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See No Evil, Hear No Evil, Speak No Evil; Stemming the Tide of No
Promo Homo Laws in American Schools

SEE NO EVIL, HEAR NO EVIL, SPEAK NO EVIL; STEMMING THE TIDE OF NO PROMO HOMO LAWS IN AMERICAN SCHOOLS

By: Madelyn Rodriguez¹

“When someone with the authority of a teacher, say, describes the world and you are not in it, there is a moment of psychic disequilibrium, as if you looked into a mirror and saw nothing.”²

I. Introduction

The average primary school student spends the majority of his or her waking hours in school.³ The school experience plays a monumental role in determining a child’s worldview.⁴ It is no surprise, then, that the issue of what to teach in schools is a perennial conflict, especially when it relates to homosexuality.⁵ Several states and many more local governments have implemented policies prohibiting any instruction given to students that could be interpreted as portraying homosexuality in a positive light.⁶ These policies, often referred to as “No Promo Homo” policies, have been accused of contributing to what is an already toxic environment for many students.⁷ To illustrate the possible effects of these laws, consider the following hypothetical :

John is a middle school student in Arizona. He has two gay dads. John’s science teacher, Ms. Smith, spends a class teaching the required Arizona sex education and AIDS curriculum. In order to comply with the law she is required to promote abstinence and dispel myths about the transmission of HIV. Further, she is not permitted to promote the homosexual life-style, promote homosexuality as a positive alternative or suggest that some methods of homosexual sex are safe. During

the class, some students begin to taunt John because of his two gay dads. The other students ridicule John with taunts that he is gay too and his dads surely must have AIDS. Ms. Smith has never received any training on how to teach these subjects or how to handle students bullying other students. She is unsure of whether to step in and stop the taunts because she is afraid anything she says to defend John and his family could be construed as a promotion of homosexuality. As a result, she ignores the taunts and continues her lesson. After class, Ms. Smith sees students still ridiculing and harassing John in the hallways. She looks on, but does not step in to stop it, still unsure of what doing so would mean for her employment. This is not the first time John has been subjected to harassment at school, but John does not report it because he does not believe anything will be done.

The above hypothetical illustrates some of the questions raised by state and local laws prohibiting the promotion of homosexuality. Teachers are left to ask what they are and are not permitted to do. Specifically, they are left to determine whether interceding and stopping anti-gay bullying might be construed as promoting homosexuality as an acceptable alternative. Is a teacher like Ms. Smith even permitted to tell students that having two parents of the same gender is not something to harass someone for, or could this too be considered promoting homosexuality?

The issue of maintaining an open and safe environment for all children in school should be of serious concern to parents, educators, society, and the law.⁸ Given that teachers will inevitably leave an immeasurable impression on the values, morals, and opinions of the children whom they teach, the question becomes one of which values should be taught.⁹ By and large, there have been two separate views in the debate over student instruction.¹⁰ The traditional view believes that the school is tasked with inculcating students with a prescribed set of norms and values, usually the status quo.¹¹ The more liberal view believes that schools should act as a sort of “marketplace of ideas.”¹² This view tends to eschew the inculcation of traditional values and instead seeks to allow each teacher the freedom to introduce differing perspectives and allow for debate within the classroom.¹³ Logically then, it is clear that the traditional view endorses more limitations on teachers and other school officials, while the modern, liberal view tends to endorse the right of the teachers to present differing perspectives.¹⁴

Generally the courts, while recognizing the need for the free exchange of ideas, have found that the political body should be given the authority to decide what values should be taught and which should not.¹⁵ While this is a reasonable view, a problem arises when the government, through its schools, is permitted to dictate a set of “right” and “wrong” values.¹⁶ The imposition of a set system of beliefs and values prescribed by government officials from above is naturally susceptible to abuse.¹⁷ This article will argue that the imposition of No Promo Homo laws in schools violates the Equal Protection Clause and further encourages the bullying and harassment of Lesbian, Gay, Bisexual, and Transgender (“LGBT”)¹⁸ students, resulting in even more egregious violations of the Equal Protection Clause. Part II explores the origins and implications of No Promo Homo laws.¹⁹ Part III then provides an overview of select No Promo Homo Laws.²⁰ Part IV outlines current jurisprudence under the Equal Protection Clause of the United States Constitution and argues that No Promo Homo policies in schools violate the Equal Protection Clause.²¹ Lastly, Part V proposes several possible responses available to mitigate the effect of No Promo Homo educational policies, and alleviate their long-lasting and damaging effects on students.²²

II. Background

A. *No Promo Homo: Origins*

The gay rights movement has been a catalyst for controversy and social change since its inception.²³ Traditionally, anti-gay arguments have emerged from religious doctrine, medical opinions, or social stigmatization.²⁴ More recently however, a new anti-gay rhetoric has enjoyed tremendous success.²⁵ These arguments are broadly referred to as “no promotion of homosexuals” or “no promo homo.”²⁶ Professor William N. Eskridge, Jr., has written extensively on the topic²⁷ and describes the following underlying logic behind No Promo Homo: if the state adopts a law giving rights to homosexuals or protecting homosexuality it is thereby promoting homosexuality.²⁸ It should be the state’s purpose to promote good conduct and discourage conduct that is not as good.²⁹ Because homosexuality is not as good as heterosexuality, laws should not be adopted giving rights to homosexuals or protecting homosexuality.³⁰

These sorts of arguments and policies are especially pervasive in education.³¹ No Promo Homo educational policies are “local or state educational policies which restrict or eliminate any school based instruction or activity that could be interpreted as positive about homosexuality.”³² These policies may be worded in a manner so as to prohibit promotion of homosexuality or go further and ban all discussion of homosexuality.³³ These policies help to further reinforce many of the myths and misconceptions about homosexuality that still persist in society at large.³⁴

Some supporters of these laws argue that the purpose of not promoting homosexuality is to protect children who are wavering in their sexual identity and may be swayed towards homosexuality if it were to be promoted or discussed in school.³⁵ Proponents maintain that if teachers or schools are allowed to discuss homosexuality, it will signal to children that such behavior is acceptable; thereby serving to “indoctrinate” children into believing non-heterosexuality is acceptable.³⁶ However, forcing schools and teachers not to promote, or even acknowledge, that homosexuality exists as an alternative ignores the reality of society at large.³⁷ Although many No Promo Homo policies claim to

be grounded in the idea that children should not be taught about sex at school,³⁸ sexual identity has become a major issue, even for younger children.³⁹ Children may already be aware of their own homosexuality,⁴⁰ and increasing visibility of openly gay individuals in the media and within many families ensures that homosexuality will not merely go away if it is ignored in schools.⁴¹ California seems to be the leader in understanding the importance of acknowledging the LGBT community in schools, recently passing the FAIR Education Act which will require LGBT inclusive curriculum.⁴²

B. Effects of Stigmatization on LGBT Students

Homosexuality continues to be a divisive issue in American politics.⁴³ Although approval of homosexuality by the American public has followed an upward trend, there remains a very substantial segment of the public that continues to disapprove of homosexuality.⁴⁴ Further, although homosexuality has been accepted by more Americans as a whole, many in the LGBT community continue to keep their sexuality a secret due to fear of retribution and rejection.⁴⁵ These fears and continued disapproval of homosexuality are likely bolstered by what some commenters have termed “heterosexism” or “heterocentrism.”⁴⁶ The terms refer to a system of bias which regards heterosexuality as the “normative form of human sexuality and thereby connotes prejudice against anyone who falls outside of that form.”⁴⁷ Although heterosexism is a pervasive part of virtually every facet of society, schools may play an exceptionally important part in either continuing to foster heterosexism or limiting its continued viability, due to the role of schools as an agent for socialization.⁴⁸ A teacher in a school district which adopted a No Promo Homo policy stated that “[i]f you can’t talk about it in any context, which is how teachers interpret district policies, kids internalize that to mean that being gay must be so shameful and wrong, and that has created a climate of fear and repression and harassment.”⁴⁹ Although researchers have studied the links between heterosexism in schools and its effect on students,⁵⁰ it was not until a rash of suicides by LGBT students in recent years that the issue received any significant media attention.⁵¹ The issue has gained such attention that the United States Department of Education has begun to take a more

proactive role in ensuring that schools protect LGBT students to the full extent required by the law.⁵²

A 2009 survey of middle and high school students found that eighty-four percent of LGBT youth experienced harassment at school the previous year.⁵³ LGBT young adults who reported high levels of bullying during middle and high school are 5.6 times more likely to attempt suicide, and 2.6 times more likely to have clinical levels of depression.⁵⁴ A study of the higher rate of suicides in LGBT youth identified several related factors such as stigma and discrimination, especially acts such as rejection or abuse by peers, bullying, harassment, and denunciation from religious communities.⁵⁵ The report also presented “evidence that discriminatory laws and public policies have a profound negative impact on the mental health of gay adults.”⁵⁶ When questioned as to their experiences in school, LGBT students in states with No Promo Homo policies reported much less support from teachers and administrators as compared to student support in states without No Promo Homo policies.⁵⁷ Additionally, students from states with No Promo Homo laws were less likely to report having LGBT-related resources in school, such as comprehensive school harassment/assault policies, school personnel supportive of LGBT students, and Gay-Straight Alliances.⁵⁸

LGBT youth already face substantial adversity in schools.⁵⁹ Denying teachers and school administrators the ability to present homosexuality as an acceptable alternative to students only serves to further exacerbate the problems already faced by LGBT students.⁶⁰ The inability to maintain an open environment for students to explore themselves and learn about diversity among their peers will further perpetuate school atmospheres tinged with homophobia.⁶¹

III. State of the Law

A. Current State Laws

States have almost exclusive power to run their schools, and are thus entitled to almost unfettered discretion with regard to selection and implementation of school policies and curriculum.⁶² Several states and local districts have implemented some variation of No Promo Homo policies. Among these are

Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah.⁶³ Each effectively mandates that heterosexuality be emphasized as the only acceptable lifestyle.⁶⁴ Acknowledgment of the possibility of a healthy homosexual lifestyle would violate the policies.⁶⁵ Generally, the statutes can be divided into two categories, with the first explicitly barring positive discussion of homosexuality⁶⁶ and the second employing a more subtle approach.⁶⁷ The Arizona statute, for example, proscribes instruction that “promotes” a homosexual life-style, “portrays” homosexuality as an alternative life-style, or “suggests” that some methods of homosexual sex are safe.⁶⁸ Conversely, the South Carolina statute, for example, mandates that students only receive instruction regarding homosexuality in the context of sexually transmitted diseases.⁶⁹ This prohibition essentially forecloses any possibility that homosexuality be portrayed as an acceptable alternative to heterosexuality. Further, the vast majority of these policies emphasize that abstinence before marriage is the only viable option.⁷⁰ One commentator added:

[A]s ineffective as abstinence-only-until-marriage education is in protecting adolescents in general, it is wholly inapplicable to gay and lesbian adolescents [S]tudents are told they must remain abstinent until they are married. This seems somewhat cruel, as there is a certain percentage of these students who may have no legal opportunity to engage in marriage: students who are lesbian or gay. In effect, these students are being told that they should never have sex.⁷¹

The state policies are as follows:

Alabama: “Any program or curriculum in the public schools in Alabama that includes sex education or the human reproductive process shall, as a minimum, include and emphasize the following: [a]bstinence from sexual intercourse outside of lawful marriage is the expected social standard for unmarried school-age

persons Course materials and instruction that relate to sexual education or sexually transmitted diseases should include all of the following elements: an emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.”⁷²

- a. *Arizona:* “No district shall include in its course of study instruction which: 1. Promotes a homosexual life-style; 2. Portrays homosexuality as a positive alternative life-style; 3. Suggests that some methods of sex are safe methods of homosexual sex.”⁷³
- b. *Louisiana:* “No sex education course offered in the public schools of the state shall utilize any sexually explicit materials depicting male or female homosexual activity Emphasize abstinence from sexual activity outside of marriage as the expected standard for all school-age children.”⁷⁴
- c. *Mississippi:* “Abstinence-only education shall remain the state standard for any sex-related education taught in the public schools. For purposes of this section, abstinence-only education includes any type of instruction or program which, at an appropriate age . . . [t]eaches the current state law related to sexual conduct, including forcible rape, statutory rape, paternity establishment, child support and homosexual activity . . . and teaches that a mutually faithful, monogamous relationship in the context of marriage is the only appropriate setting for sexual intercourse.”⁷⁵
- d. *Oklahoma:* “AIDS prevention education shall specifically teach students that: 1. engaging in homosexual activity, promiscuous sexual activity, intravenous drug use or contact with contaminated blood products is now known to be primarily responsible for contact with the AIDS virus; 2. avoiding the activities

specified in paragraph 1 of this subsection is the only method of preventing the spread of the virus.”⁷⁶

- e. *South Carolina*: “The program of instruction provided for in this section may not include a discussion of alternative sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.”⁷⁷
- f. *Texas*: “Course materials and instruction relating to sexual education or sexually transmitted diseases should include: emphasis, provided in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under Section 21.06, Penal Code.”⁷⁸
- g. *Utah*: “[T]he materials adopted by a local school board . . . shall be based upon recommendations of the school district’s Curriculum Materials Review Committee that comply with state law and state board rules emphasizing abstinence before marriage and fidelity after marriage, and prohibiting instruction in: the advocacy of homosexuality. . . the advocacy of sexual activity outside of marriage.”⁷⁹

B. *Vagueness*

One of the striking aspects of some of the more blatant No Promo Homo policies is just how vague they really are.⁸⁰ The Arizona law states that teachers may not “promote,” “portray,” or “suggest” certain aspects relating to the homosexual “life-style.”⁸¹ The school staff charged with abiding by these policies must then determine exactly what conduct or instruction would constitute promotion, portrayal, or suggestion. The term “life-style” is just as ineffective, in that it has no accepted meaning.⁸² Thus, the meaning of the term, and by extension the policy, becomes susceptible to a wide array of interpretations that can be manipulated in kind with desired outcomes.⁸³ It may in fact be another example of the conflation between sexual identity

and sexual behavior, a distortion that is common in society and the legal realm.⁸⁴ Compounding all of this is the fact that no guidance is normally provided to help teachers determine acceptable standards of instruction or responses.⁸⁵

C. *Most Recent Policies*

Recently, two policies were thrust into the media spotlight. The first was a local policy in effect in Anoka-Hennepin, Minnesota.⁸⁶ The Sexual Orientation Curriculum Policy (“SOCP”) stated in part:

Teaching about sexual orientation is not a part of the District adopted curriculum; rather, such matters are best addressed within individual family homes, churches, or community organizations. Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student led discussions.⁸⁷

The SOCP was predated by an official memo promulgated by the District which declared that “homosexuality [is] not to be taught/addressed as a normal, valid lifestyle.”⁸⁸ Written guidance from the Anoka-Hennepin School District made clear that the term “sexual orientation” in the SOCP was intended to bar discussion of homosexuality, but not heterosexuality.⁸⁹ In a lawsuit on behalf of five former and current students of the Anoka-Hennepin School District, the Southern Poverty Law Center and National Center for Lesbian Rights alleged that the SOCP violated student rights under the Equal Protection Clause, the Fourteenth Amendment of the United States Constitution, Title IX, and the Minnesota Human Rights Act.⁹⁰ The plaintiffs pointed to evidence of bullying and harassment that went unchecked by teachers and administrators, who were inadequately trained to deal with anti-gay bullying due to the “neutrality” policy.⁹¹ The plaintiffs alleged that one administrator told parents that the School District handles issues of racial harassment differently from harassment based on sexual orientation.⁹² Plaintiffs also pointed out that during the nine month period between November 2009 and July 2010, at least four LGBT or perceived LGBT students in the Anoka-Hennepin School District committed suicide.⁹³ After several months, the School District and the Plaintiffs entered into a

consent decree.⁹⁴ Under the decree, the School Board agreed to implement a program with significant protections for LGBT students, with the aim of preventing bullying and creating a more accepting environment.⁹⁵ Of particular importance, the School District specifically agreed to repeal its SOCP, and made clear that school officials may affirm the self-worth of students, including their status as LGBT.⁹⁶

Another policy that garnered substantial attention was Tennessee's proposed law, dubbed the "Don't Say Gay" bill.⁹⁷ The original bill would have banned teachers from "provid[ing] any instruction or material that discusses sexual orientation other than heterosexuality."⁹⁸ The bill was later amended and would have required curriculum to be "limited exclusively to age-appropriate natural human reproduction science."⁹⁹ The bill's Senate sponsor, Senator Stacey Campfield, made it clear that the change in the language of the bill was merely a way to get the bill passed by assuaging fellow Senators uneasy with viability of the original language.¹⁰⁰ He was confident that the altered language would be just as effective in barring discussion of homosexuality, stating, "There's more than one way to skin a cat. This skins the cat, but doesn't scare [other legislators] so much."¹⁰¹ The bill's House sponsor, Representative Jon Hensley stated, "I have two children — in the third- and fourth-grade — and [I] don't want them to be exposed to things I don't agree with . . ."¹⁰² The Tennessee Senate approved the bill in late 2011, but the bill died in May 2012 when the House of Representatives failed to vote on it before the end of the legislative session.¹⁰³

Although it did not garner nearly as much media attention, legislators in Missouri, taking the lead from Tennessee, introduced a similar Don't Say Gay bill.¹⁰⁴ The law would have banned teachers from talking about any sexuality other than heterosexuality and would have also banned any extracurricular activities that would do the same.¹⁰⁵ It stated, "Notwithstanding any other law to the contrary, no 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."¹⁰⁶ Tennessee and Missouri's Don't Say Gay bills illustrate that No Promo Homo school policies are not just a vestige of past anti-gay rhetoric, but instead continue

to find support from certain sizeable segments of legislators and citizens alike.

IV. Equal Protection Clause

A. *Constitutional Standard*

The Fourteenth Amendment to the United States Constitution requires that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁰⁷ The Equal Protection Clause gives Congress the power to enforce this right, "but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection."¹⁰⁸ Under this framework, the basic constitutional question is whether the challenged government action is justified by a sufficient purpose.¹⁰⁹

When a government action is challenged under the Equal Protection Clause, three inquiries should be made: First, what is the classification? Second, what is the appropriate level of scrutiny? Third, does the government action meet the level of scrutiny?¹¹⁰

The Supreme Court of the United States has interpreted the Equal Protection Clause to afford differing levels of protection to various groups.¹¹¹ Classifications such as race, alienage, and national origin are entitled to strict scrutiny.¹¹² Laws found to be discriminatory against a classification subject to strict scrutiny will be "sustained only if they are suitably tailored to serve a compelling state interest."¹¹³ Strict scrutiny is usually fatal to the challenged law because the government must have a truly significant reason for the discrimination.¹¹⁴ Classifications such as gender and illegitimacy are entitled to intermediate scrutiny.¹¹⁵ Intermediate scrutiny will result in the law being upheld if the government can establish that the discrimination is substantially related to an important government purpose.¹¹⁶

All other classifications, including sexual orientation, are reviewed based on a rational basis standard.¹¹⁷ A classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."¹¹⁸ This imposes on a plaintiff the burden of refuting any and all possible

justifications for the challenged law.¹¹⁹ As a result, rational basis review is a very difficult standard for a challenger to meet. This is especially evident when looking at the outcomes of equal protection clause claims; between 1973 and 1996, the United States Supreme Court upheld over a hundred classifications on rational review basis, while invalidating less than a dozen classifications under this review.¹²⁰

It is undeniable that the level of scrutiny a group is entitled to will be extremely influential in the outcome of any particular legal classification.¹²¹ Although the factors involved in determining the level of scrutiny a classification is entitled to have not been clearly established, some general patterns have emerged.¹²² Thus, a court will likely consider whether the involved group is a “discrete and insular” minority, whether the group is defined by an immutable characteristic, whether the group has been subjected to a history of discrimination, whether the group is “politically powerless,” and whether the government classification is related to the group’s functioning in society.¹²³ Groups who meet these criteria may then be entitled to suspect or quasi-suspect classification.¹²⁴

It has been the aim of many minority groups who are only entitled to rational review to attempt to convince the court to afford their classification an upgrade to require heightened scrutiny via a suspect or quasi-suspect classification.¹²⁵ However, these classifications have remained relatively unaltered over time, and are likely to remain so, due to the Supreme Court’s reluctance to acknowledge new suspect or quasi-suspect classifications even where the group appears to have fulfilled the factors that would ostensibly entitle them to such treatment.¹²⁶ Additionally, the Court has been reluctant to recognize new fundamental Constitutional rights, which would likely lead to a blitz of challenges to state and local laws.¹²⁷ Recent cases, however, indicate that the rational basis review has been given “a bite” resulting in a sort of quasi-heightened scrutiny for classifications such as sexual orientation.¹²⁸ Thus, it is my contention that this shift in analysis, if applied to No Promo Homo laws in schools, would be more likely to result in a finding that these laws are unconstitutional.¹²⁹

B. Rational Review With a Bite

Much has been said about the consistency of the U.S. Supreme Court’s decisions regarding rational review in the context of the Equal Protection Clause.¹³⁰ The standard two-step test requires that: 1) the legislature pursue a legitimate goal; and 2) the means chosen to attain that goal are not arbitrary or irrational.¹³¹ Thus, if a court finds any plausible government interests and can conceive of reasons to support the government’s methods for achieving those interests, the law will survive Constitutional scrutiny.¹³²

While this test is fairly straightforward, the rational review standard has become increasingly difficult for the Court to implement in a consistent manner.¹³³ Under what has been termed “second order” rational review or “rational review with a bite,” the Court does not defer to the judgment of the legislature, but instead conducts an “inquiry into whether given the benefits of the statute, the statute reflects a rational accommodation of interests.”¹³⁴ In implementing a more equitable, balancing-type approach, the Court is effectively eschewing the dictates of rational review, and instead, applying some formulation of the more stringent heightened review. In his concurring opinion in *City of Cleburne v. Cleburne Living Center*, Justice Marshall chastised the majority’s reasoning, stating:

[T]he Court’s heightened-scrutiny discussion is even more puzzling given that Cleburne’s ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called “second order” rational-basis review rather than “heightened scrutiny.” But however labeled, the rational basis test invoked today is most assuredly not the rational-basis test of [precedent].¹³⁵

Almost two decades later, in another concurring opinion, Justice O’Conner seemed to echo Justice Marshall’s observations, albeit in a more approving manner. In *Lawrence v. Texas*,¹³⁶ the Court declared a Texas statute criminalizing same-sex sodomy was unconstitutional under the Due Process Clause.¹³⁷ While the majority refused to strike down the law based on the Equal Protection Clause, the Court acknowledged that it was a “tenable” argument.¹³⁸ In her concurring opinion, Justice O’Connor argued that “[w]hen a law exhibits such a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”¹³⁹ Although the *Lawrence* statute was invalidated under the Due Process Clause, the Court’s reasoning echoes the reasoning found in several critical “rational review with a bite” cases.¹⁴⁰ Three cases, discussed in detail below, are especially poignant in the analysis of modern Equal Protection Clause jurisprudence under rational review: *United States Department of Agriculture v. Moreno*, *Cleburn v. Cleburn Living Center*, and *Romer v. Evans*.¹⁴¹

1. *United States Department of Agriculture v. Moreno*

Moreno involved an Equal Protection Clause challenge to a provision of the Food Stamp Act of 1964, which excluded distribution of food stamps to any household containing an unrelated individual.¹⁴² A class of plaintiffs barred from receiving benefits because of their household make-up filed suit, alleging the requirement was discriminatory and contrary to the Equal Protection Clause.¹⁴³ Because the plaintiffs were not one of the classifications entitled to heightened scrutiny, the Court evaluated the challenged law under rational basis review.¹⁴⁴

Of particular importance in the case was the legislative history of the Food Stamp Act of 1964.¹⁴⁵ A House report indicated that the intent behind the relation requirement was to prevent “hippies” and “hippie communes” from receiving benefits.¹⁴⁶ The Court rejected the government’s argument that the exclusionary classification was an effort to curb fraud, instead finding that the classification did not bear enough relation with the stated intent for the reasoning to be credible.¹⁴⁷ The Court held that absent any other justification, the Food Stamp Act’s relation

requirement could not be upheld based on this purpose.¹⁴⁸ Writing for the majority, Justice Brennan declared that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹⁴⁹ *Moreno* establishes that while rational review is a very relaxed standard, there are some instances where there is really no rational basis for the government action.¹⁵⁰

2. *Cleburne v. Cleburne Living Center*

Cleburne involved a city ordinance requiring a special use permit for the construction of hospitals for the insane, feeble-minded, alcoholics or drug addicts, or penal or correctional institutions.¹⁵¹ The Cleburne Living Center sought a permit to build a home for the mentally retarded.¹⁵² When the city council denied the permit, the Cleburne Living Center filed suit, challenging the validity of the ordinance, and arguing that it discriminated against the mentally retarded and violated the Equal Protection Clause.¹⁵³ The district court found that mental retardation was neither a suspect class nor a quasi-suspect class, and was instead subject to rational review.¹⁵⁴ Applying rational review, the district court found that the ordinance was rationally related to the city’s legitimate interests in protecting the community and the mentally retarded and thus found the ordinance to be constitutional.¹⁵⁵ The Fifth Circuit Court of Appeals determined that mental retardation was a quasi-suspect classification and thus subject to an intermediate level of scrutiny.¹⁵⁶

The Supreme Court of the United States held that mental retardation was only entitled to rational basis review, not heightened scrutiny.¹⁵⁷ The Court was hesitant to set out a standard that would expand the classifications entitled to strict scrutiny, due to the difficulty that could arise in where to draw to the line.¹⁵⁸ Even subject to only rational review, the Supreme Court was unwilling to accept the City’s reasoning for the law.¹⁵⁹ The Court found that the city’s reasoning was based on “mere negative attitudes or fear” which was not a rational basis for the legislative action.¹⁶⁰ The Court found that where the permit requirement rested on “irrational prejudice,” the ordinance was plainly contrary to the requirements of the Equal Protection Clause.¹⁶¹

3. *Romer v. Evans*

In 1992, Colorado voters approved Amendment 2, a constitutional provision prohibiting any state action designed to protect homosexuals from discrimination.¹⁶² A suit was filed by several government employees and private citizens challenging the amendment on the basis of the Equal Protection Clause.¹⁶³ The district court ruled that the amendment was subject to strict scrutiny because of its infringement on the rights of gays and lesbians from participating in the political process.¹⁶⁴ The state attempted to make the argument that Amendment 2 was designed to serve compelling interests; however, the court was not persuaded.¹⁶⁵ The Supreme Court of Colorado affirmed the ruling and the United States Supreme Court granted certiorari.¹⁶⁶

In its ruling striking the amendment, the Court rejected Colorado's argument that by prohibiting protections for gays and lesbians, the State was merely ensuring that everyone was placed on equal ground.¹⁶⁷ Emphasizing the fact that the law specifically singled out only homosexuals, and had an extensive effect upon the legal rights of homosexuals, the Court found that even if the amendment was only subject to rational review, the law was still violative of even this lenient standard.¹⁶⁸ Amendment 2 was found to be unconstitutional because it "imposed a 'broad and undifferentiated disability' on a single group and harbored 'animus' toward a class of people."¹⁶⁹ The *Romer* Court's finding of a violation of the Equal Protection Clause even under rational review was a significant development in Equal Protection jurisprudence.¹⁷⁰

C. *Rational Review With A Bite as Applied to No Promo Homo Laws*

In determining the level of scrutiny afforded to various classifications, the Court has pointed to several important considerations, such as whether the group is a discrete and insular minority, whether the group is defined by an immutable characteristic, and whether the group has been subjected to a history of discrimination.¹⁷¹ Although LGBT people are likely to fulfill most of these factors, it is unlikely that LGBT people will be afforded strict scrutiny, due to a general reluctance to accept new strict scrutiny classifications.¹⁷² However, because the Supreme

Court has effectively closed off this avenue, the Court seems more willing to afford classifications entitled to rational review a more probing analysis.¹⁷³ This rational review with a bite standard would likely be the standard applied to No Homo Promo policies challenged under the Equal Protection Clause.¹⁷⁴

Rational review with a bite cases such as *Moreno*, *Cleburne*, and *Romer* established that even where the Court ostensibly defers to the judgment of the government, not every justification will be sufficient.¹⁷⁵ In each case, the Court found evidence of some ulterior basis for the classification, essentially some sort of bias or animus against the group.

In the case of Tennessee's proposed "Don't Say Gay Bill," the words of one of the bill's sponsors, Senator Stacey Campfield, were especially telling. In a radio interview discussing his proposed bill, responding to a question concerning the prevalence of bullying of LGBT students in schools, he stated "[t]he bullying thing is the biggest lark out there."¹⁷⁶ Regarding homosexuality, he stated, "[i]t happens in nature, but so does bestiality, that does not make it right or something we should be teaching in school."¹⁷⁷ Further he asserted that "it is virtually, not completely, but virtually, impossible to contract AIDS through heterosexual sex . . . very rarely [transmitted]."¹⁷⁸ As the sponsor of law which was supposedly intended to protect children from the dangers of sexual activity and sexually transmitted diseases, Senator Campfield's statements are not only false, they are downright dangerous.¹⁷⁹

With regard to No Promo Homo policies in general, it will be difficult for the government to provide any justification beyond that of moral opposition to homosexuality. Even though some of the policies are proffered in the context of sex education or AIDS education, the central policies do not seem to have an interest in actually preventing the transmission of sexually transmitted diseases.¹⁸⁰ It is completely implausible to assert that no method of homosexual sex is safe. If the state was truly interested in preventing the spread of sexually transmitted diseases, as would be the likely justification for the law should it be challenged, they might actually provide instruction on methods of safe homosexual sex, just as they would do for heterosexual sex. Furthermore, the language of the policies evidences an animus against LGBT people.¹⁸¹ These laws make it clear that the aim

of the policy is to deter homosexuality by stigmatizing and demeaning it. It is striking that the policies require that teachers emphasize that homosexual conduct is a criminal offense,¹⁸² in spite of the fact that the United States Supreme Court struck down Texas's own law banning same-sex sodomy in *Lawrence v. Texas*.¹⁸³ As a result, these policies violate the Equal Protection Clause because they do not have any viable rational justifications as written.

V. Challenging No Promo Homo

The aim of those fighting to eliminate No Promo Homo policies in schools is not to recruit young children into a homosexual "lifestyle," as some have argued.¹⁸⁴ Instead, the aim is to remove just one of the many legal and social barriers to equality. Because the school plays such an influential role in children's lives, No Promo Homo policies can be especially destructive to children who identify or are perceived as LGBT.¹⁸⁵ The recent media attention on two No Promo Homo policies indicates the time is ripe to bring further challenges to the laws.¹⁸⁶ The Annoka-Hennepin School District lawsuit and subsequent settlement, which agreed to repeal its policy regarding LGBT students, and allow for the affirmation of students' LGBT status, could be instrumental in spurring similar challenges to other No Promo Homo policies around the United States, or even encourage some states or districts to reconsider and repeal their No Promo Homo policies.¹⁸⁷ The threat of possible negative media attention and litigation costs involved in defending such a policy might also help to prevent No Promo Homo policies from being adopted by other schools and legislators. It is also important to note that some of the statewide No Promo Homo policies have been challenged by subsequent legislators.¹⁸⁸ Media coverage of these efforts could help increase support for these repeal measures.

In addition, another promising response to local and state level No Promo Homo educational policies is federal intervention. Although, education has traditionally been within the purview of state and local government,¹⁸⁹ recent federal legislation, such as the No Child Left Behind Act and the Race to the Top Fund, indicates a possible trend towards standardization of educational programs across the United States.¹⁹⁰ Continued pressure from the

Department of Education could help lead to a change in policy. Alternatively, the Department could issue guidance on the topic of how teachers can abide by these policies while still ensuring the safety and well-being of students.

Moreover, the Department of Education can continue to lobby for federal anti-bullying legislation that specifically covers sexual orientation and gender identity. Two such bills, The Student Non-Discrimination Act and the Safe Schools Improvement Act, have been introduced and met with approval from LGBT activists and educators.¹⁹¹ Although similar legislation¹⁹² has failed in the past, the hope is that eventually there will be enough political support to have such a law passed. These protections would send the signal that even if No Promo Homo laws remain on the books, this will not excuse ignoring the destructive results they may have on students. This would also force school officials to evaluate their programs to ensure compliance with the law. Ultimately the best anti-bullying policies prevent bullying rather than punish it severely after the fact.¹⁹³

VI. Conclusion

No Promo Homo policies continue to enjoy prevalence in classrooms around the country.¹⁹⁴ Those who support these policies applaud them for presumably protecting children from homosexuality. Those who oppose the policies argue that these laws unfairly target a vulnerable group, and that children should be entitled to accurate information. Accordingly, it is unsurprising that battles over what students are exposed to in the classroom, especially with regard to homosexuality, engender strong opinions on both sides of the aisle. Complicating the issue, or perhaps resulting from it, the incidence of bullying and stigmatization of students who are LGBT or are perceived to be LGBT demonstrates the urgency required in dealing with this issue.¹⁹⁵ The failure of schools to address or support students who are LGBT or may come from an LGBT family likely contributes to the stigmatization of those students.

Ultimately, however, those states and local governments who continue to enforce curricular requirements banning the discussion or promotion of homosexuality, are likely violating the rights of students themselves. These policies stigmatize one

class of people, based on nothing more than political and social animus against them.¹⁹⁶ Although sexual orientation has not been acknowledged as a strict scrutiny classification under the relevant Equal Protection Clause jurisprudence, it appears that sexual orientation fits squarely within the enumerated requirements for strict scrutiny, and should be classified as such.¹⁹⁷ However, even if the Court continues its reluctance to grant strict scrutiny review to new classifications, it would appear that No Promo Homo policies still violate the Equal Protection Clause, even when only entitled to rational basis review. Although rational basis review is a very deferential standard, the Supreme Court has shown that although it may be applying rational review, there does seem to be a willingness to give it a bite, thus requiring a more compelling reason for the classification.¹⁹⁸

There is no doubt that challenging these policies in court will likely prove a long and difficult process, but taking into account the immense impact they have on students, it is an important cause. In addition to courtroom challenges, educators, parents and legislators should work together to come up with a solution that would be both appropriate for school children but also present a fair portrayal of homosexuality, so as to protect vulnerable children.¹⁹⁹ Ultimately, those who support these policies, and those who are fighting to change them, have the same goal in mind. Indisputably, the goal is to protect our children. The only question is whether both groups will be able to put aside their ideological differences in order to prevent further damage to children across the country.

(Endnotes)

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*At the time this article went to press, two cases involving gay rights issues were set to be heard by the U.S. Supreme Court in March 2013. *See Hollingsworth v. Perry* and *United States v. Windsor*.*

² ADRIENNE RICH, *Invisibility in Academe*, in BLOOD, BREAD & POETRY: SELECTED PROSE 1979-1985 199 (1986).

³ Sandra L. Hofferth & John F. Sandberg, *How American Children Spend Their Time*, 62 J. OF MARRIAGE AND FAM.

295, 300 (2001) (reporting that children between the ages of six and twelve spent over thirty hours per week in school, more than double the next most common activities of playing and television, which consumed no more than twelve and thirteen hours per week, respectively).

⁴ *See* KATHY BICKMORE, *QUEERING ELEMENTARY EDUCATION: ADVANCING THE DIALOGUE ABOUT SEXUALITIES AND SCHOOLING* 15 (William J. Letts IV & James T. Sears eds., 1999) (expounding upon the impact of school curriculum and teacher involvement on students' social development and arguing for the inclusion of sexuality curriculum in elementary schools).

⁵ *See id.* at 18 ("Reading about or discussing any belief or culture has never been shown to cause a child to adopt that way of life [citation omitted]. However, it is precisely these kinds of deeply held identities, including values and practices involving homosexuality, that are most often censored.").

⁶ *See infra* Part III.

⁷ *See infra* Part II.

⁸ *See* David C. Anderson, *Curriculum, Culture, and Community: The Challenge of School Violence*, 24 CRIME & JUST. 317, 328-29 (1998) (compiling extensive collections of statistics regarding school violence, and stating that while not always evident in the statistics, there is "broad agreement among educators" that school violence has become more severe in recent years).

⁹ Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 779 (1995) (noting the difficulty in determining which values should be taught, because "virtually every value is objectionable to someone.").

¹⁰ Kevin G. Weiner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 965 (2003).

¹¹ *Id.*

¹² *Id.*

¹³ Tyll van Geer, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 253 (1983) ("Therefore, an educational effort consistent with respect for the autonomy of students must be one that exposes them to controversy; it must avoid seeking to imbue students with beliefs, but must instead encourage them to think critically about the goals and values they choose to pursue through life.").

¹⁴ See Weiner, *supra* note 10, at 966 (contrasting the approaches of both perspectives with regard to teacher autonomy).

¹⁵ See, e.g., Bd. of Educ. v. Pico, 457 U.S. 853, 863–64 (1982); Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474, 1476 (4th Cir. 1996).

¹⁶ See Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (forbidding educators from casting a “pall of orthodoxy” over the classroom); West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

¹⁷ See Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 20–23 (1987) (discussing the public and judicial system’s general ambivalence towards the potential for abuse of power inherent in the right of schools to inculcate values).

¹⁸ See THE HANDBOOK OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PUBLIC HEALTH: A PRACTITIONER’S GUIDE TO SERVICE 3 (Michael D. Shankle ed., 2006) (explaining the variety and importance of terminologies used to describe non-heterosexual persons). “LGBT” stands for Lesbian, Gay, Bisexual, Transgender. *Id.* For the purposes of this comment the term LGBT will be used in the interest of brevity. It should be read to include all other related terms, including but not limited to, gay, lesbian, bisexual, transgender, queer, questioning, confused supportive and intersexed.

¹⁹ See *infra* Part II.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

²² See *infra* Part V.

²³ See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 478–80 (2001) (exploring the development and impact of minorities on the development and interpretation of the law).

²⁴ 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, 1339–40 (2000) (discussing the evolving nature of anti-gay policies, and arguing that the traditional anti-gay discourse has been supplanted by No Promo Homo reasoning).

²⁵ *Id.* at 1338 (contending that No Promo Homo arguments have been more successful in defeating gay

marriage rights due to the sedimentary nature of the argument, and its appeal to diverse groups of society).

²⁶ See David M. Skover & Kellye YTesty, *Lesbigay Identity as Commodity*, 90 CAL. L. REV. 223, 226 n. 13 (citing Dan Beyers, *Montgomery Students Push for Discussion of Gay Issues*, WASH. POST., Dec. 8, 1966, at B1) (explaining that the origin of “no promo homo” is uncertain; however the phrase first appeared in a newspaper article reporting on a Virginia school board’s refusal to endorse homosexual activity).

²⁷ See *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, *supra* note 24, at 1329; see also William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equity*, 74 IND. L. J. 1085, 1096–98 (1999) (discussing No Promo Homo in the context of the federal Defense of Marriage Act); WILLIAM N. ESKRIDGE JR. & NAN HUNTER, *SEXUALITY, GENDER AND THE LAW*, 1010–1014 (2d ed. 2003) (discussing no promo homo educational policies).

²⁸ *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, *supra* note 24, at 1329.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1359–60.

³² Mary L. Bonauto, *Background Information on “No Promo Homo” Policies*, GAY LESBIAN AND STRAIGHT EDUCATION NETWORK, <http://www.glsen.org/cgi-bin/iowa/all/news/record/30.html> (last visited Nov. 29, 2012) (explaining that No Promo Homo educational policies target activities or educational materials, instruction, or other services that may encourage a homosexual lifestyle).

³³ *Id.*

³⁴ See AMY D. RONNER, *HOMOPHOBIA AND THE LAW* 95–98 (2005) (discussing continued prevalence of irrational beliefs regarding homosexuality); see also Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1401 (2010) (explaining that much of the opposition to equal rights for homosexuals has been premised on the idea that homosexuality is in some way contagious and that children are especially susceptible to homosexual suggestion).

³⁵ See Candi Cushman, *Capturing Children’s Minds*, TRUE TOLERANCE (2010), <http://www.truetolerance.org/2011/capturing-childrens-minds> (last visited Nov. 29, 2012) (claiming that gay advocacy groups are forcing homosexual promoting curriculum on children in schools as a way to “capture” their minds).

³⁶ Compare Tina Fetner, *Working Anita Bryant: The Impact of Christian Anti-Gay Activism on Lesbian and Gay Movement Claim*, 48 SOC. PROBS. 411 (2001) (“I don’t hate the homosexuals! But as a mother, I must protect my children from their evil influence They want to recruit your children and teach them the virtues of becoming a homosexual.”) (citing an undated direct mail fund-raising letter from Anita Bryant’s organization, Anita Bryant Ministries. Letter preserved by the National Gay, Lesbian, Bisexual, and Transgender Historical Society of Northern California), with KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 45–46 (2006) (“[I]f the children are honestly wavering, no promo homo laws are just as much attempts to convert them to heterosexuality.”). Statements such as those made by Anita Bryant, quoted above, exemplify Professor Yoshino’s “contagion model,” which dictates that children must be protected from being converted to homosexuality by aggressive efforts of homosexuals. YOSHINO, *supra*.

³⁷ See Bickmore, *supra* note 4, at 15 (discussing an informal study where students at six different elementary schools were asked to describe what the words “gay,” “lesbian,” and “bisexual” meant; the students provided substantial lists of information, most of which was learned from the media or peers).

³⁸ See Emma Renold, *‘Coming Out’: Gender, (hetero) sexuality and the primary school*, 12 GENDER AND EDUC. 309–326 (2000) (challenging the idea that primary school children are free of pressures to conform to expectations of societal sexual norms).

³⁹ See GLSEN Research Brief, GAY LESBIAN AND STRAIGHT EDUCATION NETWORK, http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1475-1.pdf (middle schools students (last visited Nov. 29, 2012) (analyzing the experiences of LGBT youth in middle schools around the United States); see also Bickmore, *supra* note 4, at 15–18 (discussing the need for instruction on human sexuality even for children as young as elementary school aged); Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 270 (1996) (deconstructing the seemingly perpetual social and legal fiction that gay children do not naturally exist).

⁴⁰ See Jason Cianciotto & Sean Cahill, *Education Policy: Issues Affecting Lesbian, Gay, Bisexual, and Transgender Youth*, THE NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE 11–12 (2003), <http://thetaskforce.org/reports>

_and_research/education_policy. Various research studies indicate that around five percent of students in grades nine through twelve identify as LGBT. *Id.* To illustrate, this would have meant that in 2002, almost 689,000 students of the total 13.8 million in the United States in that age bracket, identified as LGBT or had same-sex attraction/experiences. *Id.*

⁴¹ See A. DAMIEN MARTIN & EMERY S. HETRICK, PSYCHOPATHOLOGY AND PSYCHOTHERAPY IN HOMOSEXUALITY 166–175 (Michael W. Ross ed., 1988) (analyzing the cognitive, social and emotional effects of stigmatization on homosexual youth).

⁴² See CAL. EDUC. CODE § 51204.5. The California law requires instruction in social sciences including “a study of the role and contributions” of various ethnic and minority groups including lesbian, gay, bisexual, and transgender people “with particular emphasis on portraying the role of these groups in contemporary society.” *Id.* Conservative groups mounted a drive to repeal the law, but the effort ultimately failed when organizers were unable to collect enough signatures to meet ballot initiative requirements. Wyatt Buchanan, *Group Fighting LGBT Teachings Fails Petition Drive*, SAN FRANCISCO CHRONICLE, Oct. 13, 2011, at C1. However, further challenges to the law are anticipated. *Id.* Much of the opposition to the FAIR Education Act is premised on religious opposition and claims that the law acts as a tool for indoctrination of children. See David Badash, *SB 48: California’s FAIR Education Act Is this Year’s Prop 8. Is it DOA?*, THE NEW CIVIL RIGHTS MOVEMENT (Sept. 2, 2011), <http://thenewcivilrightsmovement.com/sb-48-californias-fair-education-act-is-this-years-prop-8-is-it-doa/politics/2011/09/02/26271>.

⁴³ See Lydia Saad, *Four Moral Issues Sharply Divide Americans*, GALLUP POLITICS (May 26, 2010), <http://www.gallup.com/poll/137357/four-moral-issues-sharply-divide-americans.aspx> (finding that fifty-two percent of Americans believe gay and lesbian relations are “morally acceptable” while forty-three percent believe they are “morally wrong”).

⁴⁴ See Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 LAW & SEXUALITY 119, 135–36 (2003) (explaining that nationwide polls reveal that in 2001, fifty-two percent of Americans believed that homosexuality was an acceptable alternative lifestyle, as compared to forty-four percent in 1996, thirty-eight percent in 1992, and thirty-four percent in 1982); cf. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP POLITICS (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority->

americans-favor-legal-gay-marriage.aspx (explaining that a 2011 poll reveals that a majority of Americans favor legal same-sex marriages, claiming support from fifty-three percent of Americans, a major increase from only twenty-seven percent support in 1996).

⁴⁵ See Yatar, *supra* note 44, at 141 (noting reasons why some LGBT people remain “in the closet”).

⁴⁶ *Id.* at 141–142.

⁴⁷ *Id.*

⁴⁸ See *Schools: A Petri Dish for Heterosexism* LGBTeach (Nov. 17, 2010), <http://lgbteach.org/?p=162> (discussing several aspects of heterosexism in schools and suggesting solutions for making the school environment more inclusive of LGBT students).

⁴⁹ Sabrina Rubin Erdely, *One Town’s War on Gay Teens*, ROLLING STONE (Feb. 2, 2012), <http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202>.

⁵⁰ See, e.g., Daniel Chesir-Teran, *Conceptualizing and Assessing Heterosexism in High Schools: A Setting-Level Approach*, 31 AM. J. OF CMTY. PSYCHOL. 267, 267 (2003) (discussing the impact of heterosexism in schools and analyzing other research conducted in the field).

⁵¹ Jeremy Hubbard, *Fifth Gay Teen Suicide in Three Weeks Sparks Debate*, ABCNEWS (Oct. 3, 2010), <http://abcnews.go.com/US/gay-teen-suicide-sparks-debate/story?id=11788128>.

⁵² See Chris Geidner, *Education Department to Advise Schools on Anti-LGBT Bullying*, METROWEEKLY (Oct. 26, 2010), <http://www.metroweekly.com/poliglot/2010/10/education-dept-to-advise-scho.html>; Chris Geidner, *Education Department Sends Schools Guidance on Gay Straight Alliance Groups*, METROWEEKLY (June 14, 2011), <http://www.metroweekly.com/poliglot/2011/06/education-department-sends-sch.html>.

⁵³ *GLSEN 2009 National Climate Survey*, GAY LESBIAN AND STRAIGHT EDUCATION NETWORK, <http://www.glsen.org/cgi-bin/iowa/all/research/index.html>. (last visited Sept. 1, 2011) The study also found that seventy-two percent of students reported hearing frequent homophobic remarks at school, sixty-one percent reported feeling unsafe at school, forty percent reported being physically harassed, and eighteen percent reported being physically assaulted. *Id.* Sixty-two percent of students who reported being harassed or assaulted stated they did not report the incidents to school staff either because they believed nothing would be done or the situation would become worse if reported. *Id.* Further, thirty-three percent of students who did report the

harassment or assault stated that school staff did nothing. *Id.*

⁵⁴ Steven T. Russell et al., *Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, J. OF SCH. HEALTH 223, 228 (2011). The study showed that students who identify or are perceived to be LGBT face consistent and dramatically higher risks for health concerns such as substance abuse, suicide and suicidal ideation and depression as compared to their heterosexual peers. *Id.*

⁵⁵ See Ann P. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations*, J. OF HOMOSEXUALITY 10 (2010).

⁵⁶ *Id.*

⁵⁷ *GLSEN 2009 National Climate Survey*, *supra* note 53.

⁵⁸ *Id.* Although no more likely to hear homophobic remarks from their peers, students in No Promo Homo states were more likely to hear homophobic remarks from school staff. *Id.* Staff who were informed of student harassment and assault were also far less effective in handling those problems as they arose. *Id.*

⁵⁹ See Cianciotto, *supra* note 40, at 6 (explaining that students who identify as LGBT may face backlash at home and at school, which creates a greater need for guidance and support from accepting adults).

⁶⁰ Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 587 (1999). The schools’ denial of homosexuality as an alternative results in a vacuum of positive information that may have otherwise improved students’ self-esteem. *Id.*

⁶¹ See *id.* at 586 (noting that the absence of information regarding homosexuality in the curriculum may perpetuate myths and stereotypes about homosexuality and provide tacit support for homophobic attitudes and conduct).

⁶² Carolyn Depoian, *Homosexuality, the Public School Curriculum and the First Amendment: Issues of Religion and Speech*, 18 LAW & SEXUALITY 163, 166 (2009).

⁶³ See ALA. CODE § 16-40A-2 (1992) (requiring that teachers emphasize that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense); ARIZ. REV. STAT. ANN. § 15-716(C) (2009) (forbidding instruction that promotes homosexual life-style, portrays homosexual life-style as an alternative, or suggests some methods of homosexual sex are safe); LA. REV. STAT. ANN. § 17:281 (2006) (barring use of sexually explicit materials portraying homosexual activity, but not barring sexually explicit materials displaying heterosexual activity); MISS. CODE ANN. § 37-

13-171 (2011) (requiring teaching of state law relating to sexual conduct, including homosexual activity and requiring teaching that the only appropriate setting for sexual intercourse is in a monogamous relationship in the context of marriage); OKLA. STAT. tit. 70, § 11-103.3 (2006) (requiring instruction in AIDS prevention that teaches students that engaging in “homosexual activity, promiscuous sexual activity, intravenous drug use or contact with contaminated blood products is primarily responsible for contact with the AIDS virus); S.C. CODE ANN. § 59-32-30 (2010) (barring discussion of homosexuality in health education classes, except in the context of sexually transmitted diseases); TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2005) (requiring teachers to emphasize that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense); UTAH CODE ANN. § 53A-13-101 (West 2004) (prohibiting the advocacy of homosexuality).

⁶⁴ See ALA. CODE § 16-40A-2 (1992); ARIZ. REV. STAT. ANN. § 15-716(C) (2009); LA. REV. STAT. ANN. § 17:281 (2006); MISS. CODE ANN. § 37-13-171 (2011); OKLA. STAT. tit. 70, § 11-103.3 (2006); S.C. CODE ANN. § 59-32-30 (2010); TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2005); UTAH CODE ANN. § 53A-13-101 (West 2004).

⁶⁵ See ALA. CODE § 16-40A-2 (1992); ARIZ. REV. STAT. ANN. § 15-716(C) (2009); LA. REV. STAT. ANN. § 17:281 (2006); MISS. CODE ANN. § 37-13-171 (West 2011); OKLA. STAT. tit. 70, § 11-103.3 (2006); S.C. CODE ANN. § 59-32-30 (2010); TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2005); UTAH CODE ANN. § 53A-13-101 (West 2004).

⁶⁶ See ALA. CODE § 16-40A-2 (1992); ARIZ. REV. STAT. ANN. § 15-716(C) (2009); TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2005); UTAH CODE ANN. § 53A-13-101 (West 2004).

⁶⁷ See LA. REV. STAT. ANN. § 17:281 (2006); MISS. CODE ANN. § 37-13-171 (2011); OKLA. STAT. tit. 70, § 11-103.3 (2006); S.C. CODE ANN. § 59-32-30 (1988).

⁶⁸ See ARIZ. REV. STAT. ANN. § 15-716(C) (2009).

⁶⁹ See S.C. CODE ANN. § 59-32-30 (2010).

⁷⁰ See, e.g., LA. REV. STAT. ANN. § 17:281 (2006) (requiring that instruction emphasize abstinence from sexual activity outside of marriage as the expected standard for all school-age children).

⁷¹ James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665, 681 (2004); see also Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching*

Stereotypes: Sex Education and Indoctrination in Public Schools, 13 U. PA. J. CONST. L. 587, 601 (2011) (“Many curricula overwhelmingly emphasize marriage as the only acceptable context for sex without even acknowledging that gay and lesbian students are legally barred from marrying in most states. Same-sex relationships are ignored or, if mentioned, plainly disapproved.”).

⁷² ALA. CODE § 16-40A-2 (1992).

⁷³ ARIZ. REV. STAT. ANN. § 15-716(C) (2009).

⁷⁴ LA. REV. STAT. ANN. § 17:281 (2006).

⁷⁵ MISS. CODE ANN. § 37-13-171 (2011).

⁷⁶ OKLA. STAT. tit. 70, § 11-103.3 (2006).

⁷⁷ S.C. CODE ANN. § 59-32-30 (2010).

⁷⁸ TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2005).

⁷⁹ UTAH CODE ANN. § 53A-13-101 (West 2004).

⁸⁰ See Bonauto, *supra* note 32 (arguing that these policies are unconstitutionally vague).

⁸¹ ARIZ. REV. STAT. ANN. § 15-716(C) (2009).

⁸² Larry Mutz, *A Fairy Tale: The Myth of the Homosexual Lifestyle in Anti-Gay-and-Lesbian Rhetoric*, 27 WOMEN’S RTS. L. REP. 69, 75 (2006).

⁸³ See *id.* The vagueness of the term “life-style” has made it an effective tool for opponents of gay rights by allowing them to fill in the term with inaccurate and negative stereotypes. *Id.* These inaccurate characterizations have played an important role in developing public perceptions of the LGBT community and have found their way into the “ideology of right-wing legislators, executives, and judges.” *Id.*

⁸⁴ Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 48 (1996) (explaining that the terms sexual identity, homosexuality, sexual conduct, and sexual orientation all have important but highly contested, and often contradictory, meanings).

⁸⁵ See Erdely, *supra* note 49 (discussing the fact that although *some* training was given to *some* teachers in one school district regarding their No Promo Homo policy, the teachers and school district officials themselves remained confused about how the policy was to be implemented).

⁸⁶ See Andy Birkey, *Anoka-Hennepin Schools Dig in on Anti-LGBT Policy as Lawsuit, Federal Investigation Start*, THE MINNESOTA INDEPENDENT (Aug. 21, 2011), <http://minnesotaindependent.com/84891/anoka-hennepin-schools-dig-in-on-anti-lgbt-policy-as-lawsuit-federal-investigation-start> (acknowledging that this case has garnered extensive attention due in part to the fact that the district falls within Republican presidential candidate Michelle Bachman’s Congressional District). For an

extensive discussion of the origins and devastating effects of the SOCP; see Erdely, *supra* note 49.

⁸⁷ Anoka Hennepin School District, School Board Policies, 601.11 Sexual Orientation Curriculum Policy, www.anoka.k12.mn.us (follow “School Board” hyperlink; then select “Education Programs” hyperlink from “School Board Policies” menu; then select “Instructional Curriculum” hyperlink; then select “Sexual Orientation Curriculum Policy” hyperlink).

⁸⁸ Erdely, *supra* note 49.

⁸⁹ Complaint, Doe v. Anoka-Hennepin School District No. 11, No. 0:11-cv-01999 (D. Minn. filed July 21, 2011).

⁹⁰ *Id.*

⁹¹ *Id.* The five students alleged similar experiences. *Id.* One student, an eighteen year old lesbian, alleged that she was forced to drop out of school as a result of harassment that began in her sophomore year of high school, when a picture of her and her girlfriend were distributed around the school. *Id.* Although she was verbally and physically abused, teachers did not take serious action. *Id.* After dropping out she admitted to attempting suicide. *Id.* Another student, a fourteen year old boy, was subjected to verbal and physical harassment because he was perceived as gay by other students because his adoptive fathers were gay and he participated in gymnastics. *Id.* He also reported the abuse, but it continued. *Id.* Another student, a fourteen year old bisexual student, alleged that she reported incidents of harassment and abuse to school staff over thirty times, but nothing substantial changed. *Id.*

⁹² *Id.* The facts as alleged indicate that many teachers and school staff were unsure of what exactly was proscribed by the neutrality policy, leaving them unsure of how to deal with anti-gay bullying, in fear that any actions taken could be construed as a violation of the policy. *Id.*

⁹³ *Id.*

⁹⁴ See *Civil Rights Organizations Announce Agreement to Resolve Anoka-Hennepin School District Bullying Lawsuits*, OUT FOR JUSTICE (Mar. 5, 2012), <http://nclrights.wordpress.com/2012/03/05/civil-rights-organizations-announce-agreement-to-resolve-anoka-hennepin-school-district-bullying-lawsuits>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See S.B.0049, 107th Gen. Assemb. (Tenn. 2011) (amending Tennessee Educational Code to impose limitations on discussions of homosexuality in schools); Policy Update, Sexuality Information and Education Council of the United States, *Tennessee Senate Passes “Don’t Say Gay” Bill* (June 2011), <http://siecus.org/index>.

[cfm?fuseaction=Feature.showFeature&featureid=2024&pageid=483&parentid=478](#) (noting that the bill has become known nationally as the “Don’t Say Gay” Bill).

⁹⁸ See *Don’t Say Gay Bill Passes Tenn. Senate*, MSNBC (May 20, 2011), http://www.msnbc.msn.com/id/43115864/ns/us_news-life/t/dont-say-gay-bill-passes-tenn-senate; Jonathan Lloyd, *George Takei Offers Alternative to “Don’t Say Gay” Bill*, NBC LA (May 22, 2011), <http://www.nbclosangeles.com/news/politics/George-Takei-Offers-Alternative-to-Dont-Say-Gay-Law-122346054.html>. The bill has garnered national attention due in part to Actor George Takei’s release of a video lending his name to students of the state who would be unable to “say gay.” Lloyd, *supra* note 98. Takei urges Tennessee students to substitute “Takei” whenever they would need to say the word “gay,” as in “march[ing] in a Takei Pride Parade” or “Takei marriage.” *Id.*

⁹⁹ See S.B. 0049, 107th Gen. Assemb. (Tenn. 2011).

¹⁰⁰ See *Senate OKs Bill to Ban Teaching of Homosexuality*, KNOXVILLE NEWS SENTINEL (May 21, 2011), <http://www.knoxnews.com/news/2011/may/21/senate-oks-bill-to-ban-teaching-of-homosexuality>.

¹⁰¹ *Id.*

¹⁰² Mary Elizabeth Williams, “*Don’t Say Gay” Bill Advances*, SALON (Apr. 18, 2012 2:30 PM), available at http://www.salon.com/2012/04/18/dont_say_gay_bill_advances/singleton.

¹⁰³ *Senate OK’s Bill to Ban Teaching of Homosexuality*, *supra* note 100; *Tennessee ‘Don’t Say Gay’ Bill To Get Axed*, THE HUFFINGTON POST (May 1, 2012), http://www.huffingtonpost.com/2012/05/01/tennessee-dont-say-gay-bill_n_1467396.html.

¹⁰⁴ See H.B.2051, 96th Gen. Assemb. (Mo. 2012)

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The bill later died when the legislative session ended while the bill remained stuck in committee. *Id.*

¹⁰⁷ U.S. CONST. amend. XIV, § 1.

¹⁰⁸ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40 (1985) (setting out Court’s ability to enforce the Equal Protection Clause even where there is no binding federal law).

¹⁰⁹ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 717 (3d ed. 2009) (providing a framework for analysis applicable to all cases arising under the Equal Protection Clause).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 719.

¹¹² *Cleburne Living Ctr., Inc.*, 473 U.S. at 440.

¹¹³ *Id.*

¹¹⁴ CHEMERINSKY, *supra* note 109, at 719.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011).

¹¹⁸ FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

¹¹⁹ See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term through Romer v. Evans*, 32 IND. L. REV. 357, 359 (1999). It has been argued that this standard is so deferential to the government interest that it “amounts to no review at all.” *Id.*

¹²⁰ *Id.* at 416–19.

¹²¹ See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138 (2011) (noting that the outcome of Equal Protection Clause claims is highly dependent on whether the group involved is classified as a suspect, quasi-suspect, or non-suspect class).

¹²² See *id.* at 147–167 (providing an in-depth analysis of the development and implementation of the various relevant factors).

¹²³ *Id.* Much disagreement has emerged due to the lack of any clear precedent delineating whether certain elements are required, and what the scope and importance of such factors should be. Compare Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How It Is Met*, 53 CLEV. ST. L. REV. 545, 557 (2006) (arguing that immutability is required and important aspect of Equal Protection claim), with Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507 (1994) (arguing that immutability is relevant but not a requirement), and Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1506 (2009) (arguing that immutability should be completely eliminated from equal rights analysis).

¹²⁴ See Strauss, *supra* note 121, at 138–39 (explaining that the definition and application of these factors has been inconsistent, ambiguous, and perhaps arbitrary).

¹²⁵ See Yoshino, *supra* note 117, at 756–57 (emphasizing the desirability of heightened scrutiny classifications from the prospective of a challenging minority).

¹²⁶ See *id.* (arguing that the heightened scrutiny classifications have been closed off but other avenues for “heightened review” have emerged elsewhere in constitutional jurisprudence); see also Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 (2004) (discussing how the set of groups entitled to heightened

review closed almost immediately after they were first enunciated).

¹²⁷ See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 12–13 (1972) (discussing the U.S. Supreme Court’s unwillingness to expand official recognition of heightened classifications).

¹²⁸ See Yoshino, *supra* note 117, at 760–61; Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L. J. 175, 180 (1997).

¹²⁹ See *supra* Part IV.C.

¹³⁰ See Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 802 (2006) (discussing the erratic and inconsistent application of the rational review standard); see also R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 231 (2002).

¹³¹ Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).

¹³² Wadhvani, *supra* note 130.

¹³³ See Yoshino, *supra* note 117, at 760–61 (noting changing patterns of analysis in Equal Protection Clause cases).

¹³⁴ Kelso, *supra* note 130.

¹³⁵ City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part).

¹³⁶ Lawrence v. Texas, 539 U.S. 559 (2003).

¹³⁷ *Id.* Many commentators view *Lawrence* as an important step in the way of increasing legal and social equality for LGBT people. See also Joseph J. Wardenski, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 J. CRIM. L. & CRIMINOLOGY 1363, 1365–66 (2005) (noting that the Supreme Court in *Lawrence* “effectively legitimized the status of being gay”).

¹³⁸ See *Lawrence*, 539 U.S. at 574–75 (“Were we to hold the [sodomy] statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

¹³⁹ *Id.* at 580 (O’Connor, J., concurring) (asserting that the Texas Statute constituted a violation of the Equal Protection Clause when analyzed under the rational review with a bite test).

¹⁴⁰ See *Romer v. Evans*, 517 U.S. 620, 625 (1996) (invalidating Colorado constitutional amendment barring protections for homosexuals); *Cleburne Living Ctr., Inc.*, 473 U.S. at 450 (invalidating ordinance requiring special

permitting for construction of group home for the mentally retarded); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (invalidating provision of Food Stamp Act requiring household members be related)

¹⁴¹ See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 68 (1996) (discussing the “Moreno-Cleburn-Romer Trilogy”).

¹⁴² *Moreno*, 413 U.S. at 529–30.

¹⁴³ *Id.* at 531–33.

¹⁴⁴ See *id.* at 533 (providing that the legislative classification must be sustained if it is rationally related to a legitimate government interest).

¹⁴⁵ *Id.* at 534.

¹⁴⁶ *Id.*

¹⁴⁷ Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1350–51 (1997).

¹⁴⁸ *Moreno*, 413 U.S. at 534.

¹⁴⁹ *Id.* (rejecting the idea that any government interest will satisfy rational review).

¹⁵⁰ See *id.* at 538 (“Traditional equal protection analysis does not require that every classification be drawn with precise mathematical nicety . . . But the classification here in issue is not only ‘imprecise’, it is wholly without any rational basis.”).

¹⁵¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 436 (1985).

¹⁵² *Id.* at 437.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 437–38.

¹⁵⁵ *Id.* at 448. The district court seems to accept the City’s argument that it was acting in the interests of the protecting the mentally retarded. *Id.* The City argued that the proposed living center would have been located across from a school, which would have led children to mock the residents. *Id.* Additionally, the City argued the proposed center was located in a flood plain area, which could be especially dangerous to the residents in the event of a flood. *Id.* The U.S. Supreme Court rejected these arguments. *Id.*

¹⁵⁶ *Id.* at 437–38.

¹⁵⁷ *Id.* at 442–43. See also Gunther, *supra* note 127 (providing further discussion of the Court’s unwillingness to expand heightened scrutiny). The Court reasoned that while mental retardation was an immutable characteristic, the mentally retarded classification is made up of people with very diverse characteristics and conditions. *Cleburne*, 473 U.S. at 442. Thus, the legislation affecting the classification is something better left to expertise of legislature and not the judiciary. *Id.* The Court also discusses the fact that there has been a good amount of

legislation aimed at protecting the handicapped, and this would seem to suggest that there should be some leeway so as to not impose or impede on “remedial efforts.” *Id.* at 445.

¹⁵⁸ *Cleburne Living Ctr., Inc.*, 473 U.S. at 445–46.

¹⁵⁹ See Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 598 (2000) (arguing that although the Court claimed to have applied rational basis review, its reasoning was consistent with a more stringent review frame).

¹⁶⁰ *Cleburne Living Ctr., Inc.*, 473 U.S. at 448 (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”) (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

¹⁶¹ *Id.* at 446 (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”) (citing *Zobel v. Williams*, 457 U.S. 55, 61–63 (1982)); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 535 (1973).

¹⁶² *Romer v. Evans*, 517 U.S. 620, 623–25 (1996).

¹⁶³ *Id.* at 625.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 625–26.

¹⁶⁶ *Id.* at 626.

¹⁶⁷ *Id.* at 631. The State made the argument that the protection of gay rights was akin to giving them special rights above and beyond those of the ordinary citizen. *Id.* ¹⁶⁸ *Id.* at 631–32. This finding represents a rejection of the idea of rational review as a completely toothless standard. See *id.* In effect, not every government interest is legitimate. See *id.*

¹⁶⁹ Amy D. Ronner, *When Court Let Insane Delusions Pass the Rational Basis Test*, 21 U. FLA. J. L. & PUB. POL’Y 1, 30 (2010).

¹⁷⁰ *Id.* at 30–31 (asserting that *Romer* “forged a foundation for future equal protection challenges”).

¹⁷¹ See Strauss, *supra* note 121.

¹⁷² *Id.*

¹⁷³ See Yoshino, *supra* note 117, at 756–57.

¹⁷⁴ See generally Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) (arguing that while rational review with a bite does afford more critical analysis, it causes inconsistency in the lower courts and makes the Court’s decisions susceptible to criticism as intellectually dishonest); see also Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281 (2011) (discussing

lower court cases evidencing the inconsistency that has resulted from rational review with a bite).

¹⁷⁵ See Part IV.B.

¹⁷⁶ Michelangelo Signorile, *Interview with TN Sen. Stacey “Don’t Say Gay” Campfield*, THE GIST (Jan. 26, 2012), <http://www.signorile.com/2012/01/interview-with-tn-sen-stacey-campfield.html>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* He continued on, saying, “[m]ost people realize that AIDS came from the homosexual community -- it was one guy screwing a monkey, if I recall correctly, and then having sex with men. It was an airline pilot, if I recall.” *Id.* In fact, the widely accepted view is that AIDS originated in Africa when a hunter was exposed to infected blood from a chimpanzee he had killed for food. *Basic Information about HIV and AIDS*, CENTER FOR DISEASE CONTROL (Apr. 11, 2012) <http://www.cdc.gov/hiv/topics/basic/index.htm>.

¹⁷⁹ See Characteristics Associated with HIV Infection Among Heterosexuals in Urban Areas with High AIDS Prevalence, CENTER FOR DISEASE CONTROL (Aug. 12, 2011). <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6031a1.htm> (explaining that in the United States one in three new cases of HIV infections are transmitted through heterosexual contact).

¹⁸⁰ See *id.*; e.g., ARIZ. REV. STAT. ANN. § 15-716(C) (2009) (forbidding instruction that promotes homosexual life-style, portrays homosexual life-style as an alternative, or suggests some methods of homosexual sex are safe).

¹⁸¹ See, e.g., ALA. CODE § 16-40A-2 (1992) (requiring that teachers emphasize that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense); see also TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2005).

¹⁸² *Id.*

¹⁸³ *Lawrence v. Texas*, 539 U.S. 559 (2003).

¹⁸⁴ See *supra* note 36.

¹⁸⁵ See *infra* Part II.B.

¹⁸⁶ See *infra* Part III.

¹⁸⁷ See *Civil Rights Organizations Announce Agreement to Resolve Anoka-Hennepin School District Bullying Lawsuits*,

supra note 94. Sam Wolfe, an attorney with the Southern Poverty Law Center, stated that the consent decree entered into by the Anoka-Hennepin School District “sets the stage for Anoka-Hennepin to become a model for other school districts to follow in creating more respectful learning environments for all students in a thoughtful, systemic, and proactive way.” *Id.*

¹⁸⁸ See, e.g., S.B. 1457, 50th Leg., 1st Sess. (Ariz. 2011) (seeking to repeal anti-gay instruction requirement in schools); H.B. 2544, 49th Leg., 1st Sess. (Ariz. 2009) (same); H.B. 604, 82d Leg. Sess. (Tex. 2011) (seeking to officially repeal Texas’s anti-sodomy statute and remove related anti-gay language in Health and Safety Code).

¹⁸⁹ See Depoian, *supra* note 62, at 166.

¹⁹⁰ See Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or A Promotion of Federal Educational Ideals?* 37 J.L. & EDUC. 193, 193 (2008) (noting expanding role of federal government in K-12 education); *American Recovery and Reinvestment Act of 2009*, Section 14005-6, Title XIV, (Public Law 111-5) (allocating over fifty-three billion dollars to be disbursed by the Department of Education to individual states for the purpose of standardizing education and improving school standards overall).

¹⁹¹ See Student Non-Discrimination Act, S. 555, 112th Cong. (2011); Safe Schools Improvement Act, S. 506, 112th Cong. (2011).

¹⁹² See, e.g., S. 3739, 111th Cong. (2010); H.R. 2262, 111th Cong. (2010); H.R. 3132, 110th Cong. (2007).

¹⁹³ Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 150–151 (2009) (arguing that the best anti-bullying policies deter by improving school climate).

¹⁹⁴ See *supra* Part II.A.

¹⁹⁵ See *supra* Part II.B.

¹⁹⁶ See *supra* Part IV.C.

¹⁹⁷ See *supra* Part IV.A.

¹⁹⁸ See *supra* Part IV.B.

¹⁹⁹ See *supra* Part V.