purpose.[498] The Ninth Circuit reversed, holding that the students had alleged a valid claim under the Equal Protection Clause.[499] On remand, the district court held that "[t]he passage and enforcement of the law against the MAS program were motivated by anti-Mexican-American attitudes," in violation of the Fourteenth Amendment.[500]

Whatever the courts conclude about Arizona's law, the Ninth Circuit's equal protection framework is clearly correct.[501] If a discriminatory curriculum law could not be challenged under 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.[502] Even if a curriculum law discriminated based on disability,

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496. Id. at 973.

497. Id. at 974; see also Acosta v. Huppenthal, No. CV-10-623-TUC-AWT, 2013 WL 871892, at *17 & n.13 (D. Ariz. Mar. 8, 2013).

498. *Acosta*, 2013 WL 871892, at *14.

499. *Arce*, 793 F.3d at 976.

500. Memorandum of Decision at 39, González v. Douglas, No. CV 10-623 TUC AWT, 2017 WL 3611658, at *20 (D. Ariz. Aug. 22, 2017). The district court is now considering appropriate remedies. Id. at *22. The defendants have not indicated whether they are planning to appeal. E-mail from Erwin Chemerinsky, Dean, Berkeley Law, to Clifford Rosky, Professor of Law, S.J. Quinney Coll. of Law (Aug. 30, 2017) (on file with the *Columbia Law Review*).

501. See Helen Norton, The Equal Protection Implications of Government's Hateful Speech, 54 Wm. & Mary L. Rev. 159, 200 (2012) (arguing that although Alabama's anti-gay curriculum law was likely "government speech[,] . . . such speech might violate the Equal Protection Clause . . . if . . . [it] facilitated discrimination against GLBT students[,] . . . deterred GLBT students from participating in certain educational or extracurricular activities[,] . . . [or] communicated GLBT students' outsider or second-class status").

502. In *Board of Education v. Pico*, six Justices endorsed a similar analysis and result under the Free Speech Clause. 457 U.S. 853, 869–72 (1982) (plurality opinion). 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

rather than race or national origin, the Court would find that the law was "inexplicable by anything but animus toward the class that it affects" and that it lacked "a rational relationship to legitimate state interests."[503]

Although the Fourteenth Amendment applies only to the states, there is little doubt that the same 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."[504] Although the Court has often upheld government funding programs under the Free Speech Clause,[505] 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.[506]

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 intimate relationships and policies discriminating in immigration, military service, and public

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> all books authored by blacks or advocating racial equality and integration.

Id. at 870–71 (plurality opinion). In his dissenting opinion, joined by two other Justices, then-Justice Rehnquist wrote, "I can cheerfully concede all of this." Id. at 907 (Rehnquist, J., dissenting). Rather than objecting to Justice Brennan's analysis, he distinguished the present case from the plurality's hypotheticals on factual grounds. Id.

503. Romer v. Evans, 517 U.S. 620, 632 (1996).

504. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217–18 (1995); Bolling v. Sharpe, 347 U.S. 497 (1954)).

505. See, e.g., Rust v. Sullivan, 500 U.S. 173, 178 (1991) (upholding federal regulations prohibiting federally funded family-planning projects from "advocating" abortion as a method of family planning).

506. See, e.g., *Adarand*, 515 U.S. at 217–18 (invalidating a federal funding program under the Fifth Amendment); Zobel v. Williams, 457 U.S. 55, 60–64 (1982) (invalidating a state funding program under the Fourteenth Amendment). In *Windsor*, the Court held that DOMA's definition of marriage was motivated by a discriminatory purpose and had a discriminatory impact on same-sex couples—that is, the "avowed purpose and practical effect of [DOMA] [were] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages . . . ." *Windsor*, 133 S. Ct. at 2693–96. In a federal challenge to the anti-gay provisions of Title V, plaintiffs would seek to enjoin the Department of Health and Human Services from applying DOMA's definition of "marriage" in the administration of Title V grants. In light of the Court's analysis of DOMA in *Windsor*, such plaintiffs would easily establish that DOMA's application in the administration of Title V grants is motivated by a discriminatory purpose and has a discriminatory impact on lesbian, gay, and bisexual students. The only remaining question would be whether DOMA's purpose and impact could somehow be justified by "legitimate" interests in the context of administering Title V grants—even though the Court has already held that DOMA's purpose and impact were not justified by "legitimate" interests in *Windsor*. Id. at 2696.

employment.[507] 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 means of deterring students from engaging in criminal conduct; before *Obergefell*, they could have been upheld as a means of deterring students from engaging in sexual activity outside of "marriage."

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 means 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 may have a moral obligation to seize it. If legislatures will not repeal these laws, organizations and individuals should strongly consider filing lawsuits to challenge them.[508] 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 curricula will help reduce these risks, bolstering the health, safety and well-being of LGBT students.[509] 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.

507. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

508. Given Utah's political culture, the Utah Legislature's repeal of the state's prohibition against "the advocacy of homosexuality" demonstrates the vulnerability of anti-gay curriculum laws. See supra notes 280–283 and accompanying text.

509. See supra notes 407–412 and accompanying text.

APPENDIX

TABLE A: TYPOLOGY OF ANTI-GAY CURRICULUM LAWS

Typology	Citations to Statutory Provisions
Don't Say Gay	La. Stat. Ann. § 17:281(A) (2013); S.C. Code Ann. § 59-32-30(A)(5) (2016).
No Promo Homo	Ariz. Rev. Stat. Ann. § 15-716(C) (2014).
Anti-Homo	Ala. Code § 16-40A-2(c)(8) (LexisNexis 2012); Ariz. Rev. Stat. Ann. § 15-716(C); Miss. Code Ann. § 37-13-171(2)(e) (2013); Okla. Stat. Ann. tit. 70, § 11-103.3(D)(1) (West 2013); Tex. Health & Safety Code Ann. §§ 85.007(b)(2), 163.002(8) (West 2011).
Promo Hetero	Fla. Stat. § 1003.46(2)(a) (2016); 105 Ill. Comp. Stat. Ann. 5/27-9.1(c)(2) (West 2012); N.C. Gen. Stat. § 115C-81 (2015).
Abstinence Until "Marriage"	Ala. Code § 16-40A-2; Ark. Code Ann. § 6-18-703 (2013); Fla. Stat. § 1003.46(2)(a); Ind. Code §§ 20-30-5-13, 20-34-3-17(a) (2015); La. Stat. Ann. § 17:281; Mich. Comp. Laws Ann. § 380.1507 (West 2013); Miss. Code Ann. § 37-13-171; Mo. Rev. Stat. § 170.015 (2015); N.C. Gen. Stat. § 115C-81; N.D. Cent. Code § 15.1-21-24 (2015); Ohio Rev. Code Ann. § 3313.6011 (West 2012); S.C. Code Ann. § 59-32-30(A); Tenn. Code Ann. § 49-6-1304 (2016); Tex. Health & Safety Code Ann. §§ 85.007, 163.002; Utah Code Ann. § 53A-13-101 (LexisNexis 2016); Va. Code Ann. § 22.1-207.1 (2016); Wis. Stat. § 118.019 (2016).

TABLE B. EVIDENCE REGARDING STATE ENFORCEMENT OF ANTI-GAY CURRICULUM LAWS

State	Citations to Education Regulation and Curriculum Guidelines
Alabama	Joseph B. Morton, Ala. Dep't of Educ., Alabama Course of Study: Health Education 32 (2009), http://www.alsde.edu/sec/sct/COS/HEALTH%202009%20—FINAL.pdf#search=health%20education [http://perma.cc/DH6G-M32T].
Arizona	Ariz. Admin. Code § R7-2-303 (2017) (requiring sex-education materials to "stress that pupils should abstain from sexual intercourse until they are mature adults"); Health and Nutrition Services, Ariz. Dep't of Educ., http://www.azed.gov/health-nutrition/ [http://perma.cc/755J-342A] (last visited Aug. 20, 2017).
Arkansas	Physical Education and Health, Ark. Dep't of Educ., http://www.arkansased.gov/divisions/learning-services/curriculum-and-instruction/curriculum-framework-documents/physical-education-and-health [http://perma.cc/6V6A-3BCN] (last visited July 27, 2017).
Florida	Policies, Standards & Guidelines: State Statutes Related to Health Education, Fla. Dep't of Educ., http://www.fldoe.org/schools/safe-healthy-schools/healthy-schools/sexual-edu/policies.stml [http://perma.cc/QZ6X-HNWT] (last visited Aug. 19, 2017) (requiring teachers to emphasize the benefits of monogamous heterosexual marriage).
Illinois	Ill. State Bd. of Educ., Sex Education Guidance Document (2016), http://www.isbe.net/Documents/guidance-16-1-sex-education.pdf#search=sex%20education [http://perma.cc/Q4AP-C7KP].
Indiana	Ind. Dep't of Educ.,CTE: Health Science (June 12, 2014), http://www.doe.in.gov/standards/cte-health-science [http://perma.cc/FD3R-UKYG].
Louisiana	La. Admin. Code tit. 28, § 2305 (2016) (encouraging sexual abstinence outside of marriage); Academic Standards + Grade Level Expectations, La. Dep't of Educ., http://www.louisianabelieves.com/resources/library/academic-standards [http://perma.cc/T7PZ-XKKE] (last visited July 27, 2017).
Michigan	Health & Safety: Curriculum & Standards, Mich. Dep't of Educ., http://www.michigan.gov/mde/0,4615,7-140-74638_74639—,00.html [http://perma.cc/7BHU-ANXR] (last visited July 27, 2017).
Mississippi	Miss. Code Ann. § 37-13-171 (2016) (repeal effective July 1, 2021) (describing abstinence-only education as the state standard and discouraging sex before marriage); Miss. Dep't of Educ., Contemporary Health (9-12), at 91, 92, 109 (2012), http://www.mde.k12.ms.us/docs/healthy-schools/2013-health-science-half-credit-v1.pdf?sfvrsn=2 [http://perma.cc/V42J-827M] (describing abstinence-only education as the state standard and instructing the teaching of state laws regarding homosexual activity).

State	Citations to Education Regulation and Curriculum Guidelines
Missouri	Health/Physical Education, Mo. Dep't of Elementary & Secondary Educ., http://dese.mo.gov/college-career-readiness/curriculum/healthphysical-education [http://perma.cc/3PXN-N8DW] (last visited July 27, 2017).
North Carolina	N.C. Pub. Schs., North Carolina Essential Standards: Health Education—Grades 6–8, at 3, http://www.ncpublicschools.org/docs/curriculum/healthfulliving/new-standards/healthful-living/6-8.pdf [http://perma.cc/GDV8-ERL5] (last visited Sept. 5, 2017).
North Dakota	N.D. Dep't of Pub. Instruction, North Dakota Health Content and Achievement Standards: Grades K–12, at 18, 26, 45 (2008), http://www.nd.gov/dpi/uploads/87/health2008.pdf [http://perma.cc/P53U-WZEV].
Ohio	Ohio Rev. Code Ann. §§ 3313.60 (West 2012); Ohio Admin. Code 3301-80-01 (2014) (advising students to "abstain from sexual activity until after marriage"); Ohio Dep't of Educ., Operations Guidance: Table of Contents (Dec. 29, 2015), http://education.ohio.gov/Topics/Operating-Standards/Table-of-Contents/Curriculum [http://perma.cc/R662-YP59].
Oklahoma	Okla. Admin. Code § 210:15-17-2 (2016) (describing homosexual activity as an activity that is "primarily responsible for contact with the AIDS virus"); Okla. State Dep't of Educ., Oklahoma Academic Standards for Health Education, http://sde.ok.gov/sde/sites/ok.gov.sde/files/documents/files/Health%20Standards%20-%20for%20Legislature.pdf [http://perma.cc/D6MG-REVW] (last visited Aug. 20, 2017).
South Carolina	Jim Rex, S.C. Dep't of Educ., South Carolina Academic Standards for Health and Safety Education 8, 104 (2009), http://ed.sc.gov/scdoe/assets/file/agency/ccr/StandardsLearning/documents/2009HealthEducationStandards.pdf [http://perma.cc/UC4U-CBLB] ("The program of instruction . . . 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.").
Tennessee	Tenn. Dep't of Educ., Tennessee Health Education Standards 6–8, http://www.tn.gov/assets/entities/education/attachments/std_pe_health_gr_6_8.pdf [http://perma.cc/WX42-TYUU] (last visited Aug. 20, 2017).
Texas	19 Tex. Admin. Code §§ 115.23, 115.31–115.33 (2017) (requiring that abstinence be taught in health courses for grades 7–10); Chapter 115, Tex. Essential Knowledge & Skills for Health Education Subchapter C. High School, Tex. Dep't of Educ., http://ritter.tea.state.tx.us/ rules/tac/chapter115/ch115c.html [http://perma.cc/ZR27-6AUN] (last visited July 27, 2017) (discussing the importance of abstinence before marriage).

State	Citation to Education Regulations and Curriculum Guidelines
Utah	Health Education I (7–8): Core Standards of the Course, Utah Educ. Network, http://www.uen.org/core/core.do?courseNum=7100 [http://perma.cc/AH9F-VNF8] (last visited July 27, 2017) (conveying "the benefits of sexual abstinence before marriage").
Virginia	Va. Dep't of Educ., Family Life Education: Special Education (2005), http://www.pen.k12.va.us/instruction/family_life_education/family_life_speced.pdf [http://perma.cc/Y75B-ULGU].
Wisconsin	Wis. Dep't of Pub. Instruction, Human Growth and Development: A Resource Guide to Assist School Districts in Policy, Program Development, and Implementation 217–24 (5th ed. 2014), http://dpi.wi.gov/sites/default/files/imce/sspw/pdf/hgdedition5.pdf [http://perma.cc/XSH3-2J3S]; Safe Schools for Lesbian, Gay, Bisexual, and Transgender Students, Wis. Dep't of Pub. Instruction, http://dpi.wi.gov/sspw/safe-schools/lgbt [http://perma.cc/2M2T-GHH9] (last visited July 27, 2017).

TABLE C. EVIDENCE REGARDING ENFORCEMENT OF UTAH STATUTORY AND REGULATORY POLICIES IN UTAH SCHOOL DISTRICTS

School District	School District Policy Prohibits "Advocacy" of "Homosexuality"	School District Policy Prohibits the "Advocacy" or "Acceptance" of "Homosexuality"	School District Policy Cites § 53A-13-101(1)(c) or r. 277-474-3(A)[510]	Response Otherwise Indicates Compliance with All Utah Statutes and Rules
Alpine		✓		
Beaver			✓	
Box Elder			✓	
Cache				
Canyons				✓
Carbon				
Daggett	✓		✓	
Davis				✓
Duchesne				✓
Emery				
Garfield	✓		✓	
Grand		✓		✓
Granite				
Iron	✓			✓
Jordan				✓
Juab	✓		✓	
Kane	✓		✓	
Logan City	✓			
Millard	✓			
Morgan	✓		✓	
Murray	✓			✓
Nebo	✓		✓	
North Sanpete	✓		✓	
North Summit	✓		✓	
Ogden City			✓	
Park City	✓			
Piute				✓

510. The school district policies discussed here cite to Utah Code § 53A-13-101(1)(c) and Utah Admin Code r. 277-474-3(A) (2017) prior to the 2017 repeal of the statutory and regulating language prohibiting "the advocacy of homosexuality" in response to a lawsuit challenging Utah's anti-gay curriculum laws amendment. See supra notes 335–336 and accompanying text.

School District	School District Policy Prohibits "Advocacy" of "Homosexuality"	School District Policy Prohibits the "Advocacy" or "Acceptance" of "Homosexuality"	School District Policy Cites § 53A-13-101(1)(c) or r. 277-474-3(A)	Response Otherwise Indicates Compliance with All Utah Statutes and Rules
Provo				✓
Rich				✓
Salt Lake				✓
San Juan	✓			
Sevier				✓
South Sanpete	✓		✓	
South Summit		✓		✓
Tintic	✓		✓	
Tooele				✓
Uintah	✓			
Wasatch				✓
Washington	✓		✓	
Wayne	✓		✓	
Weber				