# DON'T SAY GAY: THE GOVERNMENT'S SILENCE AND THE EQUAL PROTECTION CLAUSE

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*This paper will argue that the LGBT movement has played, and will continue to play, a significant role in developing doctrines that subject government speech to the requirements of the Equal Protection Clause. In particular, the paper will examine how this doctrine is being developed in litigation around anti-LGBT curriculum laws—statutes that prohibit or restrict the discussion of LGBT people and topics in public schools. It argues that this litigation demonstrates how the Equal Protection Clause can be violated by the government's silence, as well as the government's speech. In addition, it explains why the Don't Say Gay Laws recently passed in Florida and Alabama are unconstitutional, for the same reasons as the anti-LGBT curriculum laws passed in earlier eras.*

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In the introduction of her groundbreaking book, *The Government's Speech and the Constitution*, Professor Norton hints at a fascinating aspect of government speech doctrine: "[t]he full range of the government's expressive choices includes not only its affirmative speech but also its secrets and its silences."[1] "Governmental silences," she explains, "reflect the government's decision not to express its views on a contested public policy issue or crisis. . . . [E]xamples of the government's silences abound."[2]

Indeed, they do. And in some landmark cases, the Supreme Court has squarely held that the government's silence can violate specific provisions in the Bill of Rights. In *Brady v. Maryland*, the Court held that the government's failure to turn over exculpatory evidence violates the Due Process Clause.[3] In *Miranda v. Arizona*, the Court held that the government's failure to inform suspects in custody that they have "the right to remain silent" and "the right to consult with a lawyer" violates the Fifth and Sixth Amendments.[4]

In this brief essay, I would like to build on Professor Norton's theory of government speech by considering whether and when the government's silence might violate the Equal Protection Clause—one of the few aspects of government speech doctrine that she does not fully examine in her thoughtful and rigorous book. As we will see, the Supreme Court has not had an opportunity to address this question yet, but lower courts may soon be confronting it.

## I. ANTI-GAY CURRICULUM LAWS AS AN EXAMPLE OF THE GOVERNMENT'S SPEECH

I met Professor Norton a few years ago. She was writing her trailblazing book, and I was writing an article on anti-gay curriculum laws—statutes that prohibit or restrict the discussion of "homosexuality" in public schools.[5] Once one has read Professor Norton's book, the connection between these two topics becomes clear: curriculum laws regulate the content and viewpoint of what is taught in public schools. Because public school teachers are government employees, curriculum laws might be understood as an example of the government's speech.

In *Garcetti v. Ceballos*, the Supreme Court held 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."[6] In doing so, the Court expressly declined to decide whether this rule would apply to the speech of teachers—specifically, "speech related to scholarship and teaching."[7]

1. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 21 (2019).
2. *Id.*
3. 373 U.S. 83, 87 (1963).
4. 384 U.S. 436, 478–79 (1966).
5. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1463–64 (2017).
6. 547 U.S. 410, 421 (2006).
7. *Id.* at 425.

In the wake of *Garcetti*, it seems plausible to ask whether the Court might hold that a public school's curriculum is the government's speech and that the school is "not barred by the Free Speech Clause from determining the content of what it says."[8] After all, when teachers teach students in primary and secondary schools, they may well be speaking "pursuant to their official duties."[9] Because the Court sidestepped this question in *Garcetti*, and the circuits are split on it,[10] we don't know for sure yet. The key question is whether and how *Garcetti*'s carveout for "speech related to scholarship and teaching"[11] would apply to teachers in public primary and secondary schools, as opposed to professors in public colleges and universities.[12]

In her book, Professor Norton often uses anti-gay curriculum laws to illustrate how the government's speech can violate the Equal Protection Clause, even though it cannot violate the Free Speech Clause.[13] In particular, she focuses on an anti-gay curriculum law adopted in Texas more than thirty years ago.[14] Under this law, sex education courses must include an "emphasis . . . that homosexuality is not a lifestyle acceptable to the general public"[15] and an "emphasis . . . that homosexual conduct is a criminal offense . . . ."[16]

As Professor Norton suggests, this law mandates government speech—speech that violates the Equal Protection Clause.[17] By affirmatively requiring teachers to tell students that same-sex intimacy is "unacceptable" and "criminal," the law denies lesbian and gay students the opportunity to learn about who they are, inflicts dignitary harms on these students, and is motivated by nothing more than animus against lesbian and gay people.[18]

## II. ANTI-GAY CURRICULUM LAWS AS AN EXAMPLE OF THE GOVERNMENT'S SILENCE

But in one respect, the Texas law is unusual. It is one of only a few anti-gay curriculum laws on the books that affirmatively mandate government speech. In most jurisdictions, anti-gay curriculum laws operate by *prohibiting* or *restricting* the discussion of LGBT people and issues, rather than affirmatively requiring it.[19]

8. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).

9. *Garcetti*, 547 U.S. at 421.

10. *Compare* Arce v. Douglas, 793 F.3d 968, 983 (9th Cir. 2015) (asking whether curriculum law is "reasonably related to legitimate pedagogical concerns"), *with* Chiras v. Miller, 432 F.3d 606, 619–20 (5th Cir. 2005) (holding curriculum policies cannot be challenged under the Free Speech Clause).

11. *Garcetti*, 547 U.S. at 425.

12. *See* Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J.L. & EDUC. 147 (2014).

13. NORTON, *supra* note 1, at 3, 101, 124–25.

14. *Id.* at 3.

15. TEX. HEALTH & SAFETY CODE ANN. § 163.002(8) (1991). In her book, she also cites an anti-LGBT curriculum law from Alabama, which was nearly identical. See infra notes 51–53 and accompanying text.

16. *Id.*

17. NORTON, *supra* note 1, at 3, 101, 124–25.

18. *Id.* at 124–25.

19. Rosky, *supra* note 5, at 1465.

In 2017, when I published my article on anti-gay curriculum laws, twenty states still had them.[20] Only four affirmatively required teachers to discuss homosexuality at all.[21] This is why anti-gay curriculum laws have long been nicknamed "no promo homo" or "don't say gay" laws.[22] For the most part, they mandate government silence, not government speech. This essay asks whether that distinction matters: Can laws that mandate the government's silence violate the Equal Protection Clause?

To date, most courts have said yes. Ten years ago, the Arizona Legislature passed a law banning public schools from offering courses in "ethnic studies."[23] When the law went into effect, it was enforced against only one program: Tucson's Mexican American Studies program, which had been implemented to facilitate desegregation in the school district.[24] When teachers, students, and parents challenged the law, the district court found that it violated the Equal Protection Clause.[25] To the best of my knowledge, this was the first federal court to invalidate a state curriculum law under the Equal Protection Clause. Interestingly, Arizona's law did not *mandate* government speech; it merely *prohibited* it.[26]

A similar pattern has appeared in constitutional challenges to anti-gay curriculum laws, although no court has had an opportunity to rule on this subject yet. In 2016, while I was writing my article on anti-gay curriculum laws, I served as an expert witness on the legal team that filed *Equality Utah v. Utah State Board of Education*.[27] It was the country's first successful challenge to an anti-gay curriculum law.[28] In our lawsuit, we challenged the constitutionality of Utah's "No Promo Homo" law, which forbade the "advocacy of homosexuality" by public school teachers.[29] Much to our surprise, the Utah Legislature repealed the law by nearly unanimous margins six months after we filed it.[30] Apparently,

20. *Id.* at 1465 n.23.

21. *Id.* at 1470–71.

22. *Id.* at 1461, 1464 n.15.

23. ARIZ. REV. STAT. ANN. § 15-112(A)(4) (2011).

24. González v. Douglas, 269 F. Supp. 3d 948, 950–64 (D. Ariz. 2017).

25. *Id.* at 972. Because the Ninth Circuit does not regard curriculum laws as government speech regulations, the district court also concluded that the law violated the free speech rights of students. *Id.* at 973.

26. *Id.* at 957.

27. Rosky, *supra* note 5, at 1510 n.324. Because I was neither an attorney nor a client, I did not assume any legal or professional duties to represent the plaintiffs' interests. It is worth disclosing, however, that the plaintiffs and their attorneys consulted me throughout the court proceedings, the legislative session, and settlement negotiations. In addition, I have previously served as a member of Equality of Utah's Board of Directors, and I am still a member of the organization's Advisory Council. But members of the Advisory Council do not have any legal, fiduciary, or professional duties to represent the organization's interests.

28. *See* Corinne Segal, *Eight States Censor LGBTQ Topics in School. Now, a Lawsuit is Challenging That*, PBS NEWS HOUR WEEKEND (Jan. 29, 2017, 6:02 PM), https://www.pbs.org/newshour/nation/lgbtq-issues-class-lawsuit-utah [https://perma.cc/9MUN-H5WN].

29. *See* Amended Complaint at 7, Equality Utah v. Utah State Bd. of Educ., No. 2:16-CV-01081-BCW (D. Utah Oct. 24, 2016), 2016 WL 9113536.

30. Nico Lang, *The End of "No Promo Homo": Utah Could Become the First Republican State to Strike Down Anti-LGBT Law*, SALON (Mar. 14, 2017, 10:58 PM), https://www.salon.com/2017/03/14/the-end-of-no-promo-homo-utah-could-become-the-first-republican-state-to-strike-down-anti-lgbt-law/ [https://perma.cc/Q6W2-3DN8]; Lindsay Whitehurst, *Case over LGBT Talk in Schools Settled After Utah Law*

the Attorney General had advised the Legislature that if they did not repeal the law, the State would end up losing the lawsuit and paying our legal bills.[31]

In the years since, I have continued working with the National Center for Lesbian Rights and Lambda Legal to file similar claims in Arizona and South Carolina.[32] In Arizona, the Superintendent immediately agreed with our claims,[33] and the Legislature repealed the state's "No Promo Homo" law two weeks later.[34] In South Carolina, the Attorney General's Office issued a formal opinion agreeing with us, one day before we filed our complaint.[35] Within thirteen days, the court entered a consent decree and judgment, in which the court and the defendants agreed that the state's "Don't Say Gay" law was unconstitutional.[36] Again and again, states have recognized that anti-gay curriculum laws violate the Equal Protection Clause—regardless of whether they mandate the government's speech or the government's silence.

## III. THE GOVERNMENT'S SILENCE AS A FORM OF DISCRIMINATION AGAINST LESBIAN, GAY, AND BISEXUAL PEOPLE

Historically, it is no accident that anti-LGBT curriculum laws straddle the distinction between the government's speech and the government's silence. Discrimination against lesbian, gay, and bisexual people has long taken the form of governmental silence. In Blackstone's Commentaries, he refers to sodomy as "*peccatum illud horribile, inter Christianos non nominandum*"—"the dreadful sin not to be mentioned among Christians."[37] The idea was that by speaking about sodomy, the authorities might encourage it. It is an exceptionally old idea, but it has not been retired yet. Until the 1960s, most states prohibited sodomy not by describing the behavior itself, but by referring to it only as "the detestable

*Change*, ASSOCIATED PRESS (Oct. 6, 2017), https://apnews.com/article/09b6d1fc8d0d440f8495e9ea34981e85 [https://perma.cc/H7C7-R3BJ].

31. Private correspondence from anonymous source regarding conversation between Utah Attorney General and President of the Utah Senate.

32. *See* Complaint at 1, Gender and Sexuality All. v. Spearman, No. 2:20-CV-00847-DCN (D.S.C. Feb. 26, 2020), 2020 WL 2083602; Complaint at 1, Equality Ariz. v. Hoffman, No. 4:19-CV-00192-JCZ (D. Ariz. Mar. 28, 2019).

33. *Superintendent Hoffman on Federal Lawsuit Challenge to Arizona Anti-LGBTQ Curriculum Law*, SEDONA TIMES (Mar. 28, 2019), https://sedonaeye.com/superintendent-hoffman-on-federal-lawsuit-challenge-to-arizona-anti-lgbtq-curriculum-law/ [https://perma.cc/39LX-UB7R].

34. Lily Altavena, *Arizona Repeals Law That Forbids Promoting a 'Homosexual Lifestyle' in Schools*, ARIZ. REPUBLIC (Apr. 11, 2019, 5:03 PM), https://www.azcentral.com/story/news/politics/legislature/2019/04/11/arizona-repeals-law-no-promo-homo-sex-education-forbids-promoting-homosexual-lifestyle/3437357002/ [https://perma.cc/85EY-F93A].

35. Off. Att'y Gen. State of S.C., Opinion Letter on Whether Section 59-32-30(A)(5) Would Pass Constitutional Muster Under the Equal Protection Clause (Feb. 18, 2020), https://www.scag.gov/wp-content/uploads/2020/02/SpearmanM-OS-10449-FINAL-Opinion-2-18-2020-COOK-02210810xD2C78-02216000xD2C78.pdf [https://perma.cc/96TT-7Y8M].

36. Consent Decree and Judgment at 3, Gender and Sexuality All. v. Spearman, No. 2:20-CV-00847-DCN (D.S.C. Mar. 11, 2020), 2020 WL 1227345, at *2.

37. 4 WILLIAM BLACKSTONE, COMMENTARIES *126.

and abominable crime against nature."[38] In 1973, the Supreme Court held that these laws were not unconstitutionally vague, even though they deliberately failed to mention, let alone describe, the conduct that they prohibited.[39] To this day, Mississippi still defines the crime of "sodomy" in precisely these terms.[40]

Even in the years since Stonewall, governmental silence has been a prominent form of discrimination against lesbian, gay, and bisexual people. As Professor Norton observes in her book, the Surgeon General's report on AIDS was a welcome and remarkable example of government speech. But it was preceded by years of government-mandated silence about AIDS, which was motivated by animus against LGBT people.[41] For five years, while thousands of gay men were dying of AIDS, the Reagan Administration explicitly prohibited the Surgeon General from discussing AIDS and repeatedly warned the press not to ask him about it.[42] In response, the LGBT movement launched the "SILENCE = DEATH" campaign to protest the government's response to the epidemic.[43]

In 1993, President Clinton signed "Don't Ask, Don't Tell"[44]—a remarkably explicit example of the government's discriminatory silence. Rather than banning gay people from serving in the U.S. Armed Forces, the policy prohibited military recruiters from asking whether applicants were "homosexual or bisexual" and prohibited gay and bisexual soldiers from coming out.[45] It was a comprehensive regime of silence about same-sex relationships, ordered by the Commander in Chief and sanctioned by Congress.

To borrow a line from Professor Norton: in the annals of LGBT history, "examples of the government's silences abound."[46] In light of this history, it becomes clear that silence is one of the primary ways that the government has discriminated against lesbian, gay, and bisexual people. This begs the question: under what circumstances can the government's silence, as opposed to the government's speech, violate the Equal Protection Clause?

38. WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 20 (2008).

39. Wainwright v. Stone, 414 U.S. 21, 22 (1973).

40. *See* MISS. CODE ANN. § 97-29-59. Of course, this law is unconstitutional and cannot be enforced. But the Mississippi Legislature has not repealed it.

41. NORTON, *supra* note 1, at 97–98.

42. C. EVERETT KOOP, KOOP: THE MEMOIRS OF AMERICA'S FAMILY DOCTOR 284 (1992).

43. Avram Finkelstein, *SILENCE = DEATH: How an Iconic Protest Poster Came Into Being*, LITERARY HUB (Dec. 1, 2017), https://lithub.com/silence-death-how-an-iconic-protest-poster-came-into-being/ [https://perma.cc/K3AJ-XD78].

44. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 571, 107 Stat. 1547, 1670–73 (1993) (codified as amended at 10 U.S.C. § 654 (repealed 2010)); *see also* Qualification Standards for Enlistment, Appointment, and Induction, Dep't of Def. Directive 1304.26 (Dec. 21, 1993).

45. *See* JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 88 (1999).

46. NORTON, *supra* note 1, at 21.

## IV. STATE ACTION: WHEN THE GOVERNMENT'S SILENCE VIOLATES THE EQUAL PROTECTION CLAUSE

Although Professor Norton's book is about the government's speech, it supplies most of the principles required to analyze the government's silence under the Equal Protection Clause. As she says, government speech can violate the Equal Protection Clause for any of three reasons: (1) it denies certain groups equal choices and opportunities; (2) it inflicts dignitary or expressive harms on these groups; or (3) it is motivated by nothing more than animus against these groups.[47] As Professor Norton suggests, the Texas anti-LGBT curriculum law checks all three of these boxes: (1) it denies LGBT students the same educational opportunities that other students are offered; (2) it sends the message that homosexuality is too immoral or shameful to discuss in schools; and (3) it is motivated purely by animus against LGBT people.[48]

It is important to note, however, that the application of Professor Norton's principles need not be limited to the Texas law—nor even to the provisions of these laws that affirmatively require teachers to convey anti-gay messages to students. The same principles apply with equal force to all anti-gay curriculum laws[49]—even those best characterized as "Don't Say Gay" or "No Promo Homo" laws, because they mandate the government's silence.

When the government is mandating silence, however, it introduces an important wrinkle into the equal protection analysis: Depending on the circumstances, the issue of state action may not be so clear. After all, the Fourteenth Amendment prohibits the States from "deny[ing] . . . equal protection of the laws."[50] It does not prevent the government from doing nothing—*i.e.*, from remaining silent. When silence takes the form of inaction, it may not trigger the Fourteenth Amendment—including the Equal Protection Clause.[51]

It is not hard to imagine examples of government silence that fall into this category—scenarios in which the government's failure to speak can be plausibly described as inaction, rather than action. In any given moment, the government is "not speaking" about an infinite range of subjects, from veganism to string theory and beyond. And in most of these cases, it is simply "not speaking," without making a conscious choice not to address a particular subject.

But as you can already tell, the government's history of discrimination against LGBT people is another matter. In this history, we see many instances in which the government made deliberate choices, and took affirmative steps, to prohibit government officials from referring to "homosexuality" as a means of intentionally discriminating against LGBT people.

From these examples, we can deduce a principle of when the Equal Protection Clause prohibits the government's silence. When the government makes a

47. *Id.* at 105–19.
48. *Id.* at 124–25.
49. Rosky, *supra* note 5, at 1517–33.
50. U.S. CONST. amend. XIV, § 1.
51. *See* The Civil Rights Cases, 109 U.S. 3, 11–14 (1883).

deliberate choice, and takes affirmative steps, to prohibit officials from talking about a specific class of persons, this policy can be challenged and reviewed under the Equal Protection Clause. For equal protection purposes, the distinction between the government's speech and the government's silence is not relevant. So long as the state action requirement is satisfied, the government cannot deny any person equal protection of the laws—neither by its speech, nor by its silence.

## V. FLORIDA AND ALABAMA: THE NEW DON'T SAY GAY LAWS

This symposium was held on March 8, 2021. One month later, in another sign of the LGBT movement's progress, the Alabama Legislature voted by large bipartisan margins (69-30 in the House; 18-6 in the Senate) to repeal the state's anti-gay curriculum law.[52] Like the Texas law, the Alabama law had required teachers to provide "an emphasis . . . that homosexuality is a lifestyle that is not acceptable to the general public and is a crime under the laws of this state."[53]

But in March 2022, this bipartisan trend came to an end. Rather than repealing an anti-gay curriculum law, Florida adopted a new one—the first such law adopted in the United States in twenty years.[54] Officially named Parental Rights in Education and popularly known as the Don't Say Gay Law, HB 1557 provides that "classroom instruction . . . on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards."[55] In his signing statement, Governor Ron DeSantis declared that the law would prevent "schools using classroom instruction to sexualize their kids as young as 5 years old."[56] During the legislative debates, his press secretary dubbed HB 1557 the "Anti-Grooming Law" and implied that anyone who opposed it was "probably a groomer."[57]

Historically, state legislatures have cited the following concerns to justify the adoption of anti-gay curriculum laws: (1) the promotion of moral disapproval of same-sex conduct, (2) the promotion of children's heterosexual development, (3) the prevention of sexually transmitted infections, and (4) the federalist

52. *See* Brian Lyman, *Ivey Signs Bill Striking Anti-Homosexuality Language from Alabama Sex Education Law*, MONTGOMERY ADVERTISER, https://www.montgomeryadvertiser.com/story/news/2021/04/28/ivey-signs-bill-striking-anti-homoesexuality-language-alabama-sex-education-law/4869725001/ (Apr. 29, 2021, 2:43 AM), [https://perma.cc/52CC-2RL9].

53. ALA. CODE § 16-40A-2(c)(8) (1975) (amended 2021).

54. Ironically, the previous one was adopted by Florida and is still in effect. *See* FLA. STAT. § 1003.46(2)(a)(2016) (requiring health education to "teach[] the benefits of monogamous *heterosexual* marriage") (emphasis added).

55. FLA. STAT. § 1001.42(8)(c)(3) (2022).

56. Press Release, Governor of Florida, Florida Governor's Message, 3/28/2022 (Mar. 28, 2022), https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/ [https://perma.cc/6WPL-V3PW].

57. @ChristinaPushaw, TWITTER (Mar. 4, 2022, 5:33 PM), https://twitter.com/ChristinaPushaw/status/1499890719691051008?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1499890719691051008%7Ctwgr%5Ea14cc89d8460c96618dce1c28ac3e50ab02c6cdd%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Ftheweek.com%2Fron-desantis%2F1011011%2Fanyone-who-opposes-floridas-dont-say-gay-bill-is-probably-a-groomer-desantis [https://perma.cc/F972-NYBK].

tradition that grants states broad authority to regulate public schools. In my previous work, I have explained that the first and second concerns do not qualify as "legitimate interests" and the third and fourth are not rationally related to anti-gay curriculum laws.[58]

Rather than rehashing those arguments here, I will analyze the four ways in which Florida's law is different from previous anti-gay curriculum laws and explain the constitutional significance of these differences.

*Parental Enforcement*. First, HB 1557 allows for parents to enforce it: if any parent thinks that a teacher has violated the law, they may bring a private right of action against the school district seeking a declaratory judgment, injunctive relief, damages, and attorneys' fees.[59] This feature is novel, but it does not make HB 1557 consistent with the Equal Protection Clause. It is not clear that parental enforcement is even relevant to the law's constitutionality under the Equal Protection Clause, which turns on whether the law is discriminatory and whether it can be justified. But if parental enforcement means anything, it only increases the law's vagueness and arbitrariness, by multiplying the opportunities for discriminatory enforcement. Simply put, allowing parents to enforce the law, rather than the Florida Attorney General or Board of Education, vastly multiplies the number of parties who can interpret it. Almost by definition, the parents who interpret the law in the most restrictive manner will be most likely to bring lawsuits enforcing it. Although these lawsuits will ultimately be decided by courts, not judges, they seem likely to have a significant chilling effect on districts and teachers. If HB 1557 discriminates against LGBT people without a rational basis, the fact that it provides for parental enforcement does not provide one.

*Grade Level*. Second, HB 1557 includes two separate policies based on grade level. Between kindergarten and third grade, discussions of sexual orientation and gender identity are completely prohibited.[60] Between fourth grade and twelfth grade, discussions of sexual orientation and gender identity are at least nominally permitted, so long as they are "age appropriate" or "developmentally appropriate" and "consistent with state standards."[61] One can certainly object that these requirements are arbitrary and vague—especially given that they will be defined by lawsuit-by-lawsuit, rather than state educational handbooks and policies.[62] In any event, the fact that the law includes two separate policies based on grade level is not relevant to the law's constitutionality under the Equal Protection Clause. Again: if HB 1557 discriminates against LGBT people without a

58. Rosky, *supra* note 5, at 1525–32.

59. FLA. STAT. 1001.42(8)(c)(7)(b)(II) (2022).

60. *Id*. § 1001.42(8)(c)(3) (2022).

61. *Id*.

62. In the spring of 2022, a group of plaintiffs, including Florida LGBTQ students, parents, teachers, and LGBTQ organizations, filed a lawsuit challenging the Florida law on federal constitutional and statutory grounds. *See* First Amended Complaint, *Equality Florida v. DeSantis,* No. 4:22-cv-00134-AW-MJF (N.D. Fla. May 25, 2022). The constitutional claims alleged include that the law is unconstitutionally vague in violation of the Fourteenth Amendment, that it infringes students' rights to speak and receive information in violation of the First Amendment, and that the law denies equal protection of the laws in violation of the Fourteenth Amendment. At the time of this writing, the state defendants' motion to dismiss the complaint was fully briefed but no decision had been issued.

rational basis, the fact that it contains separate policies for grades K through 3 and grades 4 through 12 does not provide one.

*Gender Identity*. Third, unlike previous laws, HB 1557 explicitly prohibits discussions of "gender identity"—i.e., transgender people and issues.[63] By contrast, previous laws restricted discussions of "homosexuality," "homosexual activity," or "the homosexual life-style," without mentioning gender identity or transgender people.[64] In this sense, HB 1557 is the country's first explicitly anti-*LGBT* curriculum law. But again, the inclusion of "gender identity" cannot render the law constitutional. On the contrary, the inclusion of "gender identity" signals the legislature's intent to discriminate against transgender students and families, in addition to lesbian and gay students and families. When the Governor signed the law, he specifically expressed concerns about children learning about transgender people.[65] If HB 1557 otherwise violates the Equal Protection Clause, the inclusion of "gender identity" only exacerbates this constitutional error.

*Facial Neutrality*. Finally, unlike previous anti-gay curriculum laws, the text of HB 1557 is written in a facially neutral manner: It prohibits and restricts the discussion of "sexual orientation" rather than "homosexuality," and "gender identity" rather than "transgenderism."[66]

Even as a textual matter, however, it seems implausible to think that the law will actually be applied in a neutral manner. By way of example, let's imagine how the law might be applied to two award-winning books often taught to children between kindergarten and third grade: *Make Way for Ducklings* and *And Tango Makes Three*. Both stories feature a pair of birds raising babies together. In the first book, a pair of ducks named Mr. and Mrs. Mallard search through Boston for a suitable place to raise a flock of ducklings, eventually settling on an island in the Charles River. In the second book, a pair of penguins named Roy and Silo sing, swim, and build a nest together, eventually incubating an egg and raising a chick together.

If HB 1557 were applied in a neutral manner, both books would be banned: they both present stories that focus on the sexual orientation and gender identity of the baby bird's parents. But especially given the law's parental enforcement provisions, it is hard to imagine that this would occur. Since it was published, *And Tango Makes Three* has been one of the most banned books in the US and

63. *Id*.

64. Rosky, *supra* note 5, at 1468–75.

65. A.G. Gancarski, *Gov. DeSantis Warns of Transgender Issues Being 'Injected' into Classrooms*, FLORIDA POLITICS (Mar. 4, 2022), https://floridapolitics.com/archives/504130-in-discussing-lgbtq-instruction-bill-gov-desantis-warns-of-transgender-issues-being-injected-into-classrooms/ [https://perma.cc/3WY2-W2W9] (quoting Governor Ron DeSantis: "it's inappropriate to be injecting those matters like transgenderism into the classroom," "[h]ow many parents want their kindergarteners to have transgenderism or something injected into classroom instruction?" "right now, we see a focus on transgenderism, telling kids they may be able to pick genders and all of that").

66. *Compare* FLA. STAT. § 1001.42(8)(c)(3) (2022), *with* Gancarski, *supra* note 64 (quoting Governor DeSantis's remarks on "transgenderism").

the world. Unsurprisingly, I was unable to find a single report of a school banning *Make Way for Ducklings*.[67]

Under *Arlington Heights*, several factors are considered in determining whether a facially neutral policy is based on a discriminatory intent: "the historical background of the decision"; "the specific sequence of events leading up to the challenged decision"; and the defendant's "departures from its normal procedures or substantive conclusions."[68] HB 1557's discriminatory intent is supported by each of these factors.

*Historical Background*. Florida has a long track record of discriminating against same-sex relationships—including within the context of public school curricula. In 2003, Florida adopted a law requiring instructors to "teach[] the benefits of monogamous *heterosexual* marriage" while providing AIDS education in public schools.[69] In 2008, Florida voters approved Amendment 2, which defined "marriage" as "a union only between one man and one woman,"[70] and thus banned the creation of similar unions, such as civil unions or same-sex marriages. In 2022, during the Senate debate over HB 1557, Senator Farmer introduced an amendment to remove the word "heterosexual" from the AIDS education law, in light of the Supreme Court's ruling in *Obergefell v. Hodges*.[71] The amendment was rejected.[72]

*Specific Sequence*. In 2021, a parent named January Littlejohn sued the Leon County School District for withholding information about a student's gender identity from the parent.[73] In the wake of this lawsuit, controversy erupted when parents learned that other school districts had adopted policies of withholding similar information from parents.[74] These controversies were specifically cited as justification for HB 1557 in the House of Representatives Staff Analysis,[75] and repeatedly referenced in the legislative debates and the Governor's

67. *See* Betsy Gomez, *Banned Spotlight:* And Tango Makes Three, BANNED BOOKS WEEK (Sept. 5, 2018), https://bannedbooksweek.org/banned-spotlight-and-tango-makes-three/ [https://perma.cc/4N3H-YY32] (reporting that the book has appeared on the American Library Association's top ten challenged and banned books "a whopping eight times" in the thirteen years since it was published).

68. Vill. of Arlington Heights v. Metro. Housing Dev. Corp, 429 U.S. 252, 267 (1977). Historically, the *Arlington Heights* factors have been applied to determine whether a law is subject to heightened scrutiny or rational basis review under the Equal Protection Clause—or more recently, under the Free Exercise Clause. *See* William D. Araiza, *Regents*: Resurrecting Animus/Renewing Discriminatory Intent, 51 SETON HALL L. REV. 983, 944–45 (2021). But in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020), a plurality of the Court applied the *Arlington Heights* factors to determine whether a law survived rational basis review. *See* Araiza, *supra* at 998.

69. FLA. STAT. § 1003.46 (2002).

70. FLA. CONST. art. I, § 27.

71. Andrew Stanton, *Read the 13 Rejected Amendments to Florida's 'Don't Say Gay' Bill*, NEWSWEEK (Mar. 28, 2022, 12:03 PM), https://www.newsweek.com/read-13-rejected-amendments-floridas-dont-say-gay-bill-1685972 [https://perma.cc/KME2-MK6F].

72. *Id.*

73. Andrew Atterbury & Gary Fineout, *How a Lawsuit Over a Teen Spurred Florida Republicans to Pass the 'Don't Say Gay' Law*, POLITICO (Mar. 29, 2022, 4:31 AM) https://www.politico.com/news/2022/03/29/lawsuit-teen-florida-republicans-dont-say-gay-00021163 [https://perma.cc/BV23-K2DS].

74. *Id.*

75. Florida House of Representatives, Staff Analysis, H.B. 1557, 2022 Sess., at 4–5 (Fla. 2022), https://www.flsenate.gov/Session/Bill/2022/1557/Analyses/h1557b.JDC.PDF [https://perma.cc/FL5F-SYQC].

signing statement.[76] In light of this sequence of events, HB 1557 was motivated not by an even-handed concern about exposing children to both cisgender and transgender identities, but a specific concern about exposing children to transgender identities. Indeed, the notion that HB 1557 was motivated by even-handed concerns about exposing children to cisgender identities is patently false and absurd. During the legislative debates and when he signed the bill, the Governor repeatedly and specifically expressed concerns about school exposing children to "woke gender ideology," "the gender bread man," "transgenderism," and a book about a transgender boy named Max.[77]

*Substantive Departures*. Since Florida achieved statehood in 1845, it has rarely targeted the discussion of a class of persons in public schools. Again: in 2003, it required instructors to "teach the benefits of monogamous *heterosexual* marriage,"[78] but not requiring them to teach the benefits of monogamous same-sex marriage. Similarly, in 2022, it prohibited instructors from discussing "sexual orientation and gender identity" before the fourth grade[79]—while still allowing discussions of race, sex, religion, disability, and all other characteristics during these grades. As the Supreme Court explained in both *Romer* and *Windsor*: "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[80]

* * *

Notwithstanding these constitutional difficulties, Florida's HB 1557 has already inspired imitators. In April 2022, Alabama completed an astonishing turnaround: one year after repealing an anti-gay curriculum law, the state followed Florida by adopting a new one. In language remarkably similar to Florida's law, Alabama's HB 322 provides that teachers "in kindergarten through the fifth grade at a public K-12 school shall not engage in classroom discussion or provide classroom instruction regarding sexual orientation or gender identity in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards."[81] This language was added as a floor amendment, to a bill originally designed to prohibit transgender students from using bathrooms consistent with gender identity, rather than "birth sex."[82] In a striking admission

76. Atterbury & Fineout, *supra* note 73.

77. *3/28/22 Signing of HB 1557–Parental Rights in Education*, FLA. CHANNEL, at 01:19 (Mar. 28, 2022), https://thefloridachannel.org/videos/3-28-22-signing-of-hb-1557-parental-rights-in-education/ [https://perma.cc/S44U-L2EB] ("woke gender ideology"); *id*. at 03:10 ("the gender bread man"); *id.* at 03:48 ("Call Me Max," or "now I see a boy, because of transgender"); *id.* at 05:37 ("things like transgender"); *id.* at 07:04 ("woke gender ideology").

78. FLA. STAT. § 1003.46 (2002).

79. FLA. STAT. § 1001.42(8)(c)(3) (2022).

80. Romer v. Evans, 517 U.S. 620, 633 (1996) (citing Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928)); United States v. Windsor, 570 U.S. 744, 768 (2013).

81. H.B. 322, No. 2022-290, 2022 Reg. Sess. (Ala. 2022).

82. Brian Lyman, *Bathroom Legislation Turns into 'Don't Say Gay' Bill, Gets Alabama Legislature's Approval*, Montgomery Advertiser (Apr. 7, 2022, 11:44 AM), https://www.montgomeryadvertiser.com/story/

of discriminatory intent, the amendment's sponsor explained: "we just don't think it's appropriate to be talking about homosexuality and gender identity. You know, they should be talking about math, science (and) writing, especially in elementary school."[83]

## VI. GOVERNMENT IDENTIFICATION DOCUMENTS: THE GOVERNMENT'S SILENCE AS A WAY TO DISCRIMINATE AGAINST TRANSGENDER PEOPLE

While the history of anti-gay curriculum laws is primarily focused on lesbian, gay, and bisexual people, a similar story can be told about the relationship between the government's silence and discrimination against transgender, intersex, and nonbinary people. For many years, governments have denied such people the opportunity to change the gender designated on identification documents, as a way of discriminating against them.[84]

In her introductory essay to this symposium issue, Professor Norton offers a step-by-step analysis of an ongoing lawsuit in which the State of Alabama has refused to change the gender markers on the driver's licenses of transgender people.[85] Among other things, Professor Norton suggests that the gender marker on a person's driver's license is an example of government speech and that the state's refusal to change this marker may violate the Equal Protection and Due Process Clauses.[86]

While I agree with Professor Norton's analysis, I believe the state's refusal to change the gender marker on the government's own identification document is best understood as a combination of government speech and government silence. The original gender marker on a driver's license is government speech. The government's refusal to change that marker is government silence.

It may be tempting to assume that in such cases, the government's discriminatory act is the refusal to change a person's gender marker, rather than the original assignment of a gender marker at birth. But this may not always be true. To begin, we must pose the question of whether the government has any legitimate interests in putting gender markers on everyone's government identification documents—and if so, whether these interests justify assigning gender markers within the first days of a person's life, based on an inspection of the person's genitals.[87] Many transgender, intersex, and nonbinary people experience the

news/2022/04/07/alabama-senate-turns-bathroom-legislation-into-dont-say-gay-bill/9491630002/ [https://perma.cc/C2GD-NUQG].

83. *Id*.

84. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 733 (2007). Of course, there are many other ways in which the histories of discrimination against lesbian, gay, and bisexual people can be compared and contrasted to the histories of discrimination against transgender, intersex, and nonbinary people. A comparative analysis of these histories is well beyond the scope of this essay.

85. Helen Norton, *A Framework for Thinking About the Government's Speech and the Constitution*, 2022 U. ILL. L. REV. 1325, 1325–28 (2022).

86. *Id.* at 1348.

87. *See* AM. MED. ASS'N, REMOVING THE SEX DESIGNATION FROM THE PUBLIC PORTION OF THE BIRTH CERTIFICATE (RESOLUTION 5-I-19) 4 (2021), https://www.ama-assn.org/system/files/2021-05/j21-handbook-addendum-ref-cmte-d.pdf [https://perma.cc/C7CF-NPP7]; *see also* Clifford J. Rosky, *No Promo Hetero:*

government's original assignment of a gender marker as a profoundly harmful speech act, which triggers discrimination in a wide range of settings.[88]

As I suggested earlier, however, the constitutional analysis does not seem to depend on whether these policies are government speech, government silence, or a combination of the two concepts. So long as the state action requirement is satisfied, the state's actions must be justified under the Equal Protection Clause, as well as the Due Process Clause—regardless of whether they are best classified as speech or silence.

Recently, the right wing's backlash against transgender people has raised yet another question of whether government speech can violate the Equal Protection Clause. In *Meriwether v. Hartop*, the Sixth Circuit ruled that the Free Speech Clause protects a professor's right not to use female pronouns when addressing a transgender student.[89] In doing so, the court held that that *Garcetti*'s carveout for speech performed "pursuant to [public employees'] official duties" does not apply to the way that professors at state colleges address students in class.[90] Strangely, however, the court did not seem to take seriously the possibility that the professor's refusal to use female pronouns—in a philosophy class on an unrelated subject—may have denied the student an equal educational environment, in violation of federal law.[91]

In a long line of cases, the Supreme Court has repeatedly held that laws designed to protect Americans from discrimination and harassment do not violate the Free Speech Clause, even if they sometimes impose "incidental" restrictions on speech.[92] As the Court has explained in *Rumsfeld v. Forum for Academic and Institutional Rights*:

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.[93]

*Children's Right to be Queer*, 35 CARDOZO L. REV. 425, 507 (2013) (questioning the constitutionality of designating newborns as "male" or "female").

88. *See, e.g.*, Rosky, *supra* note 87, at 499 n.526.

89. 992 F.3d 492, 498 (6th Cir. 2021).

90. *Id.* at 505. *See also* Buchanan v. Alexander, 919 F.3d 847, 852–53 (5th Cir. 2019); Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011).

91. *See Meriwether*, 992 F.3d at 511 ("[O]n the allegations in this complaint, it is hard to see how this would have create[d] a hostile learning environment that ultimately thwarts the academic process. . . . [T]hroughout the semester, Doe was an active participant in class and ultimately received a high grade. . . . Meriwether's decision not to refer to Doe using feminine pronouns did not have [the systemic effect of denying the victim equal access to an educational program or activity]. As we have already explained, there is no indication at this stage of the litigation that Meriwether's speech inhibited Doe's education or ability to succeed in the classroom.").

92. *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 494, 502 (1949).

93. 547 U.S. 47, 62 (2006) (citation omitted).

In the coming years, controversies over changing pronouns and identification documents will ensure that our courts will continue to be confronted with questions about when the government's speech and the government's silence violate the Equal Protection Clause, the Due Process Clause—or even, under some circumstances, the Free Speech Clause itself.[94] In doing so, courts will have to decide whether the government's refusal to acknowledge a person's gender identity is a discriminatory act—regardless of whether it is best understood as an example of speech or silence.

94. NORTON, *supra* note 1, at 158–73.