

## **Erasing “Gay” from the Blackboard: The Unconstitutionality of “No Promo Homo” Education Laws**

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Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>1</sup>

– Justice William J. Brennan, Jr.

In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. . . . The machineries of discrimination against gay individuals were such that explicit exclusion of gay individuals was unnecessary – homosexuality was “unspeakable.”<sup>2</sup>

– Judge Stephen R. Reinhardt

### Introduction

Lesbian, gay, and bisexual youth are two to four times more likely to attempt suicide than their heterosexual peers.<sup>3</sup> In addition, nearly a quarter of transgender youth attempt suicide, according to some studies.<sup>4</sup> In many instances, this pattern is a product of targeted bullying on school grounds.<sup>5</sup> Despite ongoing national coverage of these suicides or suicide attempts, some states have been considering legislation that would exacerbate these children’s sense of alienation and isolation through

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<sup>1</sup> *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

<sup>2</sup> *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481, 485 (9th Cir. 2014).

<sup>3</sup> U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, SEXUAL IDENTITY, SEX OF SEXUAL CONTACTS, AND HEALTH-RISK BEHAVIORS AMONG STUDENTS IN GRADES 9-12: YOUTH RISK BEHAVIOR SURVEILLANCE 12-13 (2011); ST Russell & K Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence from a National Study*, 21 AMERICAN JOURNAL OF PUBLIC HEALTH, 1276-81 (2001).

<sup>4</sup> AH Grossman & AR D’Augelli, *Transgender Youth and Life-Threatening Behaviors*, 37 SUICIDE & LIFE-THREATENING BEHAVIOR, 527-37 (2007).

<sup>5</sup> See, e.g., Sonseeahray Tonsall, *Folsom Community Mourns 12-Year-Old Boy Bullied to Suicide*, FOX40 (Dec. 4, 2014, 11:05 PM),

<http://www.fox40.com/2014/12/04/folsom-community-mourns-boy-bullied-to-suicide/#oid=lmajY0cjpkzZbtTSTZS4dXQXOmPUEUuB>; see generally *Facts About Suicide*, THE TREVOR PROJECT, <http://www.thetrevorproject.org/pages/facts-about-suicide> (last visited Sept. 18, 2015); GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY (2014).

prohibition of lesbian, gay, bisexual, and transgender (LGBT)-related<sup>6</sup> discussion in public schools.<sup>7</sup>

In Tennessee, for instance, one former state senator made numerous failed attempts at passing such legislation, including Senate Bill 234 (2013).<sup>8</sup> Misleadingly named the Classroom Protection Act, the bill sought to “classif[y] as inappropriate” and thereby “prohibit” for “grade levels pre-K through eight . . . any such classroom instruction, course materials or other informational resources that are inconsistent with natural human reproduction.”<sup>9</sup> The bill’s predecessor, Senate Bill 49 (2011), which passed the Senate but not the House, similarly attempted to prohibit “any instruction or material that discusses sexual orientation other than heterosexuality.”<sup>10</sup> In Missouri, a related bill was introduced in, but did not pass, its House of Representatives.<sup>11</sup> That legislative measure, House Bill 2051 (2012), stated, “[N]o instruction, material, or extracurricular activity sponsored by a public school that discusses sexual orientation other than in scientific instruction concerning human reproduction shall be provided in any public school.”<sup>12</sup>

In sharp contrast, one Alabama legislator has repeatedly attempted to remove an anti-LGBT education provision that is already on her state’s books.<sup>13</sup> If those efforts succeed, she would strike a provision that calls for sexual education course materials and instruction to regard homosexuality as an unacceptable lifestyle and a criminal offense under state law.<sup>14</sup> Despite the U.S. Supreme Court’s invalidation of sodomy bans between two

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<sup>6</sup> The use of the term “LGBT” is not intended to exclude individuals identifying with other groups of the broader “queer” community, including, but not limited to, asexual, pansexual, two-spirit, questioning, and intersex.

<sup>7</sup> See GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, “No Promo Homo” Laws, <http://www.glsen.org/learn/policy/issues/nopromohomo> (last visited Sept. 18, 2015). In contrast, California has chosen to take an ideologically inverse approach by implementing a pro-LGBT curriculum in public schools. See Fair, Accurate, Inclusive, and Respectful (FAIR) Education Act of 2011, S. 48, 2011-2012 Leg., Reg. Sess. (Cal. 2011).

<sup>8</sup> S. 234, 108th Leg., Reg. Sess. (Tenn. 2013) [hereinafter S. 234]. See also S. 49, 2011-2012 Leg., Reg. Sess. (Tenn. 2011); H.R. 229, 2009-2010 Leg., Reg. Sess. (Tenn. 2009); H.R. 821, 2007-2008 Leg., Reg. Sess. (Tenn. 2008).

<sup>9</sup> S. 234 § 2(b).

<sup>10</sup> S. 49 § 1(c)(2).

<sup>11</sup> H.R. 2051, 96th Leg., Reg. Sess. (Mo. 2012) [hereinafter H.R. 2051].

<sup>12</sup> H.R. 2051 § A.

<sup>13</sup> H.R. 252, 2015 Leg., Reg. Sess. (Ala. 2015); H.R. 139, 2014 Leg., Reg. Sess. (Ala. 2014) (amending § 16-40A-2, Code of Alabama 1975).

<sup>14</sup> H.R. 252 § 1; H.R. 139 § 1. See § 16-40A-2(c)(8), Code of Alabama 1975.

consenting adults in 2003,<sup>15</sup> and finally a similar ruling in Alabama in 2014,<sup>16</sup> the existence of this provision is unsettling – it goes beyond silence on LGBT matters by actively and expressly debasing homosexuality. This provision sheds light on how far anti-LGBT sentiments could alter the course of education in public schools. Accordingly, although this paper focuses on “Don’t Say Gay” bills – or more aptly termed as “no promo homo” measures<sup>17</sup> – such as the ones described above, it is important to keep in mind how these bills could evolve into more hostile requirements.<sup>18</sup>

Title IX of the Education Amendments of 1972, relating to discrimination on the basis of sex, could assume a considerable role in a discussion about anti-transgender policies affecting course materials. However, this paper focuses instead on a constitutional analysis of “no promo homo” measures because they are typically drafted in a manner that discriminates on the basis of sexual orientation, not gender identity. Despite the focus of the paper on sexual orientation, the term “LGBT” as a collective group is used throughout this paper.

It is also worth noting that many of the following pages might become moot, contingent upon the development of the Equality Act of 2015, a federal bill introduced on July 23, 2015, in the House of Representatives and the Senate as H.R. 3185 and S. 1858, respectively.<sup>19</sup> This proposed legislation, which has not moved beyond introduction since the drafting of this paper, would prohibit discrimination on the basis of sexual orientation and gender identity by amending the Civil Rights Act of

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<sup>15</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>16</sup> See *Williams v. Alabama*, CR-12-1385 (Ala. Crim. App. 2014).

<sup>17</sup> See GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, “No Promo Homo” Laws, *supra* note 7.

<sup>18</sup> SB 234 of Tennessee would also have required specified school officials to notify the parents or legal guardians of students under certain conditions, including when officials respond “to a student whose circumstances present immediate and urgent safety issues involving human sexuality” or when students receive counseling for “engaging in, or who may be at risk of engaging in, behavior injurious to the physical or mental health and well-being of the student or another person.” S. 234 §§ 2(c)(2)-(3). Accordingly, SB 234 would not have only censored LGBT materials in the school, but would also have effectively outed some children to their parents or guardians, in violation of “the professional counselor’s ethical code and practitioner’s guide” of the American Counseling Association (ACA), which formally opposed SB 234. See JESSICA EAGLE, ACA OPPOSES TENNESSEE’S S.B. 234, “DON’T SAY GAY” BILL: UNDERMINES COUNSELORS’ CODE OF ETHICS 1 (2013). The ACA statement warned that the proposed law would violate principles of confidentiality and client autonomy against “the dignity or welfare of clients,” especially considering that “[n]ot every minor has a supportive family who will be fully accepting of one’s LGBT identity.” *Id.* at 1-2.

<sup>19</sup> H.R. 3185, 114th Cong. (2015); S. 1858, 114th Cong. (2015).

1964 and other key laws.<sup>20</sup> A more comprehensive follow-up to the failed Employment Non-Discrimination Act (ENDA),<sup>21</sup> the Equality Act would apply not only to employment, but also to housing, public accommodations, and other areas, most notably - for the purposes of this paper - public education.<sup>22</sup> Though, even with this revolutionary legislation, restrictions on LGBT-related content in schools could arguably be distinguished from discrimination against LGBT persons, which would keep intact certain “no promo homo” laws, depending on their scope.

Other related federal bills include the Student Non-Discrimination Act of 2015<sup>23</sup> and the Safe Schools Improvement Act of 2015,<sup>24</sup> which are also only in their introductory stages. However, those measures face the similar issue of not directly addressing the censorship of LGBT content in the classroom, but instead tackling discrimination, harassment, and bullying of students,<sup>25</sup> a vital and urgent legislative and cultural battle in its own respect. Though, undoubtedly, they are two sides of the same coin.

In the meantime, until enhanced protections come out of Congress, there are eight states that currently have some type of “no promo homo” law: Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah.<sup>26</sup> This paper questions the legal validity of these laws and the reincarnations of related bills in other states on two constitutional fronts. This paper argues that LGBT-related censorship in course materials unlikely violates speech protections under the First Amendment, due to the broad deference given to schools over the curriculum. It also finds restrictions on classroom instruction constitutional, considering the instructor’s official employee duties. However, this paper argues that censorship in other resources is likely unconstitutional if it steps well

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<sup>20</sup> H.R. 3185 §§ 3-12; S. 1858 §§ 3-12. *See also* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>21</sup> H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013).

<sup>22</sup> H.R. 3185 §§ 3, 5, 7, 10, 11, 12; S. 1858 §§ 3, 5, 7, 10, 11, 12.

<sup>23</sup> H.R. 846, 114th Cong. (2015); S. 439, 114th Cong. (2015).

<sup>24</sup> S. 311, 114th Cong. (2015).

<sup>25</sup> S. 439 § 4; S. 311 §3.

<sup>26</sup> GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, “No Promo Homo” Laws, *supra* note 7. For further discussion of the nature of “no promo homo” education laws in some of those states, with relevant legal and policy considerations, see Ashley E. McGovern, *When Schools Refuse to “Say Gay”: The Constitutionality of Anti-LGBTQ “No-Promo-Homo” Public School Policies in the United States*, 22 CORNELL J.L. & PUB. POL’Y 465 (2012). For a history of “no promo homo” policies in various domains of society, including the rhetorical and legal devices driving those policies, see 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 (2000).

outside of the classroom curricular boundaries.

Alternatively, under the Equal Protection Clause of the Fourteenth Amendment, this paper considers the rapid yet unresolved development of antidiscrimination jurisprudence on the basis of sexual orientation. With inter-jurisdictional variation in judicial interpretations, particularly with determining the proper tier of scrutiny, this legal endeavor remains unsettled, even with landmark LGBT victories in recent cases, including *Obergefell v. Hodges*<sup>27</sup> and its close relative *United States v. Windsor*.<sup>28</sup> Despite the nebulous nature of the framework offered by the U.S. Supreme Court, this paper argues that, with the help of instructive and perennial language found in those cases and others, "no promo homo" education laws likely fail intermediate scrutiny, and even rational basis review, in an equal protection challenge.

### **I. "No Promo Homo" Laws Are Likely Valid Under the First Amendment with Respect to Course Materials and Instruction but Invalid Outside of the Classroom.**

The U.S. Supreme Court once famously stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>29</sup> The same Court went on to note, "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."<sup>30</sup>

Granted, the Court in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* dealt with a school district's suspension of students who wore black armbands to protest the Vietnam War, holding this suppression of speech unconstitutional.<sup>31</sup> The suppression imposed by the "no promo homo" education bills is different than that in *Tinker*, as it is more associated with the curriculum of the school and the instruction by teachers than it is with speech by students. Although a student might be silenced in the classroom under a bill such as Tennessee's SB 234 due to the restrictions imposed on the instructor and the reporting duties imposed on school officials, the student's First Amendment right is not compromised. For example, Section 2(c)(1) of SB 234, discussing questions initiated by students, suggests that

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<sup>27</sup> 135 S. Ct. 2584 (2015).

<sup>28</sup> 133 S. Ct. 2675 (2013).

<sup>29</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>30</sup> *Id.* at 511.

<sup>31</sup> *See id.*

students would still, technically, be permitted to initiate a conversation about a matter inconsistent with natural human reproduction, but the instructor would be restricted in how he or she responds to the question.<sup>32</sup> As an illustration, a student might ask about the effect that homosexuality had on a historical or literary figure discussed in class with regard to his or her actions or reputation. However, the teacher would likely be unable to comment substantively on the matter, either because such an answer could be deemed as not being “in good faith” or because such a question could be construed as not being “germane and material to the course,” as would have been required by Section 2(c)(1).<sup>33</sup>

Nevertheless, *Tinker* indeed recognizes the rights of the teacher, not only those of the student. It also serves as one of the earliest cases demonstrating the general principle that some form of expression is constitutionally protected within schools, unless it creates a certain material and substantial inference, be it with respect to the disruption of classwork, disorder, or invasion of the rights of others.<sup>34</sup> The question of what constitutes such interference therefore surfaces. In the case of the “no promo homo” measures, the roles of the school and the teacher involve separate legal considerations.

*A. Schools Have Broad Control in Determining Whether to Preclude  
LGBT Materials from the Classroom Curriculum.*

Cases following *Tinker* have been deferential to schools’ control of the curriculum and their determination of material and substantial interference. In *Bethel Sch. Dist. No. 403 v. Fraser*, the Supreme Court ruled in favor of a school district that disciplined a student who had given a speech containing graphic and explicit sexual language at a student assembly.<sup>35</sup> The Court found that a fundamental value of a democratic society is to tolerate “divergent political and religious views, even when the views expressed may be unpopular.”<sup>36</sup> The Court, however, cautioned, “[T]hese ‘fundamental values’ must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students.”<sup>37</sup> Accordingly, “unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing

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<sup>32</sup> See S. 234 § 2(c)(1).

<sup>33</sup> See *id.*

<sup>34</sup> See *Tinker*, 393 U.S. at 513.

<sup>35</sup> 478 U.S. 675 (1986).

<sup>36</sup> *Id.* at 681.

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

interest in teaching the students the boundaries of socially appropriate behavior."<sup>38</sup>

This balance, if interpreted broadly, resonates with the purpose of "no promo homo" education bills. SB 234, for instance, claimed, "[C]ertain subjects are particularly sensitive and are, therefore, best explained and discussed within the home. Because of its complex societal, scientific, psychological, and historical implications, human sexuality is one such subject."<sup>39</sup> Proponents of "no promo homo" laws likely find the censorship as the "socially appropriate behavior" that trumps the arguably "unpopular and controversial" LGBT-themed teachings. However, *Fraser* involved a drastic example of materials, those with graphic language.<sup>40</sup> On the other hand, "no promo homo" laws prohibit even the cleanest and most filtered discussion of non-heterosexual human sexuality.<sup>41</sup> We therefore should turn to cases on less explicit sexual content.

Courts have often permitted school districts to regulate not only vulgar sexual language, but also materials with arguably healthy, constructive content on sexuality or reproduction.<sup>42</sup> The Supreme Court in *Hazelwood Sch. Dist. v. Kuhlmeier* held that a school district's censorship of a high school newspaper article describing, in part, students' experiences with pregnancy, was constitutional.<sup>43</sup> Analogous to the *Fraser* Court, this Court justified the speech restriction by finding that a school has the right "to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting."<sup>44</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> S. 234 § 2(a).

<sup>40</sup> *See Fraser*, 478 U.S. at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.").

<sup>41</sup> Note the "flaw" in SB 234's language, which would have theoretically allowed discussion of non-heterosexual non-human conduct (e.g. homosexual or bisexual activity in other animal species), seeing that it would not contradict human reproduction.

<sup>42</sup> Courts have given school districts discretion not only to *prohibit* certain sexual content but also to *include* other sexual content that others might deem inappropriate. *See, e.g., Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (permitting school to administer to students a survey containing questions about sex and holding that "although parents have the right to inform their children about sex when and as they choose, they do not have the right to 'compel public schools to follow their own idiosyncratic views as to what information the schools may dispense'").

<sup>43</sup> 484 U.S. 260 (1988).

<sup>44</sup> *Id.* at 272.

Under this framework, courts seem protective of school districts' authority to determine what is appropriate for the "emotional maturity" of its students. In *Kuhlmeier*, the students involved were in high school. Some of today's "no promo homo" measures are limited to even younger students, including those in grade levels pre-K through eight.<sup>45</sup> Some courts might regard certain LGBT topics as too sensitive for children to be exposed to, particularly for elementary and middle school students.

*B. Schools Have Less Discretion over LGBT Materials Outside of the Classroom.*

Despite the deference given to school districts in controlling the curriculum, this flexibility is significantly narrowed when stepping outside of the classroom. In *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 et al. v. Pico*, the Supreme Court held that censorship of certain library books was unconstitutional.<sup>46</sup> The school board had "characterized the removed books as 'anti-American, anti-Christian, and anti-Sem[i]tic, and just plain filthy.'"<sup>47</sup> The Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"<sup>48</sup> In assessing the "credibility" of school officials' decision, the Court noted, "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution."<sup>49</sup>

Applying this rule to LGBT materials, a federal district court in *Case v. Unified Sch. Dist. No. 233* held that the censorship by a school board of a school library book, *Annie on My Mind*, about a romantic relationship between two teenage girls was unconstitutional.<sup>50</sup> The plaintiffs included, among others, a high school student, a junior high school student, and a

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<sup>45</sup> See, e.g., S. 234 § 2(b).

<sup>46</sup> 457 U.S. 853, 871 (1982).

<sup>47</sup> *Id.* at 857.

<sup>48</sup> *Id.* at 872. See also *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").

<sup>49</sup> *Pico*, 457 U.S. at 870-71, 875.

<sup>50</sup> 908 F. Supp. 864 (D. Kan. 1995).

teacher.<sup>51</sup> The defendants were a local school district in Kansas, through its Board of Education, as well as the corresponding superintendent.<sup>52</sup> The court noted that the book "contains no vulgarity, offensive language, or explicit sexual content."<sup>53</sup> The court disagreed with the defendants' argument that the "plaintiffs have not been denied access to the book because it is available from sources outside of the school library," holding that its availability "from other sources does not cure defendants' improper motivation for removing the book."<sup>54</sup>

Analogously, while "no promo homo" bills' control over classroom materials unlikely violates the First Amendment, the bills' restrictions on materials outside of the classroom is likely too intrusive. SB 234 of Tennessee would have regulated not only "classroom instruction" and "course materials," but also "other informational resources."<sup>55</sup> HB 2051 of Missouri would have prohibited not only the discussion of sexual orientation in "public school instruction" and "material," but also "extracurricular activity."<sup>56</sup> These terms could be viewed as broad catch-all categories, with "other informational resources" potentially ranging from materials in the library to health-related pamphlets and other guides at the school clinic, and "extracurricular activity" potentially ranging from fine arts and civic service programs to professional services at the career-counseling office.

Although "no promo homo" laws might purport to account for the sensitivity of human sexuality, their underlying purpose could be viewed as merely a means to prescribe an orthodox view against homosexuality, or non-heterosexuality generally, whether it stems from religion, politics, or other matters of opinion, as considered by the Supreme Court in *Pico*. Further, the censored materials under such measures encompass items with solely non-vulgar language, similar to *Annie on My Mind*. They are therefore unconstitutionally censored if they are found outside the domain of the classroom curriculum. Finally, state representatives or school officials cannot simply argue that materials inconsistent with heterosexuality are readily accessible outside of school. Proposing an alternative mechanism for students to obtain such materials would not cure the "improper motivation" behind "no promo homo" education laws,

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<sup>51</sup> *Id.* at 874.

<sup>52</sup> *Id.* at 866.

<sup>53</sup> *Id.* at 867.

<sup>54</sup> *Id.* at 876.

<sup>55</sup> S. 234 § 2(b).

<sup>56</sup> H.R. 2051 § A.

analogous to the finding in *Case v. Unified Sch. Dist. No. 233*.

*C. Preventing Instructors from Discussing LGBT Matters in the Classroom Is Likely Valid Due to the Instructors' Official Duties.*

While school districts have broad control over the curriculum, they maintain even more authority over teachers, considering their role as employees of the school district. In *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, the Sixth Circuit examined the constitutionality of certain curricular choices by a high school English teacher.<sup>57</sup> Among her assignments was a censorship-themed review of a book that students would select from a list that included *Heather Has Two Mommies* by Lesléa Newman.<sup>58</sup> The court laid out a three-pronged test to assess the teacher's First Amendment claims, ultimately ruling that she had passed the first two but failed the third.<sup>59</sup>

First, the "matter of public concern" requirement, or the *Connick* test, provides that "[t]he First Amendment protects the speech of employees only when it involves 'matters of public concern.'"<sup>60</sup> A "matter of public concern" relates to "issues 'of political, social, or other concern to the community.'"<sup>61</sup> In *Evans-Marshall*, the court found, "[T]he essence of a teacher's role is to prepare students for their place in society as responsible citizens, . . . and the teacher that can do that *without* covering topics of public concern is rare indeed, perhaps non-existent."<sup>62</sup> Similarly, under "no promo homo" laws, the employees are teachers serving a community function by exchanging ideas with their students about LGBT literature, history, sociology, or current events.

Second, the "balancing" requirement, or the *Pickering* test, balances the interests of the "citizen, in commenting upon matters of public concern" with the interests of the "employer, in promoting the efficiency of the public services it performs."<sup>63</sup> In *Evans-Marshall*, the court noted that the teacher's materials that supplemented those chosen by the school board might not be "compelling" . . . but the "interest outweighed the school's

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<sup>57</sup> 624 F.3d 332 (6th Cir. 2010).

<sup>58</sup> *Id.* at 335. The teacher's assignment on *Siddhartha* by Hermann Hesse for "in-class discussion about 'spirituality, Buddhism, romantic relationships, personal growth, [and] familial relationships'" also drew criticism. *Id.*

<sup>59</sup> *Id.* at 338.

<sup>60</sup> *Id.* at 337 (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

<sup>61</sup> *Id.* at 338.

<sup>62</sup> *Id.* at 339 (citing *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001)).

<sup>63</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

near-zero interest in disciplining her for teaching a book it had purchased.”<sup>64</sup> Under “no promo homo” education laws, the situation differs since the school district would in theory not store any materials discussing LGBT matters. Accordingly, although Evans-Marshall passed the *Pickering* test, a teacher would likely fail it with respect to instruction prohibited by “no promo homo” education laws.

Third, the “pursuant to” requirement, or the *Garcetti* test, provides that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>65</sup> The *Evans-Marshall* court held, “Any dispute over the board’s motivations, *Pickering* balancing or the ‘public concerns’ of her speech under *Connick* is beside the point if, as Evans–Marshall does not dispute, she made her curricular and pedagogical choices in connection with her official duties as a teacher,” thereby rejecting her claim as a matter of law.<sup>66</sup> Similarly, teachers seeking to use LGBT-themed materials in connection with their official duties would not be protected under the First Amendment.

Overall, under the First Amendment, “no promo homo” education laws appear constitutional in some respects, namely regarding restrictions on instruction and course materials, and unconstitutional in other respects, namely regarding restrictions on other resources if they are found outside the confines of the classroom curriculum. However, a legal challenge to such laws does not stop here, as it also rests on the Equal Protection Clause, the subject of the next section.

## **II. Even If “No Promo Homo” Education Laws Survive the First Amendment, They Likely Violate the Equal Protection Clause of the Fourteenth Amendment.**

In light of the recent evolution in antidiscrimination law with respect to sexual orientation, notably in the domain of same-sex marriage,<sup>67</sup> but also in other areas, such as the strike of a gay juror,<sup>68</sup> “no promo homo” laws are likely unconstitutional on equal protection grounds. The Fourteenth Amendment of the United States Constitution provides, “No state shall . . .

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<sup>64</sup> *Evans-Marshall*, 624 F.3d at 339.

<sup>65</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>66</sup> *Evans-Marshall*, 624 F.3d at 340.

<sup>67</sup> *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

<sup>68</sup> *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014).

deny to any person within its jurisdiction the equal protection of the laws.”<sup>69</sup> This clause has been interpreted to essentially direct “that all persons similarly situated should be treated alike.”<sup>70</sup> Here, the Fourteenth Amendment applies to the “no promo homo” laws because state actors are responsible for denying the protection, namely state legislatures and, subsequently, public schools as state agents. In the case of “no promo homo” laws, the denial of equal protection is effectively targeted at non-heterosexual individuals.

This paper argues that “no promo homo” laws likely violate the Fourteenth Amendment. First, these laws classify on the basis of sexual orientation, whether explicitly or implicitly. Second, based on recent legal interpretations, heightened scrutiny should be applied to laws that discriminate on the basis of sexual orientation. Third, even under rational basis review, “no promo homo” laws would violate the Equal Protection Clause.

A. *“No Promo Homo” Education Laws Classify on the Basis of Sexual Orientation.*

Some “no promo homo” measures expressly discriminate on the basis of sexual orientation. Missouri’s HB 2051, for instance, would have prohibited the discussion of “*sexual orientation* other than in scientific instruction concerning human reproduction . . . in any public school.”<sup>71</sup> The bill leaves no doubt about this form of disparate treatment.

Other measures, however, discriminate on the basis of sexual orientation more vaguely. Tennessee’s SB 234 did not expressly discuss sexual orientation. Section 2(a) of the bill noted the “sensitive” nature of “human sexuality” and its “complex societal, scientific, psychological, and historical implications.”<sup>72</sup> Accordingly, one could look at the proposed ban as being holistic, applied to all forms of human sexuality, irrespective of sexual orientation. However, the bill aimed to restrict materials that were “inconsistent with natural human reproduction.”<sup>73</sup> This vague language raises questions as to what would fall under “unnatural” human reproduction – perhaps genetic engineering of designer babies? The bill may very well govern that subject under the terminology used. However, the common sense, colloquial meaning would instead, or in addition, have

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<sup>69</sup> U.S. Const. amend. XIV, § 1.

<sup>70</sup> *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

<sup>71</sup> H.R. 2051 § A (emphasis added).

<sup>72</sup> S. 234 § 2(a).

<sup>73</sup> *Id.* § 2(b).

us see this bill as a restriction on materials discussing non-heterosexual activity. After all, the bill's direct predecessor, SB 49 (2011), attempted to prohibit "any instruction or material that discusses sexual orientation other than heterosexuality."<sup>74</sup> Accordingly, the legislative history and the collective statutory language indicate intent to discriminate on the basis of sexual orientation in these types of "no promo homo" bills as well.

*B. "No Promo Homo" Education Laws Are Unconstitutional Under Heightened Scrutiny, the Standard That Should Be Applied to Laws That Discriminate on the Basis of Sexual Orientation.*

Courts have traditionally assessed laws according to three tiers of scrutiny in equal protection cases: rational basis review; intermediate or heightened scrutiny; and strict scrutiny.<sup>75</sup> Under rational basis review, the "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."<sup>76</sup> Under heightened scrutiny, the classification "fails unless it is substantially related to a sufficiently important government interest."<sup>77</sup> Finally, under strict scrutiny, laws are "sustained only if they are suitably tailored to serve a compelling state interest."<sup>78</sup>

Race, national origin, and alienage have been regarded as suspect classes, subject to strict scrutiny, because they are "factors [that] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others."<sup>79</sup> Meanwhile, gender and illegitimacy, known as quasi-suspect classes, are analyzed under heightened scrutiny because they "frequently" and "often" bear[] no relation to legitimate legislative aims" but they still do in some considerations.<sup>80</sup> Classifications based on non-suspect groups, such as the elderly or those with disabilities, have historically been subjected to rational basis review.<sup>81</sup>

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<sup>74</sup> S. 49 § 1(c)(2).

<sup>75</sup> See *Cleburne*, 473 U.S. at 440-41; *id.* at 451-52 (Stevens, J., concurring).

<sup>76</sup> *Id.* at 440. See *id.* at 451-52 (Stevens, J., concurring).

<sup>77</sup> *Id.* at 441.

<sup>78</sup> *Id.* at 440.

<sup>79</sup> *Id.* at 440. See *e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race).

<sup>80</sup> *Cleburne*, 473 U.S. at 469 (internal citations omitted). See, *e.g.*, *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976) (illegitimacy); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (gender).

<sup>81</sup> *Cleburne*, 473 U.S. at 441-43 (declining to recognize the mentally disadvantaged as quasi-suspect class); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per

*i. The Supreme Court Has Implicitly Used Heightened Scrutiny, or a Variation of It, for Classification on the Basis of Sexual Orientation.*

In the rapidly evolving LGBT law, courts have recently employed different tiers of scrutiny, from rational basis review to intermediate scrutiny, or somewhere in the middle. For instance, the Supreme Court ambiguously hinted at a standard that seemed higher than rational basis review in its 5-4 decision in *United States v. Windsor*, which struck down Section 3 of the Defense of Marriage Act (DOMA) and recognized on the federal level same-sex marriages that were approved on the state level.<sup>82</sup> The Court did not break down the classification of the LGBT community as a suspect or quasi-suspect class through any structured paradigm, yet it did not superficially accept the governmental interest put forth by the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives either.<sup>83</sup> Instead, the majority conducted a more rigorous analysis, in which “the *design, purpose, and effect* of DOMA should be considered as the *beginning point* in deciding whether it is valid under the Constitution.”<sup>84</sup> Justice Kennedy went on to cite his opinion in *Romer v. Evans*, stating, “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>85</sup>

Different circuit courts have disagreed on the interpretation of *Windsor*, though most have adopted it to recognize same-sex marriage regardless of the tier of scrutiny employed.<sup>86</sup> Unlike its sister circuit courts, the Sixth Circuit in *DeBoer v. Snyder* held that same-sex marriage-licensing bans survive rational basis review under the Equal Protection Clause of the Fourteenth Amendment and that the bans do not reach heightened scrutiny.<sup>87</sup> The Sixth Circuit found that its “precedents say that rational basis review applies to sexual-orientation classifications.”<sup>88</sup> It further stated that the “Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not

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curiam) (declining to extend higher scrutiny to the elderly).

<sup>82</sup> See 133 S. Ct. 2675, 2683, 2696 (2013).

<sup>83</sup> *Id.* at 2693.

<sup>84</sup> *Id.* at 2689 (emphasis added).

<sup>85</sup> *Id.* at 2692 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

<sup>86</sup> Compare *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) with *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

<sup>87</sup> *DeBoer*, 772 F.3d at 413.

<sup>88</sup> *Id.*

recognized a new suspect class in more than four decades."<sup>89</sup>

In contrast, in *SmithKline Beecham Corp. v. Abbott Laboratories*, the Ninth Circuit held that equal protection forbids striking a juror on the basis of sexual orientation, and explained that *Windsor* was "dispositive of the question of the appropriate level of scrutiny" in its case.<sup>90</sup> The Ninth Circuit reasoned, "*Windsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary."<sup>91</sup> Instead, "[w]hen the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent 'by considering what the Court actually did, rather than by dissecting isolated pieces of text.'"<sup>92</sup>

The circuit court further added that "[n]otably absent from *Windsor*'s review of DOMA are the 'strong presumption' in favor of the constitutionality of laws and the 'extremely deferential' posture toward government action that are the marks of rational basis review."<sup>93</sup> Instead of considering "whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law,"<sup>94</sup> the Supreme Court balanced "the government's interest against the harm or injury to gays and lesbians,"<sup>95</sup> which would typically be reserved "for the legislature, not the courts," under rational basis review.<sup>96</sup>

In developing its interpretation of *Windsor*, the Ninth Circuit analogized it to its interpretation of *Lawrence v. Texas* in *Witt v. Dep't of the Air Force*, in which an Air Force reservist was suspended from duty on account of her same-sex sexual relationship.<sup>97</sup> The court said that *Lawrence* "omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation," yet it "required that a legitimate state interest justify the harm imposed by the Texas law."<sup>98</sup> Analogously, *Windsor* demands that "Congress's purpose 'justify disparate treatment of the group'" and "requires a 'legitimate purpose' to 'overcome[

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<sup>89</sup> *Id.*

<sup>90</sup> 740 F.3d 471, 474 (9th Cir. 2014).

<sup>91</sup> *Id.*

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

<sup>93</sup> *Id.* at 483.

<sup>94</sup> *Id.* at 481.

<sup>95</sup> *Id.* at 483.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 480 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008)).

<sup>98</sup> *Id.* at 480, 482.

]’ the ‘disability’ on a ‘class’ of individuals”<sup>99</sup> – an analytical approach operating above the requirement of rational basis review. After considering *Windsor*’s prevalent language on “harm” and “injury” and the “‘disadvantage’ inflicted on gays and lesbians,” the Ninth Circuit held that classifications on the basis of sexual orientation were now subject to heightened scrutiny.<sup>100</sup>

Meanwhile, *Obergefell v. Hodges*, which conclusively held same-sex marriage to be the law of the land,<sup>101</sup> will likely go down in history as a monumental achievement for the LGBT community, a step forward to attaining wider societal acceptance and legal recognition. Nevertheless, this landmark 5-4 decision at the moment leaves many of the same questions unanswered; the legal framework for examining LGBT-related equal protection challenges remains nebulous, in the chambers of the highest court at least, in areas outside of marriage, including education.

The recent decision was primarily based on Due Process Clause arguments, focusing on the fundamental right to marry and reserving pages and pages on the history and value of marriage, instead of taking a broader look at sexual orientation from the lens of the Equal Protection Clause.<sup>102</sup> The opinion merely alluded to the latter clause, stating, for instance, that same-sex marriage bans “abridge central precepts of equality.”<sup>103</sup> More significantly, much of the language about the two Clauses is awkwardly tangled, with Justice Kennedy finding that “[i]n any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.”<sup>104</sup>

In his dissent, Chief Justice Roberts noted that the discussion about the “synergy” between the two Clauses was “difficult to follow,” asserting that the “majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position.”<sup>105</sup> Notably for the purposes of this paper, Chief Justice Roberts found that the majority opinion strays away from the Court’s “usual framework for deciding equal protection cases,” which is the “casebook doctrine” that involves a “methodology in which judges ask whether the classification the

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<sup>99</sup> *Id.* at 482.

<sup>100</sup> *Id.* at 474, 482.

<sup>101</sup> *See* 135 S. Ct. 2584, 2599 (2015).

<sup>102</sup> *See id.* at 2593-95, 2597-2604.

<sup>103</sup> *Id.* at 2604.

<sup>104</sup> *Id.* at 2603.

<sup>105</sup> *Id.* at 2623 (Roberts, C. J., dissenting).

government is using is sufficiently related to the goals it is pursuing."<sup>106</sup>

While the majority opinion specified no tier of scrutiny, Chief Justice Roberts offered his own view, tersely stating that the marriage laws in question "do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage.'"<sup>107</sup> In essence, Chief Justice Roberts is promoting rational basis review, at least on the question of same-sex marriage. It is possible that he would similarly lean toward rational basis review on other issues pertaining to sexual orientation. Nevertheless, with respect to the "no promo homo" legislation in question in this paper, his comments in *Obergefell* might suggest a different outcome under this lower tier of scrutiny,<sup>108</sup> as later discussed.

Meanwhile, in contrast to Chief Justice Roberts' relatively temperate tone, Justice Scalia mocked Justice Kennedy's rhetoric, not only questioning the meaning behind its discussion of the Equal Protection Clause, but also resorting to more graphic insults about the language – describing it as "pretentious" and "egotistic," "lacking even a thin veneer of law," and containing "mummeries and straining-to-be-memorable passages."<sup>109</sup>

Although the majority opinion is lacking in technical legal analysis, its flaws are overstated in Justice Scalia's hyperbolic diatribe; the majority opinion instead accomplishes something that is arguably more impressive than the traditional analytical approach. The motifs embedded in its words cannot be "reduced to any formula,"<sup>110</sup> encompassing anti-subordination,

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<sup>106</sup> *Id.* (Roberts, C. J., dissenting) (citing G. STONE ET AL., CONSTITUTIONAL LAW 453 (7th ed. 2013)).

<sup>107</sup> *Id.* (Roberts, C. J., dissenting) (citing *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring)).

<sup>108</sup> *See id.* (Roberts, C. J., dissenting) ("The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits.").

<sup>109</sup> *Id.* at 2628, 2630 (Scalia, J., dissenting). He wrote that the opinion reminded him of "the mystical aphorisms of the fortune cookie," with "showy profundities [that] are often profoundly incoherent," and wanting to hide his "head in a bag" if he were to be associated with it. *Id.* at 2630 n.22 (Scalia, J., dissenting). He added, "The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis." *Id.* at 2630 (Scalia, J., dissenting).

<sup>110</sup> *See id.* at 2598 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

personhood, and the expression of one's identity.<sup>111</sup> These concepts could easily transcend a single case and be invoked in future LGBT rights challenges, such as the one at hand in this paper, in support of a "heightened scrutiny" argument.

Therefore, although the Sixth Circuit properly noted that the Supreme Court had not expressly stated which tier of scrutiny it was employing, the Ninth Circuit's argument for the adoption of heightened scrutiny is more convincing, especially considering the collective language of *Windsor*, which subsequently resonated in *Obergefell*.

*ii. Sexual Orientation Meets the Criteria for the Status of a Quasi-Suspect Class.*

In determining suspect or quasi-suspect classification, the Supreme Court has utilized the following factors: 1) A history of discrimination against the class; 2) whether the distinguishing characteristics indicate a class member's ability to contribute to society; 3) whether the distinguishing characteristics are immutable or go beyond the class members' control; and 4) the political powerlessness of the class.<sup>112</sup> Although "no single factor for determining elevated scrutiny is dispositive," the Supreme Court has been shown to emphasize the first two criteria.<sup>113</sup>

Various courts have written opinions containing strong indications that sexual orientation should be classified as a quasi-suspect class, thereby falling under heightened scrutiny. The following section delineates this point, using the four aforementioned classification factors.

*History of Discrimination*

With respect to the first criterion, the Ninth Circuit noted, "[T]hroughout the twentieth century, gays and lesbians were the 'anticitizen.'"<sup>114</sup> According to the court, they "were thought to be so contrary to our conception of citizenship that they were made inadmissible

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<sup>111</sup> See *id.* at 2593 ("express their identity"), 2596 ("normal expression of human sexuality"), 2602 ("diminish their personhood to deny them this right"), 2604 ("The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").

<sup>112</sup> *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310 (D. Conn. 2012) (citing *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012)). See also *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (discussing statutes directed at "discrete and insular minorities").

<sup>113</sup> *Pedersen*, 881 F. Supp. 2d at 310-11 (citing *Golinski*, 824 F. Supp. 2d at 983).

<sup>114</sup> *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485 (9th Cir. 2014).

under a provision of our immigration laws that required the Immigration and Naturalization Service (INS) to exclude individuals ‘afflicted with psychopathic personality’” until 1990.<sup>115</sup>

The court found that “[g]ays and lesbians have been systematically excluded from the most important institutions of self-governance. Even our prior cases that rejected applying heightened scrutiny to classifications on the basis of sexual orientation have acknowledged that gay and lesbian individuals have experienced significant discrimination.”<sup>116</sup> The Ninth Circuit added that “[i]n the first half of the twentieth century, public attention was preoccupied with homosexual ‘infiltration’ of the federal government. Gays and lesbians were dismissed from civilian employment in the federal government at a rate of sixty per month.”<sup>117</sup> Moreover, “[g]ays and lesbians did not identify themselves as such because, for most of the history of this country, being openly gay resulted in significant discrimination. . . . The machineries of discrimination against gay individuals were such that explicit exclusion of gay individuals was unnecessary — homosexuality was ‘unspeakable.’”<sup>118</sup>

Though in less detailed terms, the Supreme Court also illustrated this history of discrimination and the harm imposed on the LGBT community in *Windsor*. In describing non-recognition of same-sex marriage, the Court noted, “[T]he differentiation demeans the couple, whose moral and sexual choices the Constitution protects. . . . And it humiliates tens of thousands of children now being raised by same-sex couples.”<sup>119</sup> The Court added, “The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>120</sup> The Court also acknowledged that health care and financial harms result from such discrimination of same-sex couples’ families.<sup>121</sup>

Similarly, the majority in *Obergefell* repeatedly affirmed the dignity of same-sex couples, and likely that of the LGBT community as a whole, despite the opinion’s use of more limited LGBT terminology. Justice Kennedy wrote, “Even when a greater awareness of the humanity and

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

<sup>116</sup> *Id.* at 484.

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

<sup>118</sup> *Id.* at 485.

<sup>119</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2694-95.

integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions.”<sup>122</sup> His opinion contains the word “dignity,” or a variation of it, in eleven instances.<sup>123</sup> *Obergefell* also uses the terms “demean” and “stigma,” or variations of them six and three times, respectively.<sup>124</sup>

Not all of the justices have embraced this line of rhetoric, as some have argued that it is void of legal basis. In his dissent, Chief Justice Roberts noted, “There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution.”<sup>125</sup> Meanwhile, Justice Thomas allocated more time and words to dismissing the majority opinion’s stance on the matter, explaining that “the government would be incapable of bestowing dignity,” for “[h]uman dignity has long been understood in this country to be innate.”<sup>126</sup>

Although his commentary on the inherent and inalienable nature of dignity in people is compelling, Justice Thomas seems to conflate possession of dignity with recognition of dignity, diverting attention away from the likely reason Justice Kennedy brought up this abstract concept. The majority does not appear to be arguing that the Supreme Court is itself granting dignity to same-sex couples by the power vested in it. Rather, the majority seems to merely acknowledge and protect this already-existing dignity, taking one step forward in guaranteeing its protection through the more tangible, applied context of marriage.

True, there is no such thing as a “dignity” clause in the Constitution. And Justice Kennedy’s language in *Obergefell* can indeed come across as frustrating, for both opponents and proponents of LGBT rights, by utilizing sentimental and “fuzzy” words in lieu of more technical, legal discourse. However, the majority’s use of pathos may be a conscious effort to translate its understanding of equality and liberty to the American people, underscoring the human element of these constitutional principles. It is also possible that the Court was considering the broader reach of this decision, perhaps finding it strategic to use this language in order to convey that it regards sexual orientation as a suspect or quasi-suspect class, although it fell short of expressly stating so. Viewed in this light, the majority opinion could be useful for other antidiscrimination challenges, such as education,

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<sup>122</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

<sup>123</sup> *Id.* at 2594-97, 2599, 2600, 2603, 2606, 2608.

<sup>124</sup> *Id.* at 2594, 2596, 2602, 2604 (“demean”), 2600, 2602 (“stigma”).

<sup>125</sup> *Id.* at 2616 (Roberts, C. J., dissenting).

<sup>126</sup> *Id.* at 2639 (Thomas, J., dissenting).

the matter at hand in this paper.

Some lower courts appear to have followed suit, echoing *Windsor* and the need to protect the LGBT community, including its youth. The Fourth Circuit, for instance, noted that according to the American Psychological Association, "by preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters."<sup>127</sup> Altogether, these court decisions have vocally expressed the underlying long history of discrimination that the LGBT community has endured. As Justice Kennedy declared, "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."<sup>128</sup>

#### *Societal Relevance of the Characteristic*

The psychological and medical communities now widely agree, "[H]omosexuality per se implies no impairment in judgment, stability, reliability or general or social or vocational capabilities."<sup>129</sup> Therefore, in the domain of marriage, "by every available metric, opposite-sex couples are not better than their same-sex counterparts."<sup>130</sup> In jury service, the Ninth Circuit found that "strikes exercised on the basis of sexual orientation . . . deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve."<sup>131</sup> The court added that the strikes "would send the *false* message that gays and lesbians could not be trusted to reason fairly on issues of great import to the community or the nation."<sup>132</sup> The military represents a prime example, where "Don't Ask Don't Tell" was repealed and the contributions of homosexual service members to their country have been officially recognized.<sup>133</sup>

Based on the view that the first two factors carry the most weight,

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<sup>127</sup> *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014). *See also* *Baskin v. Bogan*, 766 F.3d 648, 664 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) ("[I]magine the parents having to tell their child that same-sex couples can't marry, and so the child is not the child of a married couple, unlike his classmates.").

<sup>128</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

<sup>129</sup> *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 318 (D. Conn. 2012) (citing Dkt. #73, Peplau Aff., ¶30) (quoting 1975 Resolution of the American Psychological Association).

<sup>130</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010).

<sup>131</sup> *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485 (9th Cir. 2014).

<sup>132</sup> *Id.* at 486 (emphasis added).

<sup>133</sup> *See Pedersen*, 881 F. Supp. 2d at 318.

sexual orientation already seems to convincingly meet quasi-suspect status. Though, the latter two factors also reinforce this designation.

### *Immutability of the Characteristic*

With regard to the third factor, “the consensus in the scientific community is that sexual orientation is an immutable characteristic.”<sup>134</sup> The American Psychological Association task force also concluded, “[S]exual orientation change efforts . . . are unlikely to be successful and involve some risk of harm.”<sup>135</sup> In addition, studies have “indicated that the majority of gay men and lesbians report that they experienced no choice or little choice about their sexual orientation.”<sup>136</sup> The majority in *Obergefell* shared similar views, finding that in contrast to the earlier-held belief that homosexuality was an illness, “sexual orientation is both a normal expression of human sexuality and immutable.”<sup>137</sup>

### *Political Powerlessness*

Finally, the Connecticut district court in *Pedersen v. Office of Personnel Management* found that “openly gay officials are underrepresented in political office in proportion to the gay and lesbian population.”<sup>138</sup> The court even highlighted Tennessee’s SB 234 to dispel the myth that “gay men and lesbians” have “political power in view of recent political, legal and cultural gains made by homosexuals,” such as California’s “legislation which requires California’s public school textbooks to include historical contribution of . . . LGBT . . . Americans.”<sup>139</sup> The court argued,

The passage of such legislation suggests only an isolated achievement for gay rights generally in one state and is not indicative of gay men and lesbians’ political clout in a majority of states. Indeed months after the signing of California’s bill, both Tennessee and Missouri introduced ‘Don’t say gay’ bills which would not only have the effect of prohibiting the teaching of LBGT history in schools but would also prohibit any discussion of homosexuality in public schools more broadly. . . . Since only one out of fifty

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<sup>134</sup> Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012).

<sup>135</sup> *Pedersen*, 881 F. Supp. 2d at 321.

<sup>136</sup> *Id.*

<sup>137</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

<sup>138</sup> *Pedersen*, 881 F. Supp. 2d at 328.

<sup>139</sup> *Id.* at 329-31.

states has adopted legislation mandating the teaching of LGBT history, the Court does not find this particular news article to be demonstrative of gay men and lesbians' political clout. On the contrary, these legislative backlashes illustrate the powerlessness of gays and lesbians in America today.<sup>140</sup>

The assessments of these four factors combined reinforce the position that heightened scrutiny should indeed apply to classification on the basis of sexual orientation. The next step is to determine whether "no promo homo" education laws pass this test.

*iii. "No Promo Homo" Education Laws Likely Fail Heightened Scrutiny.*

As we have seen, heightened scrutiny calls for careful consideration and, in doing so, weighs the government's interest in passing "no promo homo" laws against the harm to members of the school. LGBT students or those with LGBT relatives should be accorded special attention, though censorship of LGBT materials has widespread negative effects on all.

On the governmental interest side, Tennessee's SB 234 argued that "certain subjects are particularly sensitive and are, therefore, best explained and discussed within the home. Because of its complex societal, scientific, psychological, and historical implications, human sexuality is one such subject. Human sexuality is best understood by children with sufficient maturity to grasp its complexity and implications."<sup>141</sup> On the surface, a concern about confusing or overwhelming young, impressionable students with possibly unfamiliar concepts relating to sexuality is not far-fetched and perhaps reasonable. However, this type of "no promo homo" bill is hypocritical because it argues that human sexuality is complex while the bill prohibits discussion of only non-heterosexual matters. The bill permits discussion of heterosexual sexual conduct, seeing that it is part of "natural human reproduction."<sup>142</sup> The bill's purported goal is to keep discussions of human sexuality away from children in school, but it allows a subset of it in the classroom after all. Accordingly, the governmental interest already seems weak and misleading.

Moreover, while certain dimensions of human sexuality would likely be foreign to a pre-K student or even an eighth grader, a child would likely find the subject of human sexuality less sensitive or complex if he or she were, in fact, exposed to the subject at an earlier age, especially in a safe

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<sup>140</sup> *Id.* at 331.

<sup>141</sup> S. 234 § 2(a).

<sup>142</sup> *See id.* § 2(b).

academic environment. The child could subsequently grow up to be a more informed adult who could comfortably and effectively communicate with people of varying sexual orientations or gender identities, rather than remain perplexed about them into adulthood.

Additionally, such “no promo homo” laws not only shield children from so-called “sensitive” details about intercourse between two men or two women, but they also censor very mild content, such as a book that happens to include as a secondary character a child with two mothers, or, more critically, health pamphlets at the school clinic about LGBT-targeted bullying. In this respect, the blanket ban of these materials across the full spectrum is likely not substantially related to a sufficiently important governmental interest concerned with sexuality. The connection between the law and the furtherance of the asserted state interests is too attenuated. The harm that results from these “no promo homo” restrictions likely outweighs any arguably legitimate governmental interest. Courts should recognize the alienation and anxiety that LGBT children experience as a result of knowing that their sexual orientation or gender identity is deemed as taboo by the school – or, at least, by the state legislature – while the heterosexuality or cisgender identity of their peers is permitted as a subject for discussion.

Empirical evidence reflects this very notion. In 2013, the Gay, Lesbian and Straight Education Network (GLSEN) updated its longstanding National School Climate Survey, with a sample of 7,898 LGBT students.<sup>143</sup> Among its multiple metrics, the study examined schools with an LGBT-inclusive curriculum, which contained “[p]ositive representations of LGBT people, history, and events,”<sup>144</sup> compared to schools without such a curriculum. GLSEN reported that LGBT students attending schools with an LGBT-inclusive curriculum “[w]ere less likely to feel unsafe because of their sexual orientation (34.8% vs. 59.8%).”<sup>145</sup> In addition, these students “[w]ere less likely to miss school in the past month” (16.7% vs. 32.9%), “were less likely to hear homophobic remarks such as ‘fag’ or ‘dyke’ often or frequently (46.3% vs. 68.7%),” and “[w]ere more likely to report that their classmates were somewhat or very accepting of LGBT people (75.2% vs. 39.6%).”<sup>146</sup> Meanwhile, 17.5% of the total surveyed LGBT students reported being “prohibited from discussing or writing about LGBT topics

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<sup>143</sup> GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, 2013 NATIONAL SCHOOL CLIMATE SURVEY 7 (2014).

<sup>144</sup> *Id.* at 71.

<sup>145</sup> *Id.* at xx.

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

in school assignments.”<sup>147</sup>

These statistics coincide with the analysis in *Baskin v. Bogan* by Judge Richard Posner, who noted, “Children, being natural conformists, tend to be upset upon discovering that they’re not in step with their peers.”<sup>148</sup> LGBT students remain a minority, but they would likely have a more robust sense of belonging in the classroom if they were included in the conversation. Alarming, the final number above illustrates that, first, LGBT censorship remains widespread and, second, students themselves are silenced, and not only teachers and books.

Altogether, the harms caused by the exclusion of LGBT content from the curriculum are considerably burdensome, reinforcing the argument that the discriminatory education laws should fail heightened scrutiny.

C. “No Promo Homo” Education Laws Likely Violate the Equal Protection Clause Even Under Rational Basis Review.

Although judicial doctrines and recent appellate decisions have demonstrated recognition of some variation of heightened scrutiny, the tier-of-scrutiny question for classification on the basis of sexual orientation will not be wholly resolved unless the Supreme Court elucidates with clear language the standard it seeks to employ. As noted earlier, the Supreme Court has recently managed to weigh in on the recent circuit split on same-sex marriage through *Obergefell*, without considering the standards question yet again. Perhaps a future legal challenge involving sexual orientation will compel the Court to delve into deeper examination of the matter. In any event, regardless of the prolonged ambiguity, even under rational basis review, “no promo homo” education laws are likely unconstitutional.

When following that standard, a court typically upholds a statute if its classification is rationally related to a legitimate state interest.<sup>149</sup> However, despite the lower threshold under this approach, “a court’s constitutional scrutiny of a law is not ‘minimalist,’ rather the Court must consider the ‘case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered.’”<sup>150</sup> Under this view, “rational basis review is not indiscriminately deferential.”<sup>151</sup> Further,

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

<sup>148</sup> *Baskin v. Bogan*, 766 F.3d 648, 664 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014).

<sup>149</sup> *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (zoning ordinance affecting persons with intellectual disabilities).

<sup>150</sup> *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310 (D. Conn. 2012).

<sup>151</sup> *Id.* at 334.

the Supreme Court in *Romer v. Evans* noted, “The search for the link between classification and objective gives substance to the Equal Protection Clause.”<sup>152</sup>

Accordingly, “[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that the classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”<sup>153</sup> The Supreme Court also held that “[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”<sup>154</sup> Further, “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [. . .] are not permissible bases” for singling out a particular group for disparate treatment.<sup>155</sup>

Here, “no promo homo” education laws likely do not even pass rational basis review. The logical gaps of SB 234 have been discussed. Similarly, the Missouri bill, HB 2051, had its own inconsistencies. It sought to prohibit the discussion of sexual orientation in “instruction, material, or extracurricular activity . . . other than in scientific instruction concerning human reproduction.”<sup>156</sup> Unlike the Tennessee bill, which at least contained a purported objective to exclude discussion of sexual orientation relating to the complexity of human sexuality, the Missouri bill would have permitted the scientific discussion of sexual orientation only as it relates to human reproduction. It therefore bluntly sought not to ban potentially sensitive details about sexual conduct, but instead numerous facets of sexual orientation. Theoretically, this ban could encompass social, cultural, or political matters concerning non-heterosexuals.

Though, based on a plain-language reading of the provision, the proposed legislation would technically result in the prohibition of discussions on heterosexuality because it, too, is a type of sexual orientation. In that sense, the bill does not benefit one group over the other, and instead treats heterosexuals and non-heterosexuals equally, thereby possibly passing rational basis review. However, in reality, the bill has commonly been seen as an anti-gay measure both inside and outside of the state legislature.<sup>157</sup> Further, the only permissible component – the

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<sup>152</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>153</sup> *Id.* at 633 (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)).

<sup>154</sup> *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).

<sup>155</sup> *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

<sup>156</sup> H.R. 2051 § A.

<sup>157</sup> *See, e.g.,* Wes Duplantier, *Zachary Wyatt, GOP Missouri Lawmaker, Says He Is Gay*,

"scientific instruction concerning human reproduction" – if interpreted similarly to "natural human reproduction" in SB 234, would likely have a heteronormative effect, stifling discussion of non-heterosexuality.

Interestingly, it is Chief Justice Roberts' dissent in *Obergefell* that may reinforce the legal argument against these education laws. After concluding that same-sex marriage bans pass rational basis review, he added, "[P]etitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits."<sup>158</sup>

Unlike marriage, public education is not associated with religious or historical doctrines or other philosophies that restrict the institution to one invariable societal image. Quite the contrary, a school is both a physical and conceptual place for developing and fostering one's thinking, a space for learning and intellectual enrichment, where old and new ideas converge and are contemplated in an effort to find the value in both. In an academic environment that is infused with tangible benefits, it is easy to see that open and productive discussions are at the core of education as legal and financial benefits are to marriage. Here, the Court would not be weighing in on the symbolic value of the institution of education as a whole, but simply on LGBT-related conversations, which would be more akin to ruling on hospital visitation rights, the denial of which Chief Justice Roberts would apparently analyze differently than the meaning of marriage under rational basis review.<sup>159</sup>

Meanwhile, Justice Alito's response may also, perhaps surprisingly, prove useful for proponents of LGBT inclusion. In his dissent, Justice Alito worried that "those who cling to old beliefs will be able to *whisper* their thoughts in the recesses of their homes, but if they *repeat those views in*

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*Denounces 'Don't Say Gay' Bill*, HUFFINGTON POST (May 2, 2012), [http://www.huffingtonpost.com/2012/05/02/zachary-wyatt-gay-gop-missouri-lawmaker-dont-say-gay\\_n\\_1471191.html](http://www.huffingtonpost.com/2012/05/02/zachary-wyatt-gay-gop-missouri-lawmaker-dont-say-gay_n_1471191.html); Catherine Martin, *Local Teachers Critical of 'Don't Say Gay' Bill*, COLUMBIA DAILY TRIBUNE (Apr. 30, 2012),

[http://www.columbiatribune.com/news/education/local-teachers-critical-of-don-t-say-gay-bill/article\\_03561c03-9791-5e3a-9a6a-caec14cf4b5b.html](http://www.columbiatribune.com/news/education/local-teachers-critical-of-don-t-say-gay-bill/article_03561c03-9791-5e3a-9a6a-caec14cf4b5b.html).

<sup>158</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C. J., dissenting).

<sup>159</sup> *Id.* Although, this logic would likely run inverse to the overarching message in Chief Justice Roberts' dissent, namely that the "accumulation of power" by the Court over such controversial social topics would come at the expense of "public debate" and "democratic means," whether through bills or ballots. *Id.* at 2624-2625. Therefore, the fate of any potential anti-LGBT education law would be unclear should it be evaluated under those two conflicting philosophies.

*public*, they will risk being labeled as bigots and treated as such by governments, employers, and *schools*.”<sup>160</sup> Given his emphatic concern over the silencing of opponents to same-sex marriage, including in educational environments, by the same token he ought not endorse the suppression of pro-LGBT views in those same locations.

Ultimately, the majority opinion in *Obergefell* leaves us with ample language in support of maintaining LGBT-inclusive classrooms, given the Court’s express commitment to not silence one’s identity – which is the driving force behind SB 234 and HB 2051, among other related education bills. This view is reflected in the Court’s first sentence of *Obergefell* – “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and *express their identity*.”<sup>161</sup> When referring to the long history of LGBT discrimination, the Court noted, “[A] truthful declaration by same-sex couples of what was in their hearts had to remain *unspoken*.”<sup>162</sup> The majority added, “It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”<sup>163</sup> It closed its opinion with a similar sentiment, asserting that the petitioners’ “hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”<sup>164</sup>

For children, the classroom constitutes a microcosm of their civilization: it is where they spend the bulk of their day-to-day lives. By being prohibited from engaging in healthy conversations with their teachers, counselors, nurses, and peers about these important matters, LGBT students would be unjustifiably singled out “to live in loneliness.”

The statistical data of GLSEN, along with findings by other leading LGBT youth organizations, such as The Trevor Project,<sup>165</sup> illustrate the concrete manifestations of the concerns raised in *Obergefell* and its predecessors. Together, they provide a sound challenge to “no promo homo” legislation. Whether the underlying negative sentiments toward LGBT matters in these bills and statutes stem from animus or mere discomfort, the disparate treatment would likely render them in violation of

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<sup>160</sup> *Id.* at 2642-43 (Alito, J., dissenting) (emphasis added).

<sup>161</sup> *Id.* at 2593 (emphasis added).

<sup>162</sup> *Id.* at 2596 (emphasis added).

<sup>163</sup> *Id.* at 2602.

<sup>164</sup> *Id.* at 2608.

<sup>165</sup> See Resources, THE TREVOR PROJECT, <http://www.thetrevorproject.org/section/resources> (last visited Sept. 18, 2015).

the Equal Protection Clause of the Fourteenth Amendment, even under rational basis review.

### **Conclusion**

"No promo homo" education laws impose drastic restrictions on student learning, effectively banning constructive and, for some children, life-saving discussions about pressing LGBT issues in schools. Although Tennessee's SB 234 and Missouri's HB 2051 were defeated, eight other states still have "no promo homo" laws on their books, gravely harming LGBT youth, who are already at risk of harassment and isolation without these added barriers. Such legislation illustrates lingering prejudices against the LGBT community in various pockets of the country. As the political world employs its own mechanisms to improve the lives of LGBT individuals, courts can facilitate this process by revisiting and reforming their antidiscrimination doctrines, including the tier of scrutiny applied. Although schools have wide discretion over the classroom curriculum, easily trumping First Amendment protections for teachers and students, "no promo homo" education laws are likely to be deemed unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, regardless of the level of scrutiny.