ESSAY

SAFE RULES OR GAYS’ SCHOOLS?
THE DILEMMA OF SEXUAL ORIENTATION SEGREGATION IN PUBLIC EDUCATION

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INTRODUCTION

In the backdrop of clashes around the nation over same-sex marriages¹ and the surprise “ outing” of a gay New Jersey governor,² this past year marked the opening of the Harvey Milk High School (“HMHS”), the first and largest publicly funded school in the country.
for lesbian, gay, bisexual, and transgendered ("LGBT") teenagers. Named after Harvey Milk, the first openly gay man ever elected to political office, the school is the first public school intended as a safe haven for approximately one hundred teens, most of whom have been abused and harassed because of their sexual orientation. The now four-year fully accredited HMHS actually stems from a two-decade-old program known as the Hetrick-Martin Institute. With the publicized opening of HMHS, however, critics have now raised critical questions about its apparent necessity and the nature of its legal status.

Separate institutions for LGBT teenagers may call into question the efficacy of conventional schools and our legal framework to ensure a safe, reaffirming atmosphere for such students. Some commentators, however, have suggested that a separate school for LGBT
students is not prudent for several reasons. First, it creates an artificial learning environment, which suggests the way to solve problems of individual difference is to promote separation, rather than to teach tolerance. Second, such schools are viewed as opening the doors to other separate schools for minority school populations. Finally, it is suggested that such schools do not make sense from a socioeconomic standpoint.

These claims, however, elide significant concerns about the capability of schools to effectively teach a diverse community of learners. For instance, evidence suggests that because of their sexual orientation, some LGBT students currently are already not receiving an educational experience comparable to heterosexual students in our nation’s public schools. This reality is due in part to the fact that the treatment of LGBT students ultimately interferes with their ability to learn in the same quality of environment as heterosexual students in the same setting. These concerns are only further underscored by the apparent fear LGBT students experience attending a school that compromises their mental and physical well-being when they are subjected to outright violence and hostility. The so-called benign neglect by educators, administrators, and staff compounds the cruel treatment LGBT students receive on a daily basis because these educators fail to adequately comprehend LGBT student concerns. The severe, pervasive, and intolerable climate of learning is perpetuated by harassing students who so often escape discipline and accountability.

So why then are separate schools deemed an imprudent option by the same majority that seeks to socially segregate and marginalize LGBT students in conventional schooling? The reasons are less obvi-

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7 See McBain, supra note 6.
9 Virginia Uribe, The Silent Minority: Rethinking Our Commitment to Gay and Lesbian Youth, 33 THEORY INTO PRAC. 167, 167 (1994) (discussing the historical context of homophobia and developmental issues in LGBT youth, and identifying strategies for implementing school programs to address their needs).
10 Id.
12 Id. Several reasons have been offered for this occurrence, including that the teachers, administrators, and staff may shy away from assisting LGBT students to avoid controversy “because they do not know how to deal with the problem, or because they are homophobic.” Id.
ous than one might think and yet have everything to do with notions of autonomy and local control. As we attempt to demonstrate, however, separate gay high schools protect autonomy and local control rather than harm it.

Indeed, as we suggest, the inability of opponents to see past the benefits of such institutions for LGBT students also hampers constituents' capacity to realize that gay high schools advance mainstream society's wish to direct the parental upbringing of its children. For the reasons elaborated below, however, gay schools are neither uniformly appropriate nor an ideal solution.

Part I of this Essay examines the current status of education for LGBT students. More specifically, we attempt to survey current legal tools that may be available to combat peer-to-peer sexual orientation discrimination and some of the difficulties that arise from the application of these laws. We also attempt to highlight the limited effectiveness of such tools. Part II explores whether separate schools will sufficiently address the jurisprudential problems raised in Part I. In particular, should the laws fail to adequately protect LGBT students, can one fairly invoke the principle of segregated education as a matter of policy without implicating inappropriate indoctrination? Finally, Part III proposes other solutions to solving the problems in education that LGBT students face, namely intraschool remedies. Part IV concludes with a thoughtful discussion of the issues that arise from intraschool reform, namely concerns about parental autonomy. Finally, it offers a look at the Massachusetts model of safe school reform as a compromise to gay high schools.

I. WHY THE NEED?

In seeking to understand why the HMHS was established, advocates point to the number of individuals that claim an LGBT identity. The total estimate of LGBT persons nationwide still remains a source of contention, with estimates among conservative groups ranging as low as 3 percent of all U.S. adults to as high as 10 percent by gay advocates. However, the National Health and Social Life Survey,

15 Given the stigmatization of homosexual identity in the United States, the exact number of LGBT persons remains unknown. The figure noted above appears to be derived from a series of interviews conducted from 1938 to 1948 with ten thousand study respondents under the supervision of Alfred Kinsey and colleagues. The study categorized respondents as to the extent their sexual behavior and emotional attractions reflected heterosexual or homosexual patterns after the beginning of adolescence. See Alfred Kinsey et al., Sexual Behavior in the Human Male 651 (1948). In this study, ten percent of men interviewed reported being more or less exclusively homosexual for at least three years between the ages of sixteen and fifty-five. However, the study has come under sharp criticism because it appears Kinsey considered only male behavior and excluded a female population that could have discounted the ten percent figure. See Dale O'Leary, One Out # 'Two: AIDS and Sexually Transmitted Diseases Among Men Who Have Sex
which is regarded as the most comprehensive survey to date on the subject of sexual behavior, found that approximately 5 percent of men and 4 percent of women reported having had sex with a same-sex partner since age eighteen. Further, approximately 8 percent of men and women respondents alike reported that they experienced attraction to persons of their own sex, considered the prospect of sex with a same sex-partner appealing, or both. However discrete this group of persons might be, it remains clear that many of the special risks these individuals face center primarily on issues of safety, health concerns, and poor school performance. For example, LGBT students have a much greater chance than straight youth of being abused and victimized, of abusing substances, of prostituting themselves, of attempting suicide, and of being homeless. Additionally, these teens face greater risks of being harassed, being isolated, dropping out, performing poorly in school, lacking adult role models, and lacking understanding in their families. Many gay students do not graduate; 28 percent of them drop out.


16 See id. at 305.

every year, which is three times the national average. Research indicates that LGBT teenagers are also three times more likely to commit suicide than “straight” teenagers; LGBT teen suicide attempts account for 30 percent of all attempts, although LGBT teens constitute only a small fraction of the total teenage population. To many observers, this is a grossly disproportionate amount of suicide attempts within the LGBT population and raises a red flag indicating the turmoil LGBT teens are likely to face.

Research gives support to the intense bias and discrimination that gay students face in school. LGBT students “hear anti-gay slurs such as ‘homo,’ ‘faggot,’ and ‘sissy’ about twenty-six times a day or once every fourteen minutes. Even more troubling, a study found that thirty-one percent of gay youth had been threatened or injured at school in the last year alone.” Listed below are just a few of these troubling statistics:

- 97% of students in public schools report hearing homophobic remarks from peers;
- 53% of students report hearing anti-gay remarks made by school staff;
- 80% of prospective teachers report negative attitudes toward sexual minority youth;
- 67% of guidance counselors harbor negative feelings towards gay students;
- 77% of prospective teachers would not encourage a class discussion on homosexuality;
- 85% [of teachers] oppose integrating gay/lesbian themes into curricula;
- 80% of lesbian and gay youth report feelings of severe social isolation.

These issues, of course, do not stand alone for the LGBT youth:

- 11.5% of gay and lesbian youth at home report being physically attacked by family members;

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19 Jonathan W. Vare & Terry L. Norton, Understanding Gay and Lesbian Youth: Sticks, Stones, and Silence, 71 CLEARING HOUSE 327, 328 (1998), available at http://home.earthlink.net/~scoey/Pride09.html (last visited Sept. 21, 2004); see also HMI Statistics, supra note 8 (observing that LGBT youth are three times more likely to attempt suicide).
• 42% of homeless youth self-identify as gay/lesbian; gay people are “probably the most frequent victims of hate crimes in the United States;
• 45% of gay males and 20% of lesbians report having experienced verbal harassment and/or physical violence as a result of their sexual orientation during high school;
• 42% of adolescent lesbians and 34% of adolescent gay males who have suffered physical attack also attempt suicide;
• 30% of gay and bisexual adolescent males attempt suicide at least once;
• 83% of adolescent lesbians use alcohol, 56% use other drugs, and 11% use crack and/or cocaine;
• 68% of adolescent gay males use alcohol, 44% use other drugs; less than 20% of guidance counselors have received any training on serving gay and lesbian students;
• only 25% of guidance counselors consider themselves “highly competent in serving gay and lesbian youth;
• teachers fail to intervene in 97% of incidents;
• 78% of school administrators say they know of no lesbian, gay, or bisexual students in their schools, yet 94% of them claim they feel their schools are safe places for these young people.22

These data are both disturbing and pervasive, and they reveal that LGBT biases and issues reach all aspects of the student experience: teaching, peer interaction, counseling, learning, administering, home, health, and beyond. It should not surprise the neutral observer that LGBT students have attempted to establish supportive environments in public high schools through gay-straight alliances clubs. However, this option, as I discuss later, is limited in its ability to address the harassment and isolation these students experience in school. The harassment compounds itself almost exponentially, as it leads to isolation, which in turn leads to educational and social problems, including resistance to answering questions or participating in class, lower participation in school activities,28 and a propensity to commit suicide. This compounding adversely impacts the education LGBT students receive.24

24 See id. at 628 (describing such effects on not only victims of harassment, but also others who witness the harassment).
Given the newness of separating LGBT teens in school and the general lack of research in the LGBT youth context, there are many more questions than answers concerning the proper administration of a separate school. For example, should the faculty and administration at a separate school be openly LGBT? Would the teachers in such a separate school be equally qualified?

As HMHS is at present the only public school of its kind, it is useful to see how its program works. HMHS was founded in 1985 in part by the New York City Department of Education. Formerly a private school, this year HMHS is now a public, “four-year, fully-accredited high school created... to offer an alternative education program for [LGBT students] that often find it difficult or impossible to attend their home schools due to continuous threats and experiences of physical violence and verbal harassment.” It offers the same curriculum that all of the other schools in that district do, and admission is “voluntary and open to all, regardless of race, gender, sexual orientation, religion or physical abilities.” Students are occasionally self-referred, although many come to the school as safety transfers through the recommendation of parents, teachers, or guidance counselors, and students must have parental approval to attend the school. Only a small proportion of New York City’s LGBT students attend the school.

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25 See id. at 621 (“[T]here is a general lack of data on [the incidence of peer sexual-orientation harassment].

26 We raise these questions merely to get the reader thinking about the possible issues implicated even though we do not wish to suggest here a basis for answering them.

27 Currently, openly gay teachers are attacked by parents who assert that teachers are “moral models” and should not be promoting something amoral like homosexuality. See Ruling Favors Lesbian Teacher, N.Y. TIMES, Apr. 5, 2003, at A9 (reporting on a Utah Supreme Court ruling against parents’ attempts to remove a lesbian teacher in contravention of the school district’s refusal to fire her). This attack would likely be thwarted today, given the recent decision in Lawrence overturning a state anti sodomy law, in part justifying its decision on the grounds that laws should not dictate morals. Lawrence v. Texas, 539 U.S. 558, 598 (2003).

28 HMI FAQs, supra note 3.

29 The Hetrick-Martin Institute, Q & A’s on HMHS [hereinafter HMI Q&As], http://www.hmi.org/GeneralInfoAndDonations/QAndAsonHMHS/default.aspx (last visited Sept. 6, 2004).


31 HMI FAQs, supra note 3.

32 HMI Q&As, supra note 29 (“HMHS services only a small portion of the total LGBTQ youth population. The vast majority of these youth in the NYC public school system attend their zoned schools.”). If HMHS is a model for separate schools, only the extreme cases would attend a separate school as a school of last resort. Admission at the high school is voluntary and, while heterosexual students are not excluded, the school aims to serve at-risk LGBT stu-
HMHS’s mission is to provide “an inclusive voluntary public high school focusing on the educational needs of children who are in crisis or at risk of physical violence and/or emotional harm in a traditional educational environment.” The founders of the controversial high school have explicitly acknowledged the need for such an educational safe haven primarily because they recognize many LGBT students face a fundamental conflict of choice between safety and an education. Accordingly, the school proudly boasts, “Thanks to HMHS [LGBT students] have a safe place to learn so that they can graduate with an education, a diploma and their lives ahead of them.” In adhering to a philosophy where students are given the same chance—not a special chance—to succeed at their education, the school proclaims “HMHS uses the same curriculum and graduation standards as any other NYC public high school, with the same Regents and other rigorous tests.”

The reason that LGBT teenagers are harassed, victimized, and disrespected can be answered from cultural, religious, and social perspectives. “Antigay” proponents, for example, often justify their views through the bible or religion, firmly believing that these condemn homosexuality. From a cultural standpoint, homosexual stereotypes, fear, and misunderstanding of AIDS dominate as reasons for harassment. Other antigay proponents make a scientific argument based on genocide, which essentially says that to accept homosexuality “dooms the human race to extinction” since homosexuals likely will not procreate. Another possible explanation is the stigma lingering from psychiatrists’ formerly characterizing homosexuality as a mental illness.

Specifically, in the education context, one of the reasons for shying away from gay-related issues in the classroom is the idea that discussing the issues or making resources available that deal with homosexuality is tantamount to recruiting homosexuality as a way of life. Another justification in education is that homosexuality is an adult

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31 Id.
32 Id.
33 Id. In addition to classes, the students receive many other services provided by the After-School Services Department and Supportive Services Department, which coordinates outreach.
36 Id.
37 Id.
38 Id.
39 Uribe, supra note 9, at 167.
40 Rowe, supra note 37, at 609–10.
issue or the misconception that homosexuality is a choice. Others make the argument that teens’ sexual identities are not established yet. Research, however, points to the contrary. A person’s sexual orientation is established before adolescence and is not subject to change.

II. SEXUAL ORIENTATION DISCRIMINATION AND LEGAL SAFEGUARDS

Existing laws, as interpreted, fail to address adequately peer-to-peer sexual-orientation harassment. Courts currently use rational basis review when reviewing a sexual-orientation discrimination claim. Judges have yet to rule uniformly in all contexts whether homosexuals are a suspect or quasi-suspect class that would subject the defendants’ conduct to either strict or heightened scrutiny. They have ruled, however, that with regard to the military, discrimination on the basis of sexual orientation is subject to rational-basis review. Under rational-basis review there is no constitutional violation if there is any reasonably conceivable set of facts that would provide a rational basis for the government’s conduct. But query whether there is a rational basis for a school permitting one student to assault another based on the victim’s sexual orientation. There is little reason to believe one exists.

LGBT students have also couched their peer-to-peer sexual-discrimination allegations and harassment claims on the Equal Access Act and the First Amendment. Nonetheless, the Equal Protection Clause of the Fourteenth Amendment, Title IX of the Educational Amendments of 1972, and other state and local laws also play an important role in litigation strategy of gay rights advocates.

A. Equal Access and the First Amendment

The Federal Equal Access Act (“EEA”) provides that [i]t shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open

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42 Vare & Norton, supra note 19, at 328.
43 Some researchers have even argued that it is established at conception. Id. at 327.
44 Lovell, supra note 23, at 617.
45 See Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996) (holding that discrimination on the basis of sexual orientation was subject to rational basis review, rather than heightened or strict scrutiny).
46 See Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989) (“[W]e believe that [the] classification [of homosexuals] is supported by the military and should be left to the army.”).
forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.\footnote{20 U.S.C. § 4071(a) (1997).}

Accordingly, schools may not deny equal access to a limited open forum. A public secondary school has a limited open forum whenever “such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.”\footnote{Id. § 4071(b).}

Further, a far lower threshold will satisfy the establishment of a limited public forum for purposes of EAA compliance than what is ordinarily required by the First Amendment. With regard to the latter, courts have held that government does not create an open forum simply by authorizing a limited discourse.\footnote{See Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (“The government does not create a public forum by inaction or by permitting limited discourse; but only by intentionally opening a nontraditional forum for public discourse.”). Although the EAA does not specify what number will suffice to establish a limited public forum, conceivably that number could be as small as two persons, for the Act prohibits schools from limiting the rights of groups of students that are not a precise size. Although it is not quite clear, Congress’s statutory language suggests that some type of formal, recurring meetings by groups is required in order to establish a limited open forum rather than the casual student encounter.}

A student-initiated association that holds organizational meetings on school premises may run into objections from school officials desiring to limit their presence, typically because they do not agree with the students’ message, whether it be implied or express, for fear of the appearance of official sponsorship of such views. While no impediment may exist for students to hold meetings anywhere and anytime they so desire off campus, the importance of the EAA can be seen in the convenience, trusted safety, and the relative attractiveness of an on-campus meeting that already has a built-in student body from which to draw members. But, those who believe that schools should condemn homosexuality may ultimately be displeased when a gay-rights club attempts to draw members by advertising its meetings and beliefs on school grounds. Given these concerns, most schools choose not to sponsor controversial student groups at all. Instead, they encourage meetings of only those specific groups believed to have educational value.

In \textit{East High Gay/Straight Alliance v. Board of Education}, however, a federal district court granted injunctive relief and partial summary judgment under the EAA to a Gay/Straight Alliance (“GSA”) club that was designed as a support group for homosexual students.
thereby permitting the club to meet at the defendant high school.\textsuperscript{54} In response to the GSA seeking declaratory and injunctive relief and nominal damages for being denied access to school facilities, the school district claimed that an existing policy limited school access to only curriculum-related student groups at the defendant high school.\textsuperscript{55}

Plaintiff contended that notwithstanding the school’s official policy, as a matter of actual practice, the district permitted both noncurricular as well as curricular student groups to engage in activities on school premises.\textsuperscript{56} The GSA alleged further that it was denied equal access to the defendant’s facilities, including the public address system, bulletin boards, and the school fair.\textsuperscript{57} The court found that the school district had indeed established a limited open forum and, therefore, violated the EAA, but then concluded that the limited open forum came to an end after the 1997–98 school year.\textsuperscript{58} Thus, while the EAA has the potential to provide more support in what might otherwise be an indifferent or hostile environment for LGBT students, the EAA is wholly dependent upon district administrators for the establishment of a forum, and as such, is of limited utility to students. Even when GSA students do win the right to assemble, it comes only after much abuse and hostility.

The EAA surfaced against such a background in, for example, \textit{Boyd County High School Gay Straight Alliance v. Board of Education,}\textsuperscript{59} in which the GSA alleged that the school board violated their rights under the EAA and First Amendment by denying the group the same access to facilities given other student groups.\textsuperscript{60} In that case, high

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\item \textsuperscript{54} 81 F. Supp. 2d 1166, 1184 (D. Utah 1999).
\item \textsuperscript{55} \textit{Id.} at 1168.
\item \textsuperscript{56} \textit{Id.} at 1173. The plaintiffs in \textit{East High} argued that five student groups—Improvement Council of East, Future Homemakers of America, Future Business Leaders of America, National Honor Society, and Odyssey of the Mind—were noncurricular. In that regard, the court had to determine whether the groups that the court found to be meeting during noninstructional time were noncurricular. \textit{Id.} at 1173–74. As another court stated, "[i]f defendants have permitted \textit{any} noncurriculum related student group to meet at the school during noninstructional time . . . then they must allow \textit{every} student group, whether curriculum related or noncurriculum related, to meet on the same terms." \textit{Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.}, 258 F. Supp. 2d 667, 685 (E.D. Ky. 2003); see also \textit{Bd. of Educ. v. Mergens}, 496 U.S. 226, 240 (1990) (providing general guidelines for determining noncurricular student groups); \textit{Student Coal. for Peace v. Lower Merion Sch. Dist Bd. of Sch. Distrs.}, 776 F.2d 431, 442 (3d Cir. 1985) ("[T]he Act’s purpose is to enable all students to use [school] facilities on the same terms as all other students.").
\item \textsuperscript{57} \textit{East High}, 81 F. Supp. 2d at 1168–69.
\item \textsuperscript{58} \textit{Id.} at 1197–98.
\item \textsuperscript{59} 258 F. Supp. 2d 667 (E.D. Ky. 2003).
\item \textsuperscript{60} \textit{Id.} at 669. As a general matter, the EAA is enforced through private rights of action vis-à-vis \textit{42 U.S.C. § 1983} (2000). Indeed, enforcement of the EAA is contemplated through \textit{§ 1983}, for a \textit{§ 1983} cause of action stems from a "person acting under any color of any . . . regulation, custom, or usage" who discriminates.
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school students formed the group only after receiving approval from the school board. Once again, students attempted to create a safe haven within the school from dogged harassment and outright hostility. As if this were not enough of a sign that a support network like the GSA was needed, the local community expressed even greater hostility to the GSA’s existence such that the board suspended all student groups for the balance of the academic year from meeting on school grounds. It is even more alarming that had the district stopped there, its actions might have been deemed entirely legal under the EAA, even as it foreclosed a forum where abused teens could receive interpersonal support against violently harassing teen peers.

Notwithstanding the purported suspension, once again the board permitted some student groups to continue assembling on school grounds even while vigilantly depriving the GSA of the same opportunity. The court held that once a school allows one noncurriculum-related group to meet on school property, the school may not deny other groups equal access to meet on school property. Indeed, the

In determining whether a plaintiff may bring suit under § 1983, a court first examines whether the complaint asserts the “violation of a federal right, not merely a violation of federal law.” Blessing v. Freestone, 520 U.S. 329, 340 (1997). To determine whether a federal statute creates an individual enforceable federal right, the Supreme Court in Blessing used a three-part test: first, Congress must have intended that the provision in question benefit the plaintiff; second, the plaintiff must demonstrate that the right purportedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence.; and, third, the statute must unambiguously impose a binding obligation on the states. Id. at 340-41; see also Bradford C. Mank, Using § 1983 to Enforce Title VI’s Section 602 Regulations, 49 U. Kan. L. Rev. 321, 323-24 (2001) (describing the three-part test for § 1983 relief). In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. If a federal statutory right meets the three-part test, there is a strong presumption that a plaintiff may use § 1983 to enforce that right. See Wilder v. Va. Hosp. Ass’n, 496 U.S. 498, 520 (1990) (stating that courts “do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right”) (citations omitted); Blessing, 520 U.S. at 346 (observing that § 1983 enforcement holds a “rebuttable presumption”). In this regard, it is significant to note that the EAA contemplates “the availability of any other remedy under the Constitution or the laws of the United States.” 28 U.S.C. § 4071(e) (1997).

This action appears not to be compromised by the recent Supreme Court ruling in Gonzaga University v. Doe, 536 U.S. 273, 276 (2002), which limited rights under the Federal Educational Rights and Privacy Act (“FERPA”) by denying invocation of § 1983.

One example of the harassment occurred in October 2002, when students in plaintiff’s English class stated that they “needed to take all the f[-]king faggots out in the back woods and kill them.” Id. at 671 n.1. During a basketball game in January 2003, students with megaphones chanted at another plaintiff: “faggot-kisser,” “GSA,” and “fag-lover.” Id. On a regular basis, students called out “homo,” “fag,” and “queer” behind yet a third plaintiff’s back as he walked in the hallway between classes. Id. On April 10, 2002, about twenty-five GSA students sat in a circle in the front lobby of BCHS in observance of National Day of Silence. During the lunch hour, protesters used antigay epithets and threw objects at them. Id.

Id. at 689.
school may not deny access because of community opposition, even if it interferes with order and discipline.  

B. Equal Protection and Sexual Orientation

Attacking discrimination under the Equal Protection Clause of the U.S. Constitution is another way to challenge unequal treatment by school officials, teachers, and staff. It is possible to make both a gender- and sexual-orientation-discrimination argument under the Equal Protection Clause. For example, if a gay male student is harassed and school administrators respond to his complaints differently than they do to a female’s similar discrimination complaints because they think that boys should stand up for themselves or should fight back, then this could give rise to an Equal Protection claim based on sex.

In 1996, the Lambda Legal Defense and Education Fund brought suit in Nabozny v. Podlesny. The Equal Protection claim was the first of its kind to challenge antigay violence. The decision meant that the Constitution requires schools to offer gay students the same protections and safety given other students. During his four-year ordeal from seventh to eleventh grade at Ashland Middle and Ashland High Schools in Wisconsin, Nabozny and his parents repeatedly asked the schools to safeguard him from his attackers. But Principal Podlesny purportedly said boys will be boys and told Nabozny that if he was going to be openly gay, he should learn to expect such behavior from his peers. Aside from having his classes rescheduled to avoid the perpetrators, the school placed Nabozny in a special-education class without any initial attempts to effectively discipline his harassers. During an assault that resulted in injuries requiring surgery, ten stu-

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64 Id.
65 See David S. Buckel, Legal Perspective on Ensuring a Safe and Nondiscriminatory School Environment for Lesbian, Gay, Bisexual, and Transgendered Students, 32 EDUC. & URB. SOC'Y 390, 393 (2000) (regarding the claims as “different and independent”).
66 92 F.3d 446 (7th Cir. 1996).
67 Press Release, Youth Assistance Organization, Federal Appeals Court Rules for Former Student in Anti-Gay Violence Case (July 31, 1996), available at http://www.youth.org/loc0/PERSONProject/Alerts/States/Wisconsin/suit.html. Several organizations filed amicus briefs in favor of Nabozny’s appeal, including the National Association of School Psychologists, the National Association of Social Workers, the national organization Parents, Families, and Friends of Lesbians and Gays, and the Chicago lesbian and gay social services agency, Horizons. Id.
68 Nabozny, 92 F.3d at 452; see also Jeff Walsh, Profiles in Courage: Jamie Nabozny, 20, of Minneapolis, Minnesota, OASIS, Feb. 1996, at 1 (describing, from a personal interview, Nabozny’s struggles), available at http://www.oasismag.com/Issues/9602/oasis-profiles.html. Recounting the beginnings of his troubles at school, Nabozny explains: “It started out as people found out about a sexual abuse case that ended up in the media that involved me. . . . And then people started calling me names. I didn’t acknowledge it, nor did I deny it until I was 15.” Id.
69 Nabozny, 92 F.3d at 452.
Students surrounded Nabozny while another student wearing boots repeatedly kicked him in the stomach. Another time, students urinated on him, and in another instance, students pushed him to the floor, held him down, and acted out a mock rape. Nabozny attempted suicide several times and ran away to escape the abuse only to have the Department of Social Services mandate he return to school because his parents could not afford private-school tuition. Nabozny later relocated to Minneapolis and sued his high school. The district court ruled against Nabozny, granting summary judgment to the defendant school. The circuit court reversed, holding that when, as in Nabozny’s case, a state actor turns a blind eye to the Equal Protection Clause, aggrieved parties can seek relief pursuant to 42 U.S.C. § 1983.

Although Nabozny shows that a possible remedy may lie, the hurdles for succeeding in an equal-protection claim may indeed be formidable. There must be state action carried out with a discriminatory purpose, but action that may have a disproportionate impact on a group fails to create liability under the Equal Protection Clause. Further, a showing that the defendant school district was merely negligent is insufficient to establish liability. Rather, the gravamen of an equal-protection claim lies in demonstrating that the defendant district acted either intentionally or with deliberate indifference. Such intent is open to question even when a student experiences significant deprivations of rights. He may otherwise be unable to make the necessary showing to the court’s satisfaction that he received treatment because of his gender. Therefore, despite evidence of great harm, the success of his case is questionable.

The district court did not enter judgment on the factual basis urged by defendants with respect to Nabozny’s gender discrimination claim. Instead, the district court, sua sponte, found that “there is absolutely nothing in the record to indicate that plaintiff was treated differently by the defendants because of his gender.” These elements as formulated by the district court make success in an equal-protection claim most difficult to establish. But it is not clear

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70 Walsh, supra note 68.
71 92 F.3d at 449.
72 Nabozny v. Podlesny, 92 F.3d 446, 460 (7th Cir. 1996) (holding, however, that Nabozny lacked sufficient evidence to show either the school’s affirmative duty to protect him or that the school created a dangerous environment thereby invoking such a duty). The district court settled Nabozny’s suit for $900,000 on remand. Associated Press, Gay Man Wins $900,000 in School-District Case, WALL ST., Nov. 21, 1996, at B14.
73 See Lovell, supra note 23, at 628 (describing these hurdles, such as the absence of a duty to protect).
74 Id.
75 Nabozny, 92 F.3d at 454 (quoting the district court’s decision).
whether other circuit courts will follow the district court and require a higher evidentiary threshold showing that one received treatment because of his gender, or will use the approach of the Seventh Circuit and apply a true rational-basis review in placing the burden on the state actor to justify its actions. Until these doctrinal ambiguities are resolved satisfactorily, Equal Protection doctrine may prove more treacherous to navigate.

1. The Implications of Lawrence v. Texas

Although there is much ado about the ramifications for LGBT civil rights in the wake of the recently decided Lawrence v. Texas, in which the Supreme Court struck down a Texas criminal sodomy law, there are also implications for sexual-orientation segregation. The case has been regarded as the most pivotal decision on the rights of gays and lesbians in recent time. As one commentator explains, this is not because homosexual sodomy arrests are on the rise, but because of the unspoken implication that they are criminals without actually being convicted. Likewise, Justice O’Connor observes in her concurring opinion in Lawrence that “Texas’ sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.” Accordingly, a growing reluctance emerges among victims to report hate and biased crimes perpetrated against them for fear of prosecution under sodomy statutes. Does the Lawrence holding actually change this outcome? One optimistic interpretation suggests so:

Individuals can no longer justify their violent acts against gays and lesbians by claiming that they are simply retaliating against criminals. There is also more incentive for the victims of these crimes to come forward. Thus, legal protection from hate crimes should now be more readily available to gays and lesbians. Legislators have used Bowers in order to exclude gays and lesbians from legal protection, rationalizing that homosexuals are “immoral criminals deserving of punishment.” This may have been true under Bowers—homosexuals engaged in sodomy were breaking the law—but Lawrence held that sodomy is no longer a crime. Therefore, if lawmakers try to exclude gays and lesbians from legal protection, they

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73 Lawrence, 539 U.S. at 581 (O’Connor, J., concurring).
will have to provide justifications other than their previous argument that homosexuals are criminals. These arguments have some merit, and it is certainly possible that removing the criminality of sodomy laws removes the impediment to report crimes within the gay community, including in public schools. Yet these assertions prove too much. The beginning of an honest discursive deconstruction of sexual-orientation hate crime in America must start with the realization that perpetrators of such hate crimes do not predicate their actions on the basis of the law. Those who break the law, by definition, do not feel bound to observe it. Therefore, whether sodomy is a crime or not, the hatred and animosity visited upon lesbians and gays may have more to do with the moral opprobrium felt and less to do with whether state law defines them as criminals. It is true, however, that the Lawrence decision may more directly benefit the gay community than transform the straight community.

To suggest that lawmakers will have to provide justification other than criminality says very little because, as President Bush and the Massachusetts legislature demonstrate, this is hardly a difficulty. President Bush has recently called for a constitutional amendment to outlaw gay marriage. But however likely or unlikely success might come with such a proposed amendment, opposition is formidable enough that it is fair to say that the Lawrence case may not, at least in the short term, have the broad ramifications many see in it. Several jurisdictions still have in force statutes that prohibit schools from mentioning gay relations in their health, or any curricula.

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80 Schimelfenig, supra note 77, at 163–64 (citation omitted).
81 See Paul Van de Ven, Talking with Juvenile Offenders About Gay Males and Lesbians: Implications for Combating Homophobia, 30 ADOLESCENCE 19 (1995). Van de Ven observes empirical evidence that such hate crimes are not motivated by illegality:
Not a single participant suggested that they or other young people did not harass or bash gay males or lesbians because it was against the law. This suggests that legal consequences are not a major consideration in this domain for juvenile offenders or, arguably, there is a perception that being caught or penalized is a remote possibility. Emphasizing the legal consequences or the provisions of Anti-Discrimination Acts therefore may not be very effective with this group. Alternatively, adopting a complacent attitude to the law may in itself have been reinforcing. Showing respect for legal authority, even in an interview situation, is hardly likely to win influence among offending peers.

Id. at 39.
82 See Rob DeKoven, Commentary, State Laws Require Schools to Ignore GLBTs, GAY & LESBIAN TIMES, Aug. 21, 2003, available at http://www.gaylesbiantimes.com/?id=793&issue=817. DeKoven catalogs the various state prohibitions on mentioning gay relations:
Four states actually prohibit schools from teaching anything about homosexuality in sex education curricula (e.g., Alabama, Arizona, North Carolina, and South Carolina).

Alabama and North Carolina require that if there is any discussion of homosexuality in any classroom schools mention that homosexual acts are illegal. And while you may think states will update their laws after Lawrence, remember that Mississippi only recently removed its laws preventing interracial marriage.
Lawrence will be applicable in such circumstances is more a function of political will than the objective operation of neutral principles of law. Under current education laws in some states like California, schools exclude gay and lesbian students from discussion primarily because same-sex marriage runs counter to the educational mandate to teach “respect for monogamous heterosexual relationships.”

While it is clear that such laws curry political support from some parents and politicians wishing to shield their children from such discourse, it is unclear to what extent these laws shut down any meaningful conversation about the equal treatment homosexual students should receive in school. This is quite significant since it can be reasonably argued that not every issue of peaceful civility to LGBT students can be addressed in a sex-ed curriculum or through a discussion of AIDS, which is likely to reinforce stereotypes rather than deconstruct them. Indeed, the limited contexts where homosexuality can be discussed at all in public schools may actually further lead to LGBT students being stigmatized and ostracized in ways that just perpetuate peer violence against them. However, even assuming there is an avenue of expression in the classroom about homosexuality issues, it is quite conceivable that the contentious discussion could lead to more than an undifferentiated fear or apprehension by school officials that violence could indeed erupt among students of differing views.

Thus, under Tinker v. Des Moines Independent Community School District, school officials would have the authority to bar such expression in the classroom simply if it posed a real threat of disruption of the educational process. In Tinker, the Court held that where the exercise of First Amendment rights may substantially and materially interfere or disrupt the educational process, or impinge upon the rights of others, school officials may be empowered to ban or abridge such free speech exercise. Moreover, even assuming further that such dialogue about homosexuality could occur without violent incident in the classroom, such discussions about one’s sexuality would still be

South Carolina permits talk of homosexuality only in the context of sexually transmitted diseases.

Arizona prohibits characterizing homosexuality as a “safe or positive lifestyle.”

Utah prohibits schools from “promoting” or “advancing homosexuality.”

Louisiana prohibits the use of sexually explicit materials depicting homosexual activity.”

Florida requires schools to promote the benefits of monogamous, heterosexual marriage.

Mississippi requires schools to teach that sex is only appropriate in the context of a monogamous heterosexual marriage.

Id.

Id.


Id. at 513.
constitutionally banned if it reasonably could be deemed vulgar and indecent. This has precisely been the case ever since the Supreme Court in *Bethel School District v. Fraser* held that the school’s legitimate function in teaching “the shared values of a civilized social order” allows schools to ban any comments or discussion that can be construed as reasonably offensive, lewd, indecent, vulgar, and obscene speech.\(^8^6\)

Therefore, with few avenues left to challenge stereotypes and correct prejudices, there is little wonder why most schools find it hard to cultivate an educational culture that respects the bodily integrity and mental peace of LGBT students. Should conventional school curricula, officials, and students continue to ostracize gay and lesbian students, then in some cases a separate school may just be an entirely appropriate option in such extreme cases. Further, if advocates of public school choice believe that parents and students as consumers should have more schooling options, then it also may appear just as fair to present an all-gay high school as an option to avoid continued harm, severe harassment, and unabated discrimination.

In taking public school choice principles to their logical extreme, conservative public school choice advocates will have a hard time reconciling their belief that schools should inculcate traditional moral values with the idea of giving parents the freedom of public school choice. Likewise, it will be equally difficult for school officials to boast an appreciation for diversity when the very terms of homosexual discourse may be deemed constitutionally suspect or dangerous.

### C. Title IX and “Sex”

Title IX of the Educational Amendments of 1972 is a federal statute which, in relevant part, prohibits a student from being “excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance.”\(^8^7\) It is currently not established whether sexual-orientation harassment is actionable under Title IX, and the Supreme Court has yet to address this matter.\(^8^8\) The Supreme Court has, however, suggested that a sexual orientation claim may lie under Title VII of the Civil Rights Act of 1964,\(^8^9\) a statute very similar to Title IX. In *Oncale v. Sundowner Offshore Services*, the Su-
preme Court explicitly observed that sex similarity made no differ-
ence:

If our precedents leave any doubt on the question, we hold to-
day that nothing in Title VII necessarily bars a claim of dis-


crimination “because of . . . sex” merely because the plaintiff
and the defendant (or the person charged with acting on be-
half of the defendant) are of the same sex.

Thus, by extrapolation, Title IX may serve as a basis for legal re-
course against school districts that discriminate or permit harassment


to continue. Title IX is less effective, however, in the sense that the


statute’s language limits the prohibited conduct only by the recipient
district’s degree of control over the harasser and the environs in


which the harassment occurs. This is clearly contemplated in the


statute that specifies that the harassment must take place “under”


“the operations of” a funding recipient. In Davis v. Monroe County


Board of Education, the Supreme Court made clear that the standard


set out in Gebser v. Lago Vista Independent School District—that a school


district may be liable for damages under Title IX where it is deliber-
ately indifferent to known acts of teacher-student sexual harass-


ment—also applies in cases of student-student harassment. Delib-
erate indifference makes sense as a direct liability theory only where
the recipient has the authority to take remedial action, and Title IX’s
language itself narrowly circumscribes the circumstances giving rise
to damages liability under the statute. If, for example, a recipient
does not engage in harassment directly, it might not be liable for
damages unless its deliberate indifference “subjects” its students to
harassment, that is, at a minimum, causes students to undergo har-
assment or makes them liable or vulnerable to it. Moreover, because
the harassment must occur “under” “the operations of” a recipient,
the harassment must take place in a context subject to the school dis-


trict’s control. These factors combine to limit a recipient’s damages
liability to circumstances wherein the recipient exercises substantial
control over both the harasser and the context in which the known
harassment occurs. Where, as here, the misconduct occurs during
school hours on school grounds, misconduct is taking place “under”
an “operation” of the recipient. In these circumstances, the recipient


523 U.S. 75, 79 (1998). Some judges have agreed with this analysis. See Rene v. MGM
Grand Hotel, Inc., 305 F.3d 1061, 1074–75 (9th Cir. 2002) (en banc) (holding that a gay man
who suffered sexual harassment in the form of unwelcome touching from derisive coworkers
could state a claim under Title VII).

20 U.S.C. § 1681(a) (2000); id. § 1687 (defining “program or activity”).


id. at 290.

Davis, 526 U.S. at 650.
retains substantial control over the context in which the harassment occurs. Thus, a school is generally liable only for its own misconduct and is liable for student-student harassment only when “the school had actual notice of the harassment and its reaction was ‘clearly unreasonable,’ so that its own ‘deliberate indifference’ actually caused the discrimination.”

Boards of education and school officials exercise significant control over the harassing student for it has disciplinary authority over all its students. However, school administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed “deliberately indifferent” to acts of student-student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.

Although sexual-orientation discrimination is not specifically covered by Title IX, Title IX protects discrimination “on the basis of sex.” A student, therefore, would have to successfully argue that sexual-orientation discrimination is sex discrimination to receive protection under Title IX. Two arguments dominate this proposition. First, a person’s sexual orientation is based on [his] sex combined with the sex of the person he is attracted to. The second argument for the proposition that sexual-orientation discrimination is sex discrimination is known as the “sex-stereotype argument.” Generally, this argument says that the gender stereotype mandates that people should be attracted to people of the opposite sex, and the perpetuation of this stereotype is sex discrimination.

In addition to having to show that sex orientation discrimination is sex discrimination, students under Title IX will also have to show

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96 Feoick, supra note 11, at 322 (citing Davis, 526 U.S. at 633, 648–50).
97 Id.
99 Id. at 639 (summarizing the views of various commentators who advance the idea of sexual-orientation discrimination as sex discrimination).
100 Id. at 641. The Supreme Court has lent support to this second position in a sex discrimination case in the employment context involving Title VII. In this case, a woman was passed over for a promotion to partner in an accounting firm, not because she had the characteristic of being aggressive, but instead because she was a woman with an aggressive personality. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (plurality opinion) (recognizing the legal relevance of sex stereotyping discrimination). See also Julie A. Baird, Playing it Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics, 17 BERKELEY WOMEN'S L.J. 31, 48–49 (2002) (discussing the Court’s rationale in Price Waterhouse). This is promising for sexual orientation discrimination to be found as sex discrimination under Title IX because courts often look to decisions on Title VII in applying Title IX.
101 See Lovell, supra note 23, at 641 (using Hopkins as a primary example).
that this discrimination was “based on sex.”102 Plaintiffs must prove this with a but-for showing; that is, but for the students’ sexual orientation the harassment would not have occurred.103 Put another way, the putative plaintiff would not have encountered any discrimination for his relationship or sexual orientation if he had been a woman. This analysis, of course, is predicated upon one’s relationship with the same sex or that person’s peers’ perception of such. At least some courts have allowed recovery where there was a mistaken attribution based upon perceived membership in a group.104 This confirms that the associative theory may be available in some jurisdictions when discrimination is based on the perpetrator’s perception of the victim. However, it is yet to be determined whether courts will follow this logic to its inevitable conclusion in the context of sexual orientation or whether formalistic distinctions will emerge to block its potentially broad application.

Title IX is also problematic in dealing with sexual orientation discrimination because it was enacted under the Spending Clause, which limits private damages available to students suing a school by requiring that schools have notice that their conduct is unreasonable before a student can receive private damages.105 This minimizes the chance that a student would win damages in a suit against a school.

But the legal footing of this statute places it among the less effective tools for effecting real change in school climate and tolerance. More specifically, Title IX’s reach proves even more limited in the sense that it does not reach issues of curriculum bias, the absence of role models, and the unavailability of counseling services which, as the statistics shown earlier demonstrate, does not speak to the circumstances of LGBT youth.

102 See id. at 646 (observing that courts have taken “based on sex” to exclude sexual orientation).
103 See id. at 646–47 (recognizing plaintiff’s difficulties with proof under such a standard).
104 See LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 769–70 (D. Neb. 1999) (approving an Italian-American plaintiff’s cause of action for racial discrimination based on employer’s mistaken belief that the plaintiff was Hispanic); Perkins v. Lake County Dep’t of Util., 860 F. Supp. 1262, 1277–78 (N.D. Ohio 1994) (holding that under Title VII “it is the employer’s reasonable belief that a given employee is a member of a protected class that controls this issue . . . . As with the joy of beauty, the ugliness of bias can be in the eye of the beholder”). The Ninth Circuit has held that, under 42 U.S.C. § 1983, which is closely related to Title IX, the discriminator’s perception controls the plaintiff’s standing. See Estate of Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir. 2001) (“[F]or purposes of standing, [the plaintiff] should be viewed as [the plaintiff] alleges [the defendant] viewed him: as a Native American.”). See generally Matthew Clark, Comment, Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel, 51 UCLA L. Rev. 313 (2003) (considering several legal theories, paralleling those of gender or racial discrimination, under which sexual orientation discrimination claims may be brought).
105 See Feiock, supra note 11, at 323 (noting the deleterious effect on the chances plaintiffs have of winning damages).
D. Other Laws

Attacking sexual-orientation discrimination on the basis of state laws is a possibility, but only a few states have laws that explicitly prohibit sexual-orientation discrimination. There are, however, numerous city and county laws that an aggrieved student could rely upon to bring an action against a school board or district. Another possibility is state tort law or criminal law. The effectiveness of state law turns on how the laws are enforced, with the most promising laws either allowing a private right of action for students against districts and school boards, or those having an administrative means through which students can file complaints.

In theory, relief may be had under applicable state tort law for assault and battery, but here again, these tools are limited. One possibility lies in the common law of privacy torts, more specifically, the tortious disclosure of private facts by harassers who reveal and disparage one’s sexual orientation in the local community. The applicable rule governing such claims provides, in pertinent part, that one is subject to liability for giving publicity to (a) a private fact about the plaintiff, provided that (b) the fact publicized would be highly offensive to a reasonable person, and (c) the fact is not a matter of legitimate public concern. The analysis here, however, depends upon several factors. To begin with, if the putative plaintiff, like Nabozny, is openly gay, the claim presumptively fails since his sexual orientation is not a “private” fact. Accordingly, the efficacy of this tort is limited in this regard. But if the person remains in the closet so to speak, then it is more likely that the publicity of one’s orientation will be both private and highly offensive to a reasonable person. This is provided that the private information is widely disseminated to sufficiently satisfy the publicity requirement of this tort. It is also likely that such a disclosure would not satisfy any legitimate public concern.

Another possibility is whether one can state a cause of action against the harasser for intrusion upon seclusion or solitude. The applicable Restatement rule regarding the privacy tort of intrusion upon seclusion provides that one is subject to liability for intrusion (physical or other) upon (a) the solitude, seclusion, or private life and affairs of another, and where (b) the intrusion would be highly

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105 Id. at 324 & n.49 (citing statutes of fifteen states); Buckel, supra note 65, at 394 (noting that eleven states have such laws).

106 See Buckel, supra note 65, at 394 (offering the possibility of local city and county laws, which “were too numerous to list”).

107 Id. (discussing the possibility of personal injury claims).

108 See Feiock, supra note 11, at 327 (stating that the most effective laws contain both enforcement mechanisms).

offensive to a reasonable person. There is no question that elements (a) and (b) would be met if the intimate matters relating to one’s sexual orientation and sexual activity were surreptitiously shared or if a gay student, in the course of being harassed, was stripped of his clothes in public school during lunch period.

A third option may lie in a viable cause of action for intentional infliction of emotional distress (“IIED”) against school districts as well as offending harassers. The applicable rule governing such claims provides, in pertinent part, that one is subject for IIED if (a) he acts intentionally or recklessly, (b) his conduct is outrageous, and (c) it causes severe emotional distress.

Even if the court did not find intentional discrimination, despite the four years of harassment Nabozny experienced, the facts there could support a finding of intentional infliction under reckless IIED. To establish recklessness, a plaintiff would need to demonstrate that the school district acted with a reckless disregard to the likelihood that its inaction would engender enormous emotional distress to all but an indifferent person. Here again, Nabozny’s ordeal would most certainly establish a reckless disregard vis-à-vis the most disturbing inaction exemplified by school officials that allowed such horrendous acts to be perpetrated continuously.

The foregoing discussion demonstrates the limits of various legal tools in effectively combating heterosexist discrimination and antigay violence, as well as providing a safe, supportive environment for all youth. These various limitations only support proponents’ call for gay schools. The argument might look something like this: because the laws do not adequately protect gay students from antigay violence at school, and teachers and administrators are less willing or able to intervene, then LGBT teens have no other choice to obtain a safe, healthy learning environment other than to be provided with a school environment specifically designed to afford those protections and interventions. But to what extent do separate schools really offer a solution?

III. SEPARATE SCHOOLS: A LIMITED SOLUTION?

Of course, one should realize that separate schools will not fix the harassment that LGBT students will endure. Furthermore, there are three strong reasons why separate schools may not be prudent. First, a separate school is an unnatural, artificial environment that sends a negative message to teens about problem solving and promotes separatism. Second, their acceptance raises the question of what other

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11 Id. at § 652B.
12 Id. at § 46.
minority groups should have separate schools. Third, separate schools do not make socioeconomic sense. We examine each of these claims in turn below.

A. Indoctrination, Identity, and Bullying

There is also another real concern opponents raise about the inappropriateness of sexual-orientation schools. More specifically, they ask how one knows that an individual student is gay or lesbian and when is an appropriate age when one can trust that a teen knows what that decision actually means. There is no set answer to this question but it does raise a significant concern for critics. That is, if we are not entirely sure whether and when an adolescent is capable of making such a decision, how then do we know that a segregated school begins to indoctrinate youth into an alternative world view? Such questions are real to anti-gay school advocates and patronizing to pro-gay school advocates. It is certainly clear that basing a policy decision upon either view will be subject to competing individual philosophies. Perhaps no one can answer other than rhetorically when and how school administrators can be sure an adolescent has arrived at a true choice. For each person, it is said to be an individual matter over a gradual period:

For most, the process began in late high school or early college and lasted over a period that ranged from two months to two years. The sexual identity process thus occurs while other processes of identity are coming about in the average young adult. Several participants pointed out, however, that coming out is a life-long process in that one is continually developing more self-awareness and expanding the group of people to which one self-discloses. Some participants described their early coming out process as filled with an intense self-hatred stemming from their upbringing in a society that largely portrays gay and lesbian people as perverted or unhealthy. This internal anxiety was compounded by fears of parental and peer hostility and possible repercussions, such as loss of parental financial support to attend school.115

How then can advocates determine if and when a segregated environment is appropriate? Essentially, the justifications for a separate school like HMHS relate to self-esteem, safety, and the health of LGBT teens given the foregoing special risks they face. Undoubtedly, one might conclude that the physical risk of violence at school motivated by an LGBT teen’s sexual orientation would be effectively eliminated in a separate school environment.114 In a separate envi-

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115 However, this does not guarantee that a teen in a separate school system will never face a threat of physical violence. The teens that have been removed to a separate school could have
ronment, verbal harassment due to being an LGBT teen will be less likely. Given the link between physical and verbal harassment and the alarming suicide rates of LGBT teens, these rationales do warrant some serious thought.

B. “Homophobia” and Critical Queer Theory

By separating LGBT students, schools may be fostering or perpetuating homophobia. Simplified, separation suggests that LGBT teens are so different that they go to an entirely different school. It may also suggest that if you pick on a person long enough, and you have a strong enough effect on the victim psychologically, they will go away. In short, separation conveys the troubling message that bullying those different from you will lead to their disappearance.

Critical queer theory, a social theory that looks at the marginalization of sexual identity, is a useful tool in examining sexual orientation discrimination in schools:

Queer theory focuses on “the manner in which heterosexuality has, silently but saliently, maintained itself as a hidden yet powerful privileged norm; and an implicit, if not explicit, questioning of the goals of formal equality that, on their face, simply reify the very categories that have generated heterosexual privilege and queer oppression.”

All aspects of the education experience including teachers, administrators, and curricula, endorse and promote heterosexuality as the proper form of sexuality, thus perpetuating the belief that heterosexuality is the only right way and thereby strengthening heterosexual power. To many, this is just one reflection in our society of “heterosexism” and promotes the belief that “everyone is or should
be heterosexual."119 By being the “other,” LGBT teens are marginalized. Accordingly, a separate school would only strengthen the heterosexist student’s power position and, for this reason, may not be advisable or necessary in many cases.

If instead of separation, schools more harshly punished “gay bashers,” other students would surely be deterred by the message that intolerance and hostility have no place in the school house. Indeed, if school officials, teachers, administrators, and staff were reprimanded and punished for not protecting LGBT students and for turning a blind eye, then they and others like them would place more emphasis on protecting LGBT students from abuse and harassment. Students’ safety can be safeguarded if a school affirmatively seeks to do so. While the effects of separation on the community at large act like a furtherance of heterosexuality as “the way,” the absence of awareness of the accompanying marginalization of LGBT teens renders the task of safeguarding more difficult.

1. Defensive Homophobia and Motivational Prejudice

There does not exist a sphere of influence within human cognition that does not appear to be biased by intellectual and subjective indicia.120 The first encounter with a homosexual person is wholly without significant meaning until it is contextualized in a socially significant nomenclature comprehensible to the psyche. Indeed, because one’s world view rests upon the landscape of one’s environment and culture, defensive homophobia is not only an instinctive response as some have suggested, but rather the homophobic views students possess are meaningful to them in some functional way.121 According to theorist Mary Kite, prejudice engenders sociocultural biases which in turn symbiotically feeds into prejudice.122 Mary Kite lays out three areas for analyzing homophobic prejudice:

<table>
<thead>
<tr>
<th>Sociocultural Prejudices</th>
<th>Provided by culture and stable across time and region</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Used to demonstrate membership and loyalty to the culture</td>
</tr>
<tr>
<td></td>
<td>Can be based on social roles that some out-groups play within culture</td>
</tr>
</tbody>
</table>

121 Id. at 46.
122 Id. at 47 (citing M. E. Kite, When Perceptions Meet Reality: Individual Differences in Reactions to Lesbians and Gay Men, in LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH, AND CLINICAL APPLICATIONS 28 (Beverly Greene & Gregory M. Herek eds., 1994)).
May depend on impressions from mass media absent personal contact  
Varies among competing subcultures with differing values and interests

| **Motivational Prejudice** | Serves to bolster one’s personal identity  
|                           | Related to one’s willingness to subscribe to negative stereotypes  
|                           | Related to self-esteem or depression  
|                           | May serve different functions for different individuals

| **Cognitive Stereotyping** | Employed to categorize/interpret a complex world  
|                           | Characteristics assumed to apply to all members of certain groups  
|                           | Protective, since one cannot know individuals

Thus, while it is true that bigotry may not constitute entirely irrational behavior as a functionalist view would suggest, symbolic value is nonetheless acquired and therefore is an ingredient of learned prejudice.\(^{124}\) The symbol of a separate school would therefore only strengthen the heterosexist student’s cognitive stereotyping and learned prejudice toward LGBT students that is portrayed in some media coverage and society more generally. Left unchecked, this learned prejudice may be a direct outcome of a segregated sociocultural public school education. Of course, this too is a proposition that remains questionable, since enclaves of prejudice may reside within the most integrated public schools. Thus, actual, but nonetheless limited, social interaction will likely result in the superficial confirmation of negative stereotypes, which exacerbates defensive homophobia and learned prejudice rather than lessens it.

Herein lies a great concern for the role of sexual orientation in public education. When the sociocultural, motivational, and cognitive responses to LGBT students may vary widely as the above discussion suggests, and where these three areas of homophobia remain constant no matter the segregated or integrated nature of a public school, how does one approach the question of inclusion? Looking to the daily need of LGBT students to learn in a safe environment is surely a starting point. But when the school is deemed physically safe “enough” or when LGBT students themselves may differ widely on the appropriateness or the very need for separate schooling, we are left asking ourselves about the real socioeconomic costs of preserving the status quo approach to the education of LGBT students.

\(^{124}\) Id.
C. Socioeconomic Considerations

There are great socioeconomic costs for not protecting and not shaping an education that is homosexual-tolerant. The effects of harassment—suicide, substance abuse, acting out, skipping school, violence, and lack of achievement—all present high social costs. These costs can appear to school districts directly in the form of lawsuits through litigation costs and damage awards. Ignoring or allowing intentional mistreatment of LGBT students has health care costs associated with it and poses a risk of funding loss to schools due to lack of attendance. Overlooking LGBT teens also has the possibility of social loss because, by not educating them with the freedom to explore and grow, society is losing out on the possible intellectual and labor-force contributions a self-actualized LGBT person could make.

In pure economic terms, the question regarding the education of LGBT students becomes the following: what is more costly, the cost of operating and maintaining a separate school or the incidental, but real social costs discussed above of not having a separate school? Or, put another way, would it be less expensive to incorporate gay-related issues into the curriculum, to train staff, and to discipline against sexual-orientation harassment than to open and operate a separate school? Presumably, the former is more cost-effective.

D. Comparing Same-Sex Education Separation: Where Do We Draw the Line?

Like girls in early adolescence, there is research to indicate that LGBT students also become disinterested in learning in a non-

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125 See Connie Callahan, Schools That Have Not Protected and Worked with Gay and Lesbian Students Have Been Sanctioned by the Courts, 121 EDUC. 313, 313 (2000).
126 Id.
127 Id. at 314.
128 Id.
129 See generally Nancy Benson et al., Suggestions for Application of Maslow’s Theory to Education, available at http://facultyweb.cortland.edu/~andersmd/maslow/suggest.html (last visited Sept. 30, 2004) (discussing Abraham Maslow’s hierarchy of needs, which leads to self-actualization, and ways in which his theory can be fostered through creative, expressive and inclusive educational initiatives).

The HMHS website summarily addresses the economic argument by responding to the question: “Wouldn’t the money [used to operate the Harvey Milk school] be better spent on public schools with anti-harassment programs, trying to teach more tolerance among students towards some of these other kids?” HMHS responds: “HMHS is a practical, safe solution for certain at-risk students subject to extreme levels of violence and harassment. We believe that anti-harassment programs and teaching tolerance in all public schools are important, and that additional funding should [continue to be directed] to those programs.” HMI Q&As, supra note 29.
LGBT students’ disinterest comes from fear and isolation; they do not want to stick out more than they already do. Generally, sexual harassment for girls in school is overlooked by teachers and school officials because the teachers and officials see it as something the girls “asked for,” as part of growing up, or as something inherent in boys’ behavior (i.e., “boys will be boys”). Harassment and violence towards LGBT students is overlooked for similar reasons. Girls’ self-confidence and academic achievement, starting approximately in middle school, plummets. There are numerous reasons researchers offer for this phenomenon, including studies that find that teachers treat boys preferentially, asking them more questions and treating their outbursts more tolerantly. The combination of teachers’ giving preferential treatment to boys and turning a blind eye to male-female harassment makes school a less positive experience for girls. LGBT students face congruent challenges: harassment and resulting lowered self esteem and sub-par treatment from teachers and administrators. Although the disparity in school experiences lends support to a separate educational environment for both girls and LGBT students, it may not be realistic to solve developmental and social problems with separatism because it is difficult to define where the justifiable need for separation ends in many circumstances. What about obese children, foreign children, non-native speakers, and other minority students? Opening the doors to separate schools for LGBT students may lead to more problems than it solves.

131 Curiously, Dallas Independent School District parents overwhelming favored separate schools for girls. Tawneil D. Hobbes, DISD Approves All-Girls School, DALLAS MORNING NEWS, Sept. 26, 2003, at 6B. But the existing publicly funded gay school, HMHS, has not received equally favorable support; it was picketed. First Public Gay H.S. Opens in NYC, supra note 3.
132 Eriksson, supra note 129, at 1800.
134 Id.
135 Brown v. Board of Education, 347 U.S. 483, 495 (1954), announced that separate is inherently unequal. Logically, this extends from racial segregation to sexual orientation segregation. The following are a few of the differences and resulting inequities that a separate school will bring: the teachers may not be as qualified, course selection will likely be smaller, extracurricular activities will be limited, and enrichment programs will be smaller. Brown and its progeny also discussed the inequities in separation of “intangibles,” which would be an issue here too. Id. at 493–94. It is interesting to note that the school principal for HMHS, William Salzmann, does not think the school is segregationist. See First Gay Public H.S. Opens in NYC, supra note 3. Instead, the school positions itself as a safe environment for teens that have been persecuted because of their sexual orientation:
IV. CHANGING INTEGRATED SCHOOLS: CAN IT BE DONE?

In lieu of a separate school, there are numerous educational initiatives that schools can implement that will help combat sexual orientation discrimination within schools. Helpful education initiatives within a nonsegregated school have included school policies for protecting LGBT children from discrimination; training for teachers, counselors, and school staff; the establishment of school-based support groups like gay-straight student alliances; availability of information in school libraries for LGBT teens; and hiring LGBT teachers. Naturally, even these suggestions would face formidable opposition. For example, only 44 percent of Americans feel comfortable having their children taught by openly gay teachers, according to one poll (the South at 36 percent and Midwest at 42 percent, versus the Northeast at 55 percent and the West at 52 percent). The success of an integrated model appears doubtful with these realities. The same also appears true for curricula that positively present LGBT individuals and address their unique issues. A brief recounting of the attempts of gay curricular reform serves to crystallize this point:

In Massachusetts, the governor excised the library and curriculum recommendations of his Commission on Gay and Lesbian Youth . . . and the Brookline High School principal, an ostensible friend, said: "I think we'd be asking for trouble if we introduced something like the Rainbow Curriculum that specifically deals with gay developmental issues, social history, and so forth. . . ."

California's 1997 gay student protection bill . . . was lambasted by conservative school board members who warned the public that safety is-

These are children that have been in traditional schools, but have needed to leave or have dropped out because of physical violence and/or emotional harm. Thanks to HMHS they have a safe place to learn so that they can graduate. . . . It is not segregation to remove a child from a dangerous situation in order to give them a chance to learn safely. HMHS is a successful refuge for a small portion of youth who have fled unsafe schools in order to secure their right to a safe educational environment; no one is arguing for a totally separate school system.

HMI Q&As, supra note 29. This response further implicates the issue of where to draw the line in separation.

See LIPKIN, supra note 120, at 195.

See John D. Anderson, Supporting the Invisible Minority, EDUC. LEADERSHIP 65 (1997) (noting that few schools have successful support programs); MacGillivray, supra note 119; Roffman, supra note 21, at 135–36 (formulating several models for a school's attitude toward homosexuality and suggesting that the "Affirmation" model is the most positive); Uribe, supra note 9.

The adjustments I propose are minor, and I understand the complexity of an integrated curriculum proposal. I do not advocate anything overt like a "gay role model day" or a "Gays in History" segment. This would only further stigmatize gays and lesbians as "others" and further marginalize them. Instead, students, through discipline, and school policy should not be allowed to harass. Gay issues, if they come up in the classroom, should be briefly addressed by teachers. The emphasis should be on training teachers, staff, and counselors on how to deal with gay issues.
sues would degenerate into “lifestyle education” and “be in your reading and language arts curriculum, you can be sure of it.” Parents invoked the New York Rainbow curriculum in fear for their rights. The bill’s sponsor called the accusations red herrings and weakly denied curricular implications: “The bill doesn’t mandate curriculum.” Only San Francisco continued to consider the addition of sexual orientation to its multicultural curriculum mandate.138

In addition to giving rise to incendiary political issues, the incorporation of gay issues into the curriculum may actually harm rather than help the daily existence of LGBT students in school.139

The key to changing schools, for communities that support this, is full integration, including psychological, social, and academic support.140 For those truly not concerned about indoctrination, health classes can address homosexuality, English and history teachers can note when someone they are discussing is gay, such as Walt Whitman or Audre Lorde.141 When a “teachable” moment arises, teachers need not shy away from it.142 For example, if a student were to ask about the LGBT relationships in The Color Purple, it is conceivable for some to suggest that the teacher fairly address the question in an age-appropriate manner.143 Other approaches involve teachers receiving in-service training dealing with gay issues.144 Community support, pull-out instruction,146 and gay straight student alliances are some other common incorporation ideas.

138 Lipkin, supra note 120, at 327–28 (footnotes omitted).

139 Homophobia runs deep in our general culture, and LGBT students are “the most frequent victims of hate crime in the United States.” Vare & Norton, supra note 19 (citing the U.S. Department of Justice’s findings). However, schools inevitably teach students moral and social skills. If schools advance tolerance, LGBT students will likely be accepted over time. See Colleen A. Sullivan, Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems, 6 LAW & SEXUALITY 31, 57 (1996) (observing that as long as schools do not promote tolerance, LGBT students will continue to be in danger).

140 See Anderson, supra note 136, at 66.

141 See id. at 67 (describing several ways in which a Connecticut high school incorporates LGBT aspects into the curriculum).

142 MacGillivray, supra note 119, at 311.

143 Id.

144 Anderson, supra note 136, at 70 (describing a high school’s workshops).

145 Undoubtedly, parents and the community at large will be in an uproar when they find out that gay issues are being incorporated into mainstream curriculum, that gay books are available in the library, that there are gay support and school sponsored groups, etc. Like desegregation, acceptance, or at least an ease in resistance will take time.

146 Pull-out instruction is when a student is removed from the classroom for a portion of the school day to receive individualized learning. Pull-out instruction within the school is a compromise and shows gay and LGBT students that there are others like them and still maintains one large integrated student body. This service delivery model is often used for students with disabilities, students in gifted and talented settings, those with speech difficulties or English language learners (“ELLs”). For examples of pull-out instruction, see the websites of the Wisconsin school district, at http://www.dpi.state.wi.us/dpi/dsea/titleI/, and the Teachers of English to Speakers of Other Languages, at http://www.tesol.edu/assoc/k12standards/it/
A. Parental Autonomy

Sexual-orientation integration, whenever truly feasible, is superior to separation because of its greater potential impact on the community with respect to promoting safety and tolerance. However, it must be conceded that if schools are incorporating gay issues into their curricula and advocating tolerance in their policies, it is optimistic to say that parents and the community at large are going to be made more aware of the realities of sexual identity. At best, this awareness, if taken to heart, might reduce the shock, resentment, and anger many parents feel when they have to deal with their child being gay. But the awareness gained from an inclusive curriculum may not be as politically viable in the larger community. Parents who object to homosexuality will see such moves as impinging upon their right under Pierce v. Society of Sisters\(^{147}\) to direct the moral and educational upbringing of their children as they see fit. Aside from the initial media buzz, however, a separate school may be an issue only for parents who had to deal with their teen attending that school. An integrated curriculum, on the other hand, will affect all students, gay or straight, and therefore will in turn affect all parents in some measure. A future parent who had been given an education, including some exposure to gay issues, may be better equipped to deal with issues such as unexpectedly having a gay or lesbian child, or may be better equipped to teach his or her straight child how to properly behave toward LGBT students. In both scenarios, gay teens will also reciprocally benefit.

Political will may ultimately dictate an educational solution that respects parental autonomy of both gay and straight parents, whether it is separate schools or separate, distinct, and safe spaces within sexually integrated schools such as a GSA club. Surely members of a civilized society can agree that in either case, a public school LGBT student should not have to choose between education and personal safety.

B. The Safe Schools Program

One way to achieve a safe school is to devise a set of initiatives, rules, and culture for the protection of LGBT students in an inte-

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\(^{147}\) 268 U.S. 510 (1925).
grated setting rather than permitting sexual orientation schools altogether. To see examples of these kinds of measures, consider the Massachusetts Department of Education Safe Schools Program for Gay and Lesbian Students. Ultimately, schools today may consider initiatives that the Safe Schools and the Governor’s Commission implemented with some success from 1994 to 1998. Some of these included the following:

- provided technical assistance to over 350 schools
- held over 700 regional and local presentations and faculty trainings
- trained over sixty workshop facilitators (with GLSEN, the Gay Lesbian Straight Education Network)
- trained over seventy-five parent speakers (with P-FLAG, Parents, Friends, and Families of Lesbians and Gays)
- coordinated over 500 P-FLAG speaking/outreach engagements
- trained over 150 student speakers
- distributed almost $800,000 in grants of up to $2,500 to over 140 school districts for program assistance
- spurred the establishment of 140 Gay-Straight Alliances (GSAs)
- published a manual for starting GSAs
- allocated $120,000 in grants over three years for established GSAs to mentor fledging GSAs in their region
- given grants to college gay and lesbian student organizations to mentor high-school GSAs
- developed a resource manual for teachers and counselors;
- initiated a youth pride retreat for GSA members and their advisors (subsequently administered by other agencies)
- sponsored the attendance of several GSAs at Outward Bound–Boston island retreats, designed to help teachers and students reach Safe Schools goals
- allocated $60,000 for the purchase and distribution of books requested by schools
- began a Young Leaders Conference for 100 students and GSA advisors
- conducted workshops with the Massachusetts Secondary Schools Administrators Association and other educational leadership organizations
- held workshops with Interscholastic Athletics Associations and others, focusing on coaches and athletes

\[148\] Lipkin, supra note 120, at 264–65.
CONCLUSION

Separate education for LGBT students will not be necessary in all cases, although its advent and implementation in New York points to a problem in the state of our mainstream public education today. A separate school for gay teens may be a bad idea for a number of reasons. A frequent question arises that is not entirely rhetorical in nature. That is, where do we draw the line? How should our society address students that suffer discrimination for whatever reason (obesity, unattractiveness, redheads, racial minorities, children of the very wealthy or very poor, and so forth)? Should LGBT schools be allowed to siphon off needed funds from cash-strapped public schools? Should such schools be taxpayer supported? Are they pedagogically sound? A move separating those in the sexual orientation minority could open doors for other kinds of separate schools, and it furthers LGBT marginalization in the process. Additionally, what, may we ask, does separation teach children about how to problem-solve and live with difference?

Removing LGBT students only reinforces the ideas that they are somehow different and that there is no need to interact with them. One may conclude that, by removing LGBT teens, we are not being fair to either community of learners. Both need to be taught and socialized into a tolerant and civil society. When students are outside of school, there will be differences that can not be separated out through separate schools for sexual orientation. It is likely to be more cost effective and socially significant to have an integrated educational institution as compared to the costs of operating a separate school and the incidental social costs to society by not supporting LGBT teens.

Nonetheless, the needs of students are largely being ignored, which has detrimental effects on LGBT students as well as upon heterosexual students. Therefore, in some cases where the severity and systematic deprivation of rights continues despite numerous warnings and objections, an alternative school is an appropriate placement, provided it is limited to education above the elementary level. While there are anticipated arguments for not limiting such alternative placements at the elementary-school level, the threshold for alternative placement should be different where greater emphasis is placed upon intraschool and intradistrict initiatives first. Therefore, in instances where a district remains recalcitrant to alternative students’ needs, strict oversight by the state would be appropriate in addition to the adoption of a safe-school program such as the Massachusetts model. However, given the lack of effective legal tools an alternative student has available for attacking sexual orientation, immediate change can come only from the individual districts and schools. By incorporating more LGBT-sensitive curricula and policies in schools
and by training administrators, counselors, and teachers, society can address many of the safety and self-esteem concerns facing LGBT teenagers and can provide the added benefit of increasing tolerance and understanding among straight teens and the community at large. Research strongly supports the success of an integrated approach through curriculum and staff training. It reveals that if given the opportunity in a “supportive and informed environment,” most LGBT teens will develop normally and pose no greater risk for mental health problems than average teenagers.¹⁴⁹

However, if such curricular choices are introduced in public classrooms, states may run the danger of violating the spirit of parental autonomy as articulated in the Supreme Court’s holding in Pierce, which affirmed parents’ right to determine the moral and educational upbringing of their own children as they fit.¹⁵⁰ This parental right should be upheld whether we are confronted with a student that is straight or gay. While this Essay does not advocate separate schools for gays and straight students, admittedly such a proposal does respect the autonomous rights of straight parents not to expose their children to what they deem objectionable individual choice. It also respects the parental rights of LGBT teens to direct the education of their child in a safe, accepting environment. But what would Harvey Milk say?

¹⁴⁹ Vare & Norton, supra note 19, at 329 (citing J.C. Gonsiorek, Mental Issues of Gay and Lesbian Adolescents, 9 J. ADOLESCENT HEALTH CARE 114 (1988)).

¹⁵⁰ 268 U.S. at 535.