FIRST AND FOURTEENTH AMENDMENT ISSUES WITH FLORIDA'S 'DON'T SAY GAY' BILL

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ABSTRACT

Florida's 2022 passage of the "Parental Rights in Education" bill, better known as the "Don't Say Gay" bill, prohibited classroom instruction related to sexual orientation or gender. The broad, vague language of the "Don't Say Gay" law and questionable motivations of the legislation have created Constitutional tension between parental rights and minor's' rights in the educational settings. By highlighting the history of anti-gay curriculum laws, this Note argues that Florida's "Don't Say Gay" law and similar anti-gay curriculum laws reflect the prioritization of parental rights over minors' right and highlight First Amendment free speech and Fourteenth Amendment Equal Protection concerns. Students are harmed by "Don't Say Gay" laws that reflect parental concerns because these laws silence diverse student populations, place private and traditional values above educational opportunities, and create hostile educational environments.

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INTRODUCTION

On March 28, 2022, Florida's Governor Ron DeSantis signed the "Parental Rights in Education" bill into law.[2] Dubbed the "Don't Say Gay" law by its opponents, the initial version of the law prohibited "classroom instruction" related to "sexual orientation" or "gender identity" in kindergarten through third grade, after which such topics may only be discussed "in a manner that is developmentally appropriate for students in accordance with state standards."[3] Just over a year later, Florida's Board of Education expanded the law to apply to students through the twelfth grade.[4] The law does not include definitions for any of the substantive terms or phrases used,[5] and as such, the scope of the law's prohibitions remains unclear to educators.[6] Perhaps the most important question that remains

1. News Release, Staff, Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education, (Mar. 28, 2022), https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/ [https://perma.cc/W8YV-DF22].

2. FLA. STAT. § 1001.42 (2022).

3. SOLCYRE BURGA, *WHAT TO KNOW ABOUT FLORIDA'S NEW 'DON'T SAY GAY' RULE THAT BANS DISCUSSION OF GENDER FOR ALL STUDENTS*, TIME (APR. 20, 2023), HTTPS://TIME.COM/6273364/FLORIDA-DON'T-SAY-GAY-EXPANSION/ [HTTPS://PERMA.CC/WU4S-XHPT].

4. § 1001.42; *see also* Complaint at 3, Equality Florida v. DeSantis, (N.D. Fla. filed Mar. 31, 2022) (No. 4:22CV00134), 2022 WL 974108 ("The meaning of "classroom instruction" on "sexual orientation" and "gender identity" is subject to intractable uncertainty and disagreement, yet the statute's drafters made a considered choice not to include definitions for any of these terms.").

5. To illustrate some of the issues likely to stem from the law's vagueness:

> "[J]ust consider how students, teachers, parents, guests, and school personnel might navigate these common questions: Can a student of two gay parents talk about their family during a class debate about civics? Can that student paint a family portrait in art class? Can a lesbian student refer to their own coming out experience while responding to a work of literature? Can a transgender student talk about their gender identity while studying civil rights in history class? What if that occurs in homeroom, or during an extracurricular activity with a faculty supervisor, or in an op-ed in the faculty-supervised school newspaper? Are teachers allowed to respond if students discuss these aspects of their identities or family life in class? If so, what can they say? Do those same limits apply if a teacher intervenes where a student is being bullied or beaten (or mistreated at home) based on their sexual orientation or gender identity? What if students address aspects of LGBTQ identity in essays for which teachers must provide grades and feedback? Speaking of which, can a history teacher educate their students about the history of LGBTQ rights? Can a government teacher discuss *Obergefell v. Hodges,* 576 U.S. 644 (2015)? Can an English teacher make note of queer themes or plots-and can they assign books in which one of the characters (or their families, or a side character) is LGBTQ? Does the librarian

unanswered by the law's vague language is whether it prohibits teachers from directly referencing sexual orientation and gender identity in their formal curriculum or if it more broadly constrains teachers from acknowledging these subjects at all, even if the discussion is initiated by students. This uncertainty is particularly problematic because the law also includes a broad enforcement clause under which parents have a private cause of action to bring lawsuits against school districts that they believe are operating in violation of the statute.[7] Thus, Florida school districts remain at risk of significant legal action until the law's specific meaning can be deciphered and conveyed to the State's teachers.

Unsurprisingly, the "Parental Rights in Education" law has prompted many debates as to the effects that the law will have on educational curriculums and on the students themselves.[8] Lawmakers assert that the law's title exemplifies its primary purpose – to reinforce parental rights and involvement.[9] In particular, Governor DeSantis asserts that "[i]t should be up to the parent to decide if and when to introduce . . . sensitive topics" and worries that "schools [are] using classroom instruction to sexualize their kids."[10] In contrast, opponents argue that the law will create and reinforce "an environment where recognition of and discussion about LGBTQ persons and issues is chilled or silenced completely; LGBTQ students are relegated to second-class status; and LGBTQ students are unable to obtain as good an education as other students."[11]

> have to remove every book with LGBTQ characters or references? More simply, can a gay or transgender teacher put a family photo on their desk? Can they refer to themselves and their spouse (and their own children) by the proper pronouns? What do they do if a student's same-sex parents visit the class together on career day, or ask to join a field trip? Are those parents forbidden from speaking to the class, on the theory that their very presence somehow instructs students on "sexual orientation"?"

Complaint, *supra* note 4 at 5–6.

6. § 1001.42.

7. *See* Burga, *supra* note 3.

8. *See* News Release, *supra* note 1; *see also* Madeleine Carlisle, *Florida Just Passed the "Don't Say Gay" Bill. Here's What It Means for Kids*, TIME (Mar. 8, 2022), https://time.com/6155905/florida-dont-say-gay-passed[https://perma.cc/DX6V-5EJK] ("State Rep. Joe Harding, a Republican who introduced the bill, told TIME in February that the bill's intention is to keep parents 'in the know and involved on what's going on' with their child's education.").

9. News Release, *supra* note 1.

10. Complaint, *supra* note 4, at 52.

While anti-gay curriculum laws have existed since the 1980s, the enactment of Florida's "Parental Rights in Education" law was the first time in twenty-one years that an anti-gay curriculum law was passed.[12] In the years immediately preceding the passage of the Florida law, anti-gay curriculum laws were largely viewed as vestiges of the 1980s when the growing gay rights movement and the HIV epidemic spurred the enactment of discriminatory "Don't Say Gay" laws around the country, which evolved to limit the abilities of educators to discuss non-heterosexual and non-cisgender identities.[13] By the time Florida enacted its "Parental Rights in Education" law, many states had repealed their "Don't Say Gay" laws.[14] However, the passage of Florida's "Parental Rights in Education" law has already spurred numerous copycat bills.[15] Less than a month after Governor DeSantis signed the "Parental Rights in Education" bill, at least a dozen other states have drafted some form of anti-gay curriculum laws to be introduced in their respective legislatures.[16] A federal anti-gay curriculum law has also been introduced in Congress which would prohibit the use of federal funds "to develop, implement, facilitate, or fund any sexually-oriented program, event, or literature for children under the age of 10."[17] Thus, the fate of Florida's anti-gay curriculum law has far-reaching implications for students across the nation.

Anti-gay curriculum laws, including Florida's "Don't Say Gay" law, reflect the tension between parental rights and minors' rights in education settings. Parents have traditionally exerted a great influence over school

11. Kate Sosin, *In some states, versions of 'Don't Say Gay' bills have been around for awhile*, PBS (Apr. 21, 2022), https://www.pbs.org/newshour/nation/in-some-states-versions-of-dont-say-gay-bills-have-been-around-for-awhile [https://perma.cc/Y9DQ-WERB].

12. *Id.*

13. *Id.*

14. Dustin Jones & Jonathan Franklin, *Not just Florida. More than a dozen states propose so-called "Don't Say Gay" bills*, NPR (Apr. 10, 2022), https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills [https://perma.cc/C4TU-UUZS]; *see also* Jeff Raikes, *Is The 'War on Woke' A War On Our Country's Future?*, FORBES (Jul. 17, 2023), https://www.forbes.com/sites/jeffraikes/2023/07/17/is-the-war-on-woke-a-war-on-our-countrys-future/?sh=36a83bdc754a [https://perma.cc/ZA34-9F5Z] ("The ACLU is currently tracking nearly 500 anti-LGBTQ bills in play across the country – more than twice as many as [2022].").

15. *Id.*

16. Jo Yurcaba & Jay Valle, *A national 'Don't Say Gay' law? Republicans introduce bill to restrict LGBTQ-related programs*, NBC NEWS (Oct. 19, 2022), https://www.nbcnews.com/nbc-out/out-politics-and-policy/national-dont-say-gay-law-republicans-introduce-bill-restrict-lgbtq-re-rcna53064 [https://perma.cc/J3ZV-8QP8].

policies[18] and the Courts have long upheld parents' right to direct the upbringing and education of their children.[19] However, the Court has also recognized minors' Constitutional rights, resulting in a tension that requires the Court to balance a parent's rights with the rights of their children.[20] This is particularly important and necessary when a faction of parents advocate for harmful policies that infringe on minors' Constitutional rights and are at odds with the interests of other parents.[21]

In this Note, I argue that Florida's "Don't Say Gay" law and similar anti-gay curriculum laws reflect the prioritization of parental rights over minors' right and raise on both First and Fourteenth Amendment constitutional concerns. Although Florida's "Parental Rights in Education" law appears to only restrain teachers, students will suffer the most harm under this law by way of missed educational opportunities and the fostering of hostile educational environments. Thus, in Florida's battle for parental rights, the legislature is effectively trampling on the educational rights of its students.

Part I(A) of this Note examines the evolution of parental rights and Part I(B) examines the evolution of minors' First and Fourteenth Amendment rights in the context of education. Part I(C) documents the history of anti-gay curriculum laws and its resurgence in the present day. Part II of this Note concludes that Florida's "Don't Say Gay" law violates minors' First Amendment speech rights and contradicts themes found in the Fourteenth Amendment's Equal Protection jurisprudence such that parental rights must cede in the face of such constitutional violations.

17. *See infra* Part II(A).

18. *See infra* Part I(A).

19. Martha Minow, *What Ever Happened to Children's Rights*, 80 Minn. L. R. 267, 295 (explaining how "our culture and ideology produce great resistance to state intervention in families; a resistance articulated both by the political left and the right. Conceptions of personal responsibility and privacy, government bungling and individual freedom, and cultural diversity and mutual distrust fuel this resistance. The cultural resistance to rights for children thus reflects a fear that such public rights would disrupt private traditions and fail to meet children's needs compared with reliance on private families.").

20. "Parental rights," as used in this Note, refer to the interests of a faction of parents in Florida that support the "Don't Say Gay" bill. While not the focus of this Note, it should be noted that there are many Floridian parents who oppose the bill and support the continued incorporation of LGBTQ+ educational material into school curriculums.

I. HISTORY

A. Evolution of Parental Rights

The modern[22] understanding of parental rights began in 1923 with the United States Supreme Court's decision in *Meyer v. Nebraska*.[23] In this case, the Court first interpreted the term "liberty" as used in the Fourteenth Amendment to include the right of parents to "establish a home and bring up children."[24] Against this backdrop, the Court considered whether a state law that prohibited the teaching of the German language to students, despite parents' request that German language be taught, infringed upon parents' right to control and educate their children.[25] The Court reasoned that liberty interests may only be restricted if there is a legitimate state purpose, and finding that no such legitimate state purpose was furthered by the prohibition in this case, the Court ultimately held that the law unconstitutionally infringed upon parents' right to "control the education of their own."[26]

A mere two years after the decision in *Meyers*, the Court continued its momentum in recognizing parental rights in *Pierce v. Society of Sisters*.[27] In *Pierce*, the Court held that states may not require children to attend public, as opposed to private, schools.[28] Notably, the Court reasoned that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[29] Based on this understanding and the doctrine set forth in *Meyers*, the Court held that the state law requiring public education unconstitutionally encroached on the right of parents to "direct the upbringing and education of children under their

21. Prior to our modern understanding, parental rights were much broader since minors were not afforded any rights and the legal status of children was generally reduced to that of property. *See generally* F. Paul Kurmay, *Do Children Need a Bill of Rights – Children as More Than Objects of the Law*, 10 Conn. Prob. L.J. 237, 242–43 (1995-1996).

22. Meyer v. Nebraska, 262 U.S. 390 (1923).

23. *Id.* at 399.

24. *Id.* at 400.

25. *Id.* at 401.

26. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

27. *Id.* at 531.

28. *Id.* at 535.

control."[30] Later, in *Prince v. Massachusetts*, the Court reinforced the notion that "the custody, care and nurture of [a] child reside[s] first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[31] This holding both confirmed and enunciated the fundamental, constitutionally protected right that parents have to decide matters related to the upbringing of their children.

In subsequent cases, the Court defined the extent of the rights that fall under parents' overarching right to make decisions related to the "custody, care and nurture" of their children. For example, in *Wisconsin v. Yoder*, Amish parents challenged a state law that required children to attend school until the age of sixteen because it was inconsistent with their religious beliefs.[32] The Amish parents claimed that the law was unconstitutional on First and Fourteenth Amendment grounds, and the Court ultimately held that the law violated the parents' right to direct their children's religious and educational upbringing.[33] While the Court left open the possibility that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens,"[34] the Court ultimately held that the Amish parents in this case "introduced persuasive evidence undermining the arguments the State ha[d] advanced to support its claims in terms of the welfare of the child and society as a whole."[35]

The Court has also been reluctant to terminate parental rights. First, in 1972, the Court extended a parental interest to unmarried fathers in Stanley

29. *Id.* at 534–35.
30. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
31. Wisconsin v. Yoder, 406 U.S. 205 (1972).
32. *Id.* at 236.
33. *Id.* at 234. Importantly, only Justice Douglas advocated for taking the child's desires and rights into consideration. In his dissent, Justice Douglas explicitly recognized that "[w]here [a] child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit [the child's parents to withdraw him from school due to the parents' religious beliefs] without canvassing [the child's] views." *Wisconsin v. Yoder*, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting.) He further emphasized that "[w]hile the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views" and therefore "should be entitled to be heard." *Id.* at 244.
34. *Id.* at 233–34; *see also Prince*, 321 U.S. at 171 (sustaining the conviction of a minor's guardian, both the minor and the guardian being Jehovah's Witnesses, for violating a state law that prohibited child labor despite the fact that the law would disallow the minor from freely engaging in her religion by selling religious materials on public streets).

v. Illinois.[36] In this case, the Court invalidated a state law which presumed that unmarried fathers were unfit parents and allowed the state to remove children from the custody of unmarried fathers without a prior hearing to determine their fitness as parents.[37] The Court extended the protection of the family unit to encompass "family relationships unlegitimized by a marriage ceremony."[38] Later, in *Santosky v. Kramer*, the Court made it more difficult for states to terminate parental rights, even for parents who were previously deemed unfit and neglectful, by raising the evidentiary burden from a "preponderance of the evidence" standard to a "clear and convincing" evidentiary standard.[39] In *Santosky*, the state law in question allowed for the termination of parental rights if, based on a preponderance of the evidence standard, a child was found "permanently neglected."[40] The Petitioner-parents in *Santosky* had three children, all of whom had been removed by the State after multiple incidents of parental neglect.[41] However, the Court held that "the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[42] The Court reasoned that a more stringent evidentiary standard was needed to ward off the possibility of erroneous deprivation of parental rights,[43] further emphasizing the great weight that the Court places on parental rights.

Importantly, the Court has also used its parental rights precedent to overcome minors' liberty interest. For example, in *Parham v. J.R.*, a class action was brought on behalf of children being treated in a Georgia state mental hospital.[44] Under Georgia law, parents could admit their children to mental hospitals by filing an application and having a hospital superintendent concur that there was both evidence of mental illness and that hospitalization would be suitable treatment.[45] The Court recognized that a child "has a substantial liberty interest in not being confined unnecessarily

35. Stanley v. Illinois, 405 U.S. 645 (1972).
36. *Id.*
37. *Id.* at 651.
38. Santosky v. Kramer, 455 U.S. 745 (1982).
39. *Id.* at 748.
40. *Id.* at 751.
41. *Id.* at 753.
42. *Id.*
43. Parham v. J. R., 442 U.S. 584 (1979).
44. *Id.* at 590–91.

for medical treatment," but that the parental and state interests in caring for the child ultimately outweighed the child's liberty interest and thus disposed of the need for extra precautions such as pre-admission hearings.[46] Thus, the Court held that its "precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply" when making a voluntary commitment decision.[47] The Court qualified its holding by noting that "the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized," however it is the physician, and not the child, who will share "plenary authority" with the parent in seeking hospitalization of the child.[48]

Most recently, in 2000, the Court reaffirmed its commitment to parental rights by holding that parents have the right to deny visitation to other non-parent third parties.[49] In *Troxel v. Granville*, a state law which allowed anyone to petition the court for visitation rights and which directed the court to grant such visitation rights if they deemed it was in the best interest of the child was challenged as infringing upon parents' right to care, custody, and control of their children.[50] In particular, the Petitioners requested more frequent visitation rights with their grandchildren after their daughter-in-law, the Respondent, had previously denied more than a short, monthly visit.[51] The Petitioners' grandchildren were around seven and nine years old at the time, and regularly spent time with the Petitioners prior to their mother's refusal of more frequent visitation. Notably, the Court relied on the presumption that a fit parent acts in the best interest of their children[52] and recognized that an "independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship."[53] Thus,

45. *Id.* at 600.
46. *Id.* at 604.
47. *Id.*
48. Troxel v. Granville, 530 U.S. 57 (2000).
49. *Id.* at 60–62.
50. *Id.*
51. *Id.* at 68. *See also* Parham v. J. R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").
52. *Troxel*, 530 U.S. at 64.

without any meaningful consideration of the children's interests, the Court held that the state law impermissibly infringed on Respondent's constitutional right to make decisions regarding the care, custody and nurture of her children.[54]

B. Evolution of Minors' Rights

Against the backdrop of near-absolute parental rights, the emergence of minors' rights followed quite gradually. The Court has historically recognized that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution,"[55] however the Court has also allowed the states to modify and limit the rights of minors for the sake of their "protection." In particular, the Court acknowledges that minors' rights are not always equivalent to adults' rights because of the "peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[56] *Ginsberg v. State of New York* illustrates the idea that states have broader authority to restrict minors' rights than they do for adults.[57] In this case, the defendant was convicted of selling obscene material to a minor.[58] The Court upheld the conviction, reasoning that the state may restrict minors' First Amendment right to access material that the state deems harmful because of the state's "independent interest in the well-being of its youth."[59] Subsequent cases have reaffirmed the essential holding in *Ginsberg*, and when "[v]iewed together, [the] cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'"[60]

53. *Id.* at 66–67.
54. Bellotti v. Baird, 443 U.S. 622, 633 (1979).
55. *Id.* at 634.
56. Ginsberg v. State of N. Y., 390 U.S. 629, 636–37 (1968).
57. *Id.* at 631.
58. *Id.* at 640.
59. *Bellotti*, 443 U.S. at 635.

i. Minors' First Amendment Rights in Educational Settings

Most significantly for the purposes of this Note, the Court has recognized certain constitutional rights held by minors in the educational setting. The Court held in *Tinker v. Des Moines Independent Community School District*, the fountainhead case in minors' First Amendment rights in educational settings, that minors could not be censored unless their expression or speech caused a disruption in the educational process.[61] In *Tinker*, the minor-plaintiffs decided to wear black armbands to school to protest the Vietnam war.[62] In order to dissuade the plaintiffs from their plan, the school adopted a policy under which students who chose to wear armbands would be suspended if they refused to remove them.[63] Despite having knowledge of this policy, the plaintiffs nevertheless showed up to school wearing the armbands, refused to remove them, and were subsequently suspended.[64] The Court ultimately ruled in favor of the minor-plaintiffs, reasoning that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."[65] Notably, the Court stated that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[66] Finding no real "showing that the students' activities would materially and substantially disrupt the work and discipline of the school," the Court held the censorship unconstitutional.[67] In subsequent cases, the Court expressly holds that minors' First Amendment rights also protect the right to receive ideas and

60. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

61. *Id.* at 504.

62. *Id.*

63. *Id.*

64. *Id.* at 506.

65. *Id.* at 509.

66. *Id.* at 513.

information in part based on the idea that the classroom should function as a "marketplace of ideas" so that children are exposed to new thoughts.[68] For example, in *Board of Education v. Pico*, the Court considered whether a school board could remove books it deemed "un-American" or "vulgar" from school libraries.[69] Because "the Constitution protects the right to receive information and ideas," the Court reasoned that the constitutionality of removing books from a library turned on the school board's motivation for removing the books.[70] Ultimately, the Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[71]

ii. Minors' Fourteenth Amendment Rights in Educational Settings

Aside from cases that specifically concern minors' First Amendment rights in school, the Court has also impliedly recognized minors' right to receive an education absent harmful discrimination under the Fourteenth Amendment. This right was most clearly enunciated in the line of racial desegregation cases. Beginning with *Plessy v. Ferguson*, Homer Plessy, a man "of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood," challenged a Louisiana law under which Black passengers were prohibited from riding in the same railway carriage as White passengers.[72] The State of Louisiana defended the law by emphasizing its requirement for "*equal* but separate accommodations for the white, and colored races"[73] and maintained that the law did not violate the Fourteenth Amendment's Equal Protection Clause because it was reasonable legislation passed within the State's police power.[74] The Court

67. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982); *see also* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L. J. 1448, 1493, 1495 (2018) (suggesting that "[e]xposure to new ideas furthers a range of children's interests, including intellectual learning, creative explorations, social pleasures, and new ways of viewing the world," and is vital to help "prepare them to become adult members of a liberal polity").

68. *Id.* at 857–61.

69. *Id.* at 867.

70. *Id.* at 872.

71. *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896).

72. *Id.* at 540 (emphasis added).

73. *Id.* at 544.

ultimately agreed, reasoning that the Fourteenth Amendment "could not have been intended to . . . enforce a commingling of the two races" and that separation does "not necessarily imply the inferiority of either race to the other."[75] The holding in *Plessy*, while decided in the narrow context of public transportation, seemingly also blessed the application of the "separate but equal" doctrine in public education.[76] Racially segregated schools, both sanctioned by law and occurring due to housing patterns, existed long before the *Plessy* decision[77] and were premised upon the same racist logic as other Jim Crow laws.[78] In particular, many white parents and politicians, particularly in the South, feared "inter-racial marriages and resulting diseases that might arise" if public schools were integrated.[79] These parents also believed that "separate (yet equal) school facilities were not only sanctioned by the law of *Plessy v. Ferguson* but, more importantly, were at one with the divine order."[80] Due to these beliefs, up until 1954, seventeen states and the District of Columbia explicitly prohibited Black children from attending all-White schools.[81]

While the "separate but equal" doctrine was repeatedly challenged in fact-specific cases with narrow scopes,[82] it wasn't until *Brown v. Board of Education* that the Court formally rejected the doctrine and mandated school integration. The Court held in *Brown* that "[s]eparate educational facilities

74. *Id.*

75. *The Struggle Against Segregated Education*, SMITHSONIAN NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/explore/stories/struggle-against-segregated-education [https://perma.cc/T24L-EHVS].

76. The constitutionality of segregated schools was litigated as early as 1849 in *Roberts v. City of Bos.*, 59 Mass. 198 (1849).

77. David Pilgrim, *What Was Jim Crow*, JIM CROW MUSEUM (Sept. 2000), https://jimcrowmuseum.ferris.edu/what.htm htm [https://perma.cc/YFL7-KR9S] ("The Jim Crow system was undergirded by the following beliefs or rationalizations: whites were superior to blacks in all important ways, including but not limited to intelligence, morality, and civilized behavior; sexual relations between blacks and whites would produce a mongrel race which would destroy America; treating blacks as equals would encourage interracial sexual unions; any activity which suggested social equality encouraged interracial sexual relations; if necessary, violence must be used to keep blacks at the bottom of the racial hierarchy.").

78. Graeme Cope, *"A Thorn in the Side"? The Mothers' League of Central High School and the Little Rock Desegregation Crisis of 1957*, 57 ARK. HIST. Q. 160, 170 (Summer 1998).

79. *Id.*

80. Arthur E. Sutherland, *Segregation by Race in Public Schools Retrospect and Prospect*, 20 L. & CONTEMP. PROBS. 169, 171 (1955).

81. *See* Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950).

are inherently unequal" and thus violative of the Fourteenth Amendment's Equal Protection Clause despite the fact that "the Negro and white schools involved [had] been equalized, or [were] being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[83] Recognizing that "education is perhaps the most important function of state and local governments,"[84] the Court reasoned that public education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[85] Most importantly, the Court correctly recognized that:

"[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."[86]

Thus, in crediting the harmful impact that segregation had on Black children, the Court overrode parental and legislative concerns in favor of Black students' right to receive an education absent discrimination. While limited to racial discrimination, Brown helped cement the broader notion that "all kids [must] be given equal educational opportunity no matter what their race, ethnic background, religion, or sex, or whether they are rich or poor, citizen or non-citizen."[87]

82. Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 492 (1954).

83. *Id.* at 493. The Court further elaborated by describing education as "the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in heling him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.*

84. *Id.*

85. *Id.* at 494.

86. *Your Right to Equality in Education*, ACLU (July 17, 2003), https://www.aclu.org/documents/your-right-equality-education#_[https://perma.cc/TR3N-5WES].

C. History of "Don't Say Gay" Laws

"Don't Say Gay," "No Promo Homo," and other iterations of anti-gay curriculum laws were widely popularized in the late 1970s in response to the growing gay rights movement and the later HIV epidemic.[88] As the country began repealing a variety of discriminatory laws, anti-gay movements concurrently swept through the country and were promoted by certain prominent cultural voices.[89] For example, the "Save Our Children" movement, created and sponsored by singer Anita Bryant, was one such movement that specifically targeted the employment of gay schoolteachers.[90] Bryant and her supporters believed that gay teachers would "sexually molest children, serve as dangerous role models, and encourage more homosexuality by inducing pupils into looking upon it as an acceptable life-style."[91] The popularization of this rhetoric led Oklahoma, Bryant's home state, to adopt the first semblance of an anti-gay curriculum law in 1978.[92] The express legislative purpose of this law was to "head off a threat to the children of Oklahoma"[93] by targeting "speech that was likely to come to the attention of school children and speech that was of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct."[94] Specifically, the law permitted the dismissal of teachers who had engaged in "public homosexual conduct," which was broadly defined to include actions such as merely advocating for "private homosexual activity."[95]

During the 1980s, the HIV epidemic greatly impacted the country's approach to sex education in schools.[96] The concern over HIV, deemed a

87. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1476–94 (2017).
88. *Id.* at 1477–80.
89. *Id.*
90. *Id.* at 1478 (citing ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY 113–20 (1977)) (internal quotations removed).
91. Act of Apr. 14, 1978, ch. 189, 1978 Okla. Sess. Laws 381. It wasn't until 1985 that the Supreme Court struck down this law as unconstitutionally broad in a one-sentence opinion.
92. Rosky, *supra* note 75, at 1481 (citing *Senate OKs Bill to Fire Homosexual Teachers*, DAILY OKLAHOMAN, Mar. 16, 1978, at 32).
93. *Id.* at 1482 (citing Act of Apr. 14, 1978, ch. 189, §§ 1(A)(2), 1(C)(4)) (internal quotations removed).
94. Act of Apr. 14, 1978, ch. 189, § 1(A)(2), 1978 Okla. Sess. Laws 381.
95. Rosky, *supra* note 75, at 1487–88.

"homosexual disease," led many schools to choose abstinence education over comprehensive sex education.[97] In particular, laws such as the "Adolescent and Family Life Act," signed into law by President Ronald Reagan sought to "promote abstinence among adolescents" and paved the way for schools to adopt other abstinence-focused sex education policies.[98] However, the continued spread of HIV coupled with an influential report issued by the Surgeon General finally led to the adoption of HIV-education laws and more comprehensive sex education in many schools.[99] In response to this gradual acceptance of HIV-education and sex education, certain political leaders began including explicit anti-gay mandates into the laws that governed how sex education should be approached.[100] Thus, anti-gay curriculum laws were created. After Oklahoma adopted the first explicit anti-gay curriculum law, numerous states followed suit by passing similar laws.[101] Nine states adopted anti-gay curriculum laws between 1987 and 1988, and another seven states adopted such laws between 1989 and 1996.[102]

While widespread homophobia in the 1980s and 1990s led to the proliferation of anti-gay curriculum laws, recent studies have shown that Americans are much more accepting of same-sex relations.[103] For many, the culmination of LGBTQ+ acceptance was evidenced in 2015 when the Supreme Court formally recognized marriage equality in *Obergefell v. Hodges*.[104] This change in public understanding and tolerance led many states to repeal their anti-gay curriculum laws[105] and at least seven states

96. *Id.* at 1489.
97. *Id.* at 1488.
98. *Id.* at 1489–90.
99. *Id.* at 1490–91.
100. *Id.* at 1491–92.
101. *Id.* at 1491.
102. William Harms, *Americans move dramatically toward acceptance of homosexuality survey finds,* UCHICAGO NEWS *(*Sept. 28, 2011*),* https://www.norc.org/NewsEventsPublications/PressReleases/Pages/american-acceptance-of-homosexuality-gss-report.aspx [https://perma.cc/Z4PM-9RMY] ("The change toward acceptance of homosexuality began in the late 1980s after years of remaining relatively constant. In 1973, 70 percent of people felt same-sex relations are "always wrong," and in 1987, 75 percent held that view. By 2000, however, that number dropped to 54 percent and by 2010 was down to 43.5 percent.").
103. Obergefell v. Hodges, 576 U.S. 644 (2015).
104. *See, e.g.*, Sheenae Shannon, *AEA Applauds Repeal of Anti-LGBTQ Curriculum Law*, AEA (Apr. 10, 2019), https://www.arizonaea.org/about-aea/media-center/press-releases/aea-applauds-repeal-anti-lgbtq-curriculum-law_[https://perma.cc/EL66-JGLQ]; *Victory! South Carolina Court Strikes Outdated Anti-LGBTQ Curriculum Law as Unconstitutional*, LAMBDA LEGAL (Mar. 11, 2020),

have even explicitly mandated "LGBTQ+-Inclusive Curricular Standards" in public schools, which requires the inclusion of LGBTQ+ people and history in subjects such as history, civics, and social studies.[106]

Despite the progress made, universal acceptance of LGBTQ+ persons remains elusive.[107] As a result, 16% of the LGBTQ+ population still live in a state that continues to have anti-gay curriculum laws as of November 2023.[108] While past "Don't Say Gay" laws prohibited discussions of homosexuality in sex education curriculums, Florida's "Parental Rights in Education" law is much broader. This new iteration presumably applies to all classroom settings given its prohibition on any "classroom instruction."[109] Further, Florida's "Parental Rights in Education" law bans discussion of gender identity in addition to sexual orientation, making the law broader than older "Don't Say Gay" laws which only prohibit discussion of non-heterosexual sexual orientations.[110] In these ways, laws taking after Florida's "Parental Rights in Education" law pose more harm to LGBTQ+ students.

II. ANALYSIS

A. First Amendment Concerns

The tenants and themes set forward in cases such as *Tinker* and *Pico* are directly applicable to the debates concerning anti-gay curriculum laws. While these cases seemingly lack parental involvement, the underlying parental influence should not be overlooked. As recognized by Chief Justice Burger in his *Pico* dissent, "[i]n most public schools in the United States[,]

https://www.lambdalegal.org/blog/20200311_victory-south-carolina-anti-lgbtq-curriculum-law [https://perma.cc/FC6C-NKY8]; Mel King, *Victory! Utah Passes Historic Bill Repealing Anti-LGBTQ Public Education Law*, EQUAL. FED'N (Mar. 9, 2017), https://www.equalityfederation.org/post/victory-utah-passes-historic-bill-repealing-anti-lgbtq-public-education-law [https://perma.cc/8BC3-6MU9].

105. *See supra* note 10.

106. *See LGBTQ+ Rights*, GALLOP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/6G5U-TATC] (showing 28% of Americans do not think marriages between same-sex couples should be recognized by the law as valid, with the same rights as traditional marriages).

108. MOVEMENT ADVANCEMENT PROJECT, Equality Maps: LGBTQ Curricular Laws, https://www.lgbtmap.org/equality_maps/curricular_laws [https://perma.cc/FJ9J-MM5A].

108. FLA. STAT. § 1001.42 (2022).

109. *Id.*

the parents have a large voice in running the school."[111] In particular, "[t]hrough participation in the election of school board members, . . . parents influence, if not control, the direction of their children's education."[112] Thus, school administrators and school boards are frequently proxies through which parents assert their rights over their children's education. Therefore, despite the seemingly indirect parental involvement in both *Tinker* and *Pico*, these cases should be understood to set important precedent concerning students' First Amendment rights in the face of parental opposition. Similarly, while Florida's law seemingly only applies to teachers, the law also operates as an effective censor on students. By prohibiting "classroom instruction" pertaining to sexual orientation or gender identity, even if students were to initiate the conversation, teachers could not respond with meaningful comments or facilitate a broader discussion. As such, this law censors Florida's students by way of censoring its teachers.

Tinker holds that public schools cannot censor students unless their expression or speech causes a substantive disruption in the educational process and must be "more than a mere desire to avoid the discomfort and unpleasantness" of a particular viewpoint.[113] In violation of the principles set forth in *Tinker*, neither the Florida legislators nor school boards base the "Parental Rights in Education" law on any material interference in the educational process. Instead, proponents of the law explicitly state that the law's censorship is based on the desire to allow parents to decide when, if at all, to have conversations with their children about topics such as sexuality and gender.[114] This purported parental concern mirrors the exact scenario expressly disapproved of in *Tinker*, namely, the desire to avoid what some parents may deem "discomforting" or "unpleasant" conversations.[115] Without the threat of any substantive educational disruption, the mere parental desire to avoid "unpleasant" discussion cannot uphold the "Parental Rights in Education" censorship.

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110. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 891 (1982). (Burger, C.J., dissenting).

111. *Id.*

112. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

113. *See Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education, supra* note 1 ("It should be up to the parent to decide if and when to introduce these sensitive topics.").

114. *Tinker*, 393 U.S. at 509.

Similarly, the Court in both *Tinker* and *Pico* clearly acknowledged that public schools cannot use censorship to promote or repress specific ideologies. In *Tinker*, the Court took issue with the fact that the school attempted to repress a singular viewpoint, as evidenced by the school's disinterest in adopting a blanket censor on all political expression.[116] The Pico Court also held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[117] A cursory read of Florida's "Don't Say Gay" law may lead to the belief that the law is neutral with respect to any particular ideology. However, the law strongly aligns with the beliefs of certain ideologies and was admittedly passed as part of a political agenda.[118] While the "Parental Rights in Education" law is broadly written to censor the discussion of *any* sexual orientations or gender identities, the context in which the law was passed indicates that it was likely intended to repress the discussion of non-heterosexual orientations and non-binary gender identities. First, this law represents the start of a new generation of anti-gay curriculum laws, which have historically targeted individuals with non-heterosexual orientations.[119] Second, the law was also passed in conjunction with the Florida legislature's self-proclaimed "war on wokeness," a cultural movement claiming, in part, that students are being "indoctrinated" by schools with liberal values such

115. *See id.* at 510–11 ("It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.").

116. *Pico,* 457 U.S. at 872 (citation omitted).

117. Greg Allen, *Florida Gov. DeSantis takes aim at what he sees as indoctrination in schools*, NPR (July 13, 2022), https://www.npr.org/2022/07/13/1110842453/florida-gov-desantis-is-doing-battle-against-woke-public-schools [https://perma.cc/S5DN-JQ45] ("[DeSantis] recently signed a number of measures aimed at preventing the sort of "indoctrination" he and his Republican supporters fear is taking place [in schools, including the Parental Rights in Education Act].") ("[Critics of the Parental Rights in Education Act] believe the law is part of an effort by DeSantis and Republicans to mobilize the party's conservative base by targeting the LGBTQ community.").

118. *See supra* Part I(C).

as LGBTQ+ acceptance.[120] Additionally, many people believe that "the [Parental Rights in Education law] will … result in a chilly or hostile school climate [*specifically*] for LGBTQ educators, students, and families."[121] This fear has already been realized, as at least one Florida teacher has already undergone an investigation for showing a Disney movie that featured a homosexual character.[122] As of the time this Note was written, there are no reports that teachers have been investigated for showing movies with heterosexual or cisgender characters.[123] Thus, it is likely that the censorship embedded in Florida's "Parental Rights in Education" law is intended to promote a specific ideology by *specifically* targeting discussion of non-heterosexual orientations and non-binary gender identities despite its broad

119. *See News Release, Staff, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination, (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/ ("In Florida, we will not let the far-left woke agenda take over our schools and workplaces. There is no place for indoctrination … in Florida."); see also Raikes, supra note 14 (One of the most troubling fronts in this War on Woke has been the push to strip LGBTQ Americans of their fundamental and hard-won human rights. The ACLU is currently tracking nearly 500 anti-LGBTQ bills in play across the country... [including] DeSantis' "Don't Say Gay" bill, banning any instruction about sexual orientation or gender identity in Florida primary schools."); see also Jonathan Weisman, Are G.O.P. Voters Tiring of the War on 'Wokeness'?, N.Y. TIMES (Aug. 6, 2023), https://www.nytimes.com/2023/08/06/us/politics/woke-republicans-poll.html (describing the term "woke" as "a term few can define but many have used to capture what they see as left-wing views on race, gender and sexuality that have strayed far beyond the norms of American society.").*

120. Abbie E. Goldberg, *Impact of HB 1557 (Florida's Don't Say Gay Bill) on LGBTQ+ Parents in Florida,* UCLA SCH. OF L. WILLIAMS INST. (Jan. 2023) (emphasis added), https://williamsinstitute.law.ucla.edu/publications/impact-dont-say-gay-parents/ [https://perma.cc/DJ79-YYHW]; *see also* Daniel Putnam, *Florida's anti-gay bill is wrong. It's also unconstitutional.*, NBC NEWS (Mar. 28, 2022), https://www.nbcnews.com/think/opinion/florida-hb-1557-anti-gay-parental-rights-education-violates-free-ncna1293466 [https://perma.cc/YRN4-WB5V] ("straight teachers are less likely to be caught in the crosshairs of HB 1557 than their LGBTQ colleagues").

121. ISABEL ROSALES & JAIDE GARCIA, *FLORIDA SCHOOL SYSTEM HAS CLOSED INVESTIGATION INTO TEACHER WHO SHOWED DISNEY MOVIE WITH GAY CHARACTER*, CNN (MAY 23, 2023), HTTPS://WWW.CNN.COM/2023/05/23/US/FLORIDA-TEACHER-LGBTQ-DISNEY-MOVIE-INVESTIGATION/INDEX.HTML [HTTPS://PERMA.CC/78BE-ZBAC].

122. *SEE E.G.*, RAINA DEERWATER, *GLAAD'S TENTH ANNUAL STUDIO RESPONSIBILITY INDEX SEES THE PERCENTAGE OF LGBTQ-INCLUSIVE FILMS DROP, AS DOES RACIAL DIVERSITY AND SCREEN TIME*, GLAAD (DEC. 14, 2022), HTTPS://GLAAD.ORG/GLAADS-TENTH-ANNUAL-STUDIO-RESPONSIBILITY-INDEX-SEES-PERCENTAGE-LGBTQ-INCLUSIVE-FILMS-DROP-AD/ (FINDING THAT "**OF THE 77 FILMS THEATRICALLY RELEASED BY THE SEVEN MAJOR STUDIOS IN 2021, [ONLY] 16 (20.8 PERCENT) CONTAINED LGBTQ CHARACTERS,**" MEANING THAT AT LEAST 79.1% OF MOVIES RELEASED IN 2021 FEATURED HETEROSEXUAL AND CISGENDER CHARACTERS) (EMPHASIS ADDED).

prohibition on discussion of *any* sexual orientation or gender identity. In this way, the law is inconsistent with the principles emphasized for constitutional censorship in both *Tinker* and *Pico*.

Finally, and perhaps most importantly, the Tinker and Pico Courts repeatedly emphasized that the underlying reason for affording constitutional protections to minors is that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."[124] Thus, "just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[125] Based on these ideals, it is imperative that public schools afford students a broad education that is representative of the increasingly diverse society that they will live in. Anti-gay curriculum laws clearly disadvantage students by withholding the discussion and exploration of alternative identities.[126] Florida's new "Don't Say Gay" law is particularly problematic in this respect because it was written with the specific purpose to stop schools from becoming "a playground for ideological disputes" and thus to stop the spread of new ideas and information.[127] Thus, the censorship advocated for by some Floridian parents hinders students' preparedness to live in a diverse society and contradicts the very foundation upon which minors' constitutional rights are based.

123. *Tinker*, 393 U.S. at 512.

124. *Pico,* 457 U.S. at 868.

125. *See generally* Kerith J. Conron & Shoshana K. Goldberg, *LGBT People In The US Not Protected By State Non-Discrimination Statutes*, *,* UCLA SCH. OF L. WILLIAMS INST. (APR. 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf [https://perma.cc/N3C9-LZK2] (As of 2020, there is an estimated 8.1 million LGBT individuals aged 16 years and older); *see supra* note 103 ("Learning, too, about what it means to be gay or transgender can help children understand how to treat those different from them, curtailing bullying down the road.").

126. Virginia Chamlee, *What to Know About Florida's Controversial New Bill Banning LGBTQ Topics in Schools*, PEOPLE (Mar. 14, 2022), https://people.com/politics/what-to-know-about-floridas-dont-say-gay-bill/ [https://perma.cc/AK44-5RT8].

B. Fourteenth Amendment Concerns

Brown v. Board of Education, while infamous for its role in desegregating public K-12 schools, also conveys several significant ideas about the importance of inclusive education that ultimately undermine Florida's "Parental Rights in Education" law. While the challenges and discrimination faced by Black Americans and members of the LGBTQ+ community are uniquely different and incomparable in many respects, the *Brown* Court highlights certain essential themes that are applicable to the current debates regarding anti-gay curriculum laws. For example, in *Brown*'s holding, Chief Justice Warren conceded that while tangible factors such as buildings, curricula, and teacher qualifications may appear equal amongst segregated schools, segregation creates a badge of inferiority which impacts Black children's ability and motivation to learn.[128] Thus, the Court struck down the "separate but equal" doctrine in part because of the specific harm that it caused Black students in public education.[129] In doing so, the Court prioritized Black children's education over the protests of White parents, arguably the most vocal group in opposing desegregation.[130] Concededly, the Court's decision in *Brown* did not completely limit White parents' right to control the education of their children, leaving White parents who believed in the merits of segregation with other educational options for their children.[131] Nevertheless, *Brown* established an important precedent for inclusivity in public schools when students face educational impediments and disruptions due to parental discrimination.

When considering Florida's "Don't Say Gay" law against this backdrop, it is clear that anti-gay curriculum laws conflict with *Brown*'s emphasis on prioritizing children's education over discriminatory beliefs held by parents. Anti-gay curriculum laws, like racially segregated schools, undoubtedly harm students by creating a stigma of inferiority and "otherness."[132] Prohibiting teachers from acknowledging their student's lived experiences creates a stigma around non-heterosexual orientations and

128. Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 492 (1954).
128. *Id.* at 493.
130. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007).
130. *See, e.g.*, Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964).
131. *See* RINA TORCHINSKY, *NEARLY HALF OF LGBTQ YOUTH SERIOUSLY CONSIDERED SUICIDE, SURVEY FINDS*, NPR (MAY 5, 2022), HTTPS://WWW.NPR.ORG/2022/05/05/1096920693/LGBTQ-YOUTH-THOUGHTS-OF-SUICIDE-TREVOR-PROJECT-SURVEY [HTTPS://PERMA.CC/W5GS-VGSG].

non-binary gender identities, rendering them "taboo." Florida's "Parents Rights in Education" law codifies parental bias in a way that may create a sense of inadequacy amongst certain students or compound prior feelings of isolation. *Brown* also emphasized that the goal of segregation laws was never to keep White students from attending Black schools but instead to keep Black students out of White schools.[133] This one-way discrimination further reinforced notions of inferiority. In parallel, and as previously discussed, it is clear that anti-gay curriculum laws do not stop the discussion of heterosexual orientations or binary identities but instead restrict the discussion of all other orientations and identities.[134] Thus, the one-way discrimination codified in Florida's law will surely produce similar negative feelings amidst LGBTQ+ students and students stemming from LGBTQ+ households. Intense feelings of inferiority can have dire consequences amongst students, and as described in *Brown*, may subsequently affect students' ability and motivation to learn.[135] Thus, in enacting its "Don't Say Gay" law, Florida has prioritized parental biases at the expense of its students' ability to obtain an education absent stigmatization and discrimination.

CONCLUSION

Florida's newly enacted "Parental Rights in Education" law poses multiple constitutional concerns. The discriminatory legislative and societal context of anti-gay curriculum laws should automatically raise suspicion regarding the motives of the modern "Don't Say Gay" law. Despite this country's emphasis on the importance of parental rights, especially when faced with decisions regarding the upbringing and education of their children, precedent shows that the Courts have prioritized minors' rights in certain circumstances.[136] Based on this, parental concerns regarding the "classroom instruction" of sexual orientation and gender identity must give

132. *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896).

133. *See supra* Part II(A).

134. *See* Brown, 347 U.S. at 494 (recognizing that "a [student's] feeling of inferiority as to their status in the community may affect their hearts and minds," and thus cause them great harm.).

135. *See* Brown, 347 U.S. at 494 (prioritizing the education and equality of Black students over parental concerns of school integration by holding that racial segregation in public schools is unconstitutional).

way in light of the significant and real harm that this policy will inflict on students. While there are various grounds upon which the Court might invalidate Florida's "Parental Rights in Education" law, including avenues not discussed in this Note, the law's prioritization of parental rights at the expense of students' rights likely violates both the First and Fourteenth Amendments.

Florida's "Parental Rights in Education" law undoubtedly contradicts the principles set forth in various cases concerning First Amendment violations in education settings. In particular, *Tinker* and *Pico* make clear that students hold First Amendment rights and that these rights will only be cast aside when faced with the threat of a disruption in the educational process. This holding is based upon the principle that schools should foster a marketplace of ideas in which students are exposed to a variety of information. Most importantly, these cases explicitly reject the notion that parents, under the guise of school boards and school administrators, can prohibit specific materials solely because it contradicts with their private beliefs.[137] Given these settled principles, Florida's "Parental Rights in Education" law violates these precedents on multiple fronts. Florida's law expressly prohibits classroom instruction of sexual orientation and gender identity not because of any concern related to possible disruptions to the education process, but instead solely because certain parents believe that these topics are inappropriate. In particular, the law seeks to promote a set of traditional values, violating the idea that discussions and school curriculum should not be prohibited simply because a certain group finds the topic distasteful. Anti-gay curriculum laws also harm children by failing to prepare them to enter into and interact with the diverse, modern world. Finally, "Don't Say Gay" laws infringe on students' ability to fully embrace the totality of educational opportunities that stem from the "marketplace of ideas" that exists in public schools. Thus, "Don't Say Gay" laws are clearly incompatible with students' First Amendment rights.

Similarly, Florida's "Parental Rights in Education" law violates many of the principles set forth by the Fourteenth Amendment. The Court's holding in *Brown* strongly implies that parental concerns will not override students' access to educational opportunities, especially when the students

136. *See* Tinker, 393 U.S. at 509 (refusing to allow a school to censor a particular viewpoint in the absence of disruptive student conduct).

would otherwise face substantive harm.[138] Despite its facially neutral appearance, the underling motivation of Florida's law has removed any doubt that the purpose of the bill is to target and silence the LGBTQ+ community. In light of this motive, Florida's new anti-gay curriculum law has the potential to signal to students that LGBTQ+ identities are taboo and should not be discussed. This implicit disapproval could foster a sense of inferiority amongst LGBTQ+ students and students with LGBTQ+ friends and family, potentially impacting their ability to succeed in school. The significant risk of harm that this law poses to students has clearly concerned the Court in the past, as exemplified in *Brown*. Consequently, Florida's "Parental Rights in Education" law disregards important themes highlighted in Fourteenth Amendment jurisprudence.

"Don't Say Gay" laws have undoubtedly led to the further alienation of LGBTQ+ individuals. This is particularly worrisome given the already high rates of self-harm and attempted suicides within this community of people.[139] The Trevor Project estimates that "45% of LGBTQ youth seriously considered attempting suicide in the past year."[140] Even more concerning, LGBTQ+ teenagers attempt suicide at twice the rate among all teenagers.[141] However, studies also suggest that governmental action can have an impact. For example, one study found that the enactment of hate crime laws that specifically protect sexual and gender minority students significantly lowered the rate of suicide attempts amongst high school students because such laws foster a sense of inclusion and acceptance.[142] In contrast, exclusionary legislation such as Florida's "Don't Say Gay" law leads to feelings of stigmatization and rejection.[143] The increase in exclusionary legislation around the country, including laws that restrict

137. *See supra* note 137.

138. *New Research on LGBTQ Teen Suicide Rates*, NEWPORT ACAD. (May 12, 2022), https://www.newportacademy.com/resources/mental-health/lgbt-suicide-rates/ [https://perma.cc/8VWH-J7YL].

139. *2022 National Survey on LGBTQ Youth Mental Health*, THE TREVOR PROJECT, https://www.thetrevorproject.org/survey-2022/ [https://perma.cc/88M6-G6R8].

140. Amit Paley, *Bills like 'Don't Say Gay' hurt LGBTQ youth already at high risk of suicide*, USA TODAY (Feb. 10, 2022), https://www.usatoday.com/story/opinion/columnist/2022/02/10/south-dakota-florida-lgbtq-trans/6711236001/[https://perma.cc/R22W-QY53].

142. *FEWER YOUTH ATTEMPT SUICIDE IN STATES WITH HATE CRIME LAWS*, AM. PSYCH. ASS'N (JUN. 23, 2022), HTTPS://WWW.APA.ORG/NEWS/PRESS/RELEASES/2022/06/YOUTH-SUICIDE-HATE-CRIME-LAWS [HTTPS://PERMA.CC/RPK6-AJMF].

143. Paley, *supra* note 127.

participation in same-gender school sports and laws that ban gender-affirming care for minors, further intensifies such feelings of inferiority.[144] Thus, it is incredibly important to invalidate and replace these harmful laws with inclusive policies in order to protect the almost two million LGBTQ+ minors in the United States[145] and the estimated 114,000 LGBTQ+ youth in Florida.[146]

Given the blatant constitutional issues that anti-gay curriculum laws raise, the fate of Florida's "Parental Rights in Education" law is dismal if courts heed precedent and adhere to the principles of stare decisis. The Court's review and decision regarding the constitutionality of Florida's law will likely also dictate the legality of other state's anti-gay curriculum law and possibly head off the proposed federal bill. Therefore, given the significant harm that these laws threaten to invoke on students around the country, it is imperative that the courts quickly strike down these laws and reiterate their constitutional violations.

143. Priya Krishnakumar & Devan Cole, *2022 is already a record year for state bills seeking to curtail LGBTQ rights, ACLU data shows*, CNN (July 17, 2022), https://www.cnn.com/2022/07/17/politics/state-legislation-lgbtq-rights/index.html [https://perma.cc/45RY-YN6H].

144. Kerith J. Conron,*., LGBT Youth Population in the United States*, UCLA SCH. OF L. WILLIAMS INST. (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf [https://perma.cc/K3ZG-GFDC].

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