

# Making It Better Now: Working Toward Substantive Equality for LGBTQ Youth

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*Definitions are vital starting points for the imagination. What we cannot imagine cannot come into being.*

—bell hooks<sup>1</sup>

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## I. INTRODUCTION

On the afternoon of September 19, 2010, Wendy Walsh received a phone call from her thirteen-year-old son, asking her to pick him up from school because he was afraid of a group of students who were harassing and following him.<sup>2</sup> It was yet another instance of mental and physical bullying Seth had experienced since he came out at eleven years old as a gay young man in the small town of Tehachapi, California.<sup>3</sup> After returning home with his mother, he took a shower and then asked her for

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1. BELL HOOKS, *ALL ABOUT LOVE* 14 (2000).  
2. Thomas Curwen, *Gay Teen Endured a Daily Gauntlet*, L.A. TIMES (Oct. 8, 2010), <http://articles.latimes.com/2010/oct/08/local/la-me-seth-walsh-20101008>.  
3. Bryan Alexander, *The Bullying of Seth Walsh: Requiem for a Small-Town Boy*, TIME (Oct. 2, 2010), <http://www.time.com/time/nation/article/0,8599,2023083,00.html#ixzz1qLzxIhCt>.

a pen and went into the yard.<sup>4</sup> Later that day, Wendy found him hanging from their plum tree.<sup>5</sup>

As unbearable as Seth's plight was, he was loved and supported at home by his parents, grandparents, and brother. Some LGBTQ youth are not so lucky. They face bullying not only at school but in the intimacy of their homes and are sometimes even cast out onto the streets or into foster care, where they overwhelmingly face discrimination from foster care administrators and care providers.<sup>6</sup> But if students like Seth who are embraced by their families still experience a level of oppression so great that they choose suicide, the responsibility of the school in bullying prevention is great.

Seth's death took place among a rash of other suicides in states like Minnesota and New Jersey.<sup>7</sup> Many celebrities and political figures spoke out publicly against bullying, and in September 2010, journalist Dan Savage began what would become the "It Gets Better Project," an outreach endeavor encouraging harassed youth to hold on through the turmoil of their teen years in the face of school bullying and look forward to a better future.<sup>8</sup> A long-time pioneer in LGBTQ rights, the state of California also began working toward the goal of bullying prevention through a mandate for inclusive education. S.B. 48, or the Fair, Accurate, Inclusive and Respectful (FAIR) Education Act, is the first law of its kind in that it requires inclusion of LGBTQ persons, along with other ethnic and cultural groups and disabled persons, in public school social sciences curricula.<sup>9</sup> While the law names groups other than LGBTQ persons, S.B. 48 was framed by its nonprofit sponsors, Equality California and the Gay-Straight Alliance Network, as an antibullying measure.<sup>10</sup> The law

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4. Curwen, *supra* note 2.

5. *Id.*

6. Anne Tamar-Mattis, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 TUL. J.L. & SEXUALITY 149, 149-50 (2005).

7. College student Tyler Clementi committed suicide in the same month as Seth Walsh, and it is suspected to be linked to bullying by his roommate and another student. Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 29, 2010), [http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?\\_r=1](http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?_r=1). Six teen suicides over a fifteen-month period in Minnesota's Anoka-Hennepin school district are also suspected to be linked to bullying. Tom Weber, *Anoka-Hennepin Disputes Bullying-Suicide Connection*, MINN. PUB. RADIO (Dec. 17, 2010), <http://minnesota.publicradio.org/display/web/2010/12/17/anoka-hennepin-bullying-suicides/>.

8. *About Us*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited Mar. 25, 2012).

9. S.B. 48, 2010-11 Leg., Reg. Sess. (Cal. 2011).

10. *FAIR Education Act (SB 48) Fact Sheet*, EQUALITY CAL., <http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/FAIR%20education%20fact%20sheet%20final.pdf> (last visited Mar. 20, 2012).

also amends the California Education Code to make social sciences curricula more egalitarian by prohibiting the discrimination of minority groups through textbooks and instruction.<sup>11</sup> It aims to change the culture of history lessons, making school and learning a more egalitarian experience for students.

S.B. 48 passed just before other California state antibullying legislation was introduced. While S.B. 48 targets the cultural causes of bullying by focusing on a more inclusive history of the state and its citizens, A.B. 1156 and A.B. 9 attend to bullying directly. A.B. 1156 requires that school staff be trained in bullying prevention and creates flexible school transfer policies for bullying victims, as well as a clearer definition of bullying.<sup>12</sup> A.B. 9, dedicated to Seth Walsh and also known as “Seth’s Law,” requires schools to “establish policies to prevent bullying . . . , train personnel . . . , and make resources available to victims.”<sup>13</sup>

While S.B. 48 does not profess to be the vehicle for total substantive equality of all young people, its essential goal of creating a more egalitarian, inclusive environment for youth is undermined by its failure to unequivocally justify why the status quo curriculum should be changed in the first place; that is, how the status quo privileges some groups and disadvantages others. Without this critique, the law can only provide formal equality, or equal treatment, instead of substantive equality, or equality of outcome.<sup>14</sup> This Comment argues that while S.B. 48 endeavors to address the root causes of bullying under the current equal protection framework, the law lacks the necessary mechanisms to truly establish a more egalitarian culture for LGBTQ youth in California.

While a massive restructuring of the legal framework would best serve this end, there must be an immediate avenue for action. Martha Fineman’s vulnerability framework highlights the limits of formal equality and proposes that utilizing the notion of vulnerability as a universal element of the human condition can reorient U.S. equal protection law.<sup>15</sup> Fineman’s framework demonstrates how a more

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11. *Id.*

12. A.B. 1156, 2011-12 Leg., Reg. Sess. (Cal. 2011).

13. *Fact Sheet: Seth’s Law*, EQUALITY CAL., <http://www.eqca.org/atf/cf/%7B34F258B3-8482-4943-91CB-08C4B0246A88%7D/AB%209%20Fact%20Sheet%20after%20passage.pdf> (last visited Mar. 20, 2012).

14. “The substantive meaning of equality, or of equal protection, is that legislators must use law to insure that no social group, such as whites or men, wrongfully subordinates another social group, such as blacks or women.” Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 469 (1990).

15. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1-2 (2008).

responsive state can—and should—be responsible for implementing this change.<sup>16</sup> This Comment employs Fineman’s framework to identify how California’s FAIR Education Act is constrained by equal protection law and explores how it can be amended and reframed to truly provide substantive equality for LGBTQ youth. Ultimately, if the law is redrafted and reframed to prohibit the privilege and advantage that causes discrimination, this equality is possible. This Comment also recommends that the law should be revised so that it is more explicitly linked to California’s larger antibullying campaign. California must clearly define the kind of equality it hopes to create before it can transform learning culture.

Part II surveys the background of relevant law on the representation of LGBTQ persons in public education and the state’s power to mandate it. Part III reviews California’s antibullying laws and the FAIR Education Act. Part IV surveys Martha Fineman’s vulnerability framework, while Part V analyzes the FAIR Education Act under the framework. Finally, Part VI offers recommendations on how the Act can be revised in light of the vulnerability framework to realize substantive equality for LGBTQ youth.

## II. LEGAL BACKGROUND

The FAIR Education Act is a part of the larger debate around whether states can mandate that school curricula include LGBTQ persons to create a learning environment that promotes fairness and justice. An analysis of the law requires awareness of the state’s power to determine education curricula vis-à-vis students’ rights to equal protection and parents’ rights to due process. The Fourteenth Amendment to the Constitution of the United States guarantees all citizens equal protection under the law<sup>17</sup> and all states must comply with this mandate.<sup>18</sup> Equal protection law under United States Supreme Court jurisprudence resolves whether a law or state action that discriminates is justified by a legitimate purpose.<sup>19</sup> While all *persons* are meant to be protected in the most common sense of the word,<sup>20</sup> courts also consider whether a law discriminates against a protected or suspect class of

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16. *Id.* at 2.

17. U.S. CONST. amend. XIV.

18. *See* *Bolling v. Sharpe*, 347 U.S. 497 (1954).

19. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 669 (3d ed. 2006).

20. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982) (rejecting the claim that immigrant children are not legally recognized “‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments”).

individuals—namely, race or nationality<sup>21</sup> and gender.<sup>22</sup> While the Supreme Court has not recognized sexual orientation as a protected group, it has ruled that state discrimination based on arbitrary animus toward sexual orientation violates the Equal Protection Clause absent “a *legitimate* governmental interest.”<sup>23</sup> Conversely, some state courts have fully recognized sexual orientation as a suspect class.<sup>24</sup> The California Supreme Court held that “sexual orientation is a suspect classification for purposes of [the California Constitution’s] equal protection clause.”<sup>25</sup>

With regard to discrimination in the context of education, a California district court denied a motion to dismiss a plaintiff’s claim that her school violated the Equal Protection Clause when it discriminated against her because of her sexual orientation.<sup>26</sup> In that case, the plaintiff filed a civil rights claim against the school when she was removed from physical education class after she revealed that she is a lesbian.<sup>27</sup> The court reasoned that the plaintiff properly alleged a violation of her constitutional right<sup>28</sup> because the “law has been clearly established for several years that discrimination on the basis of sexual orientation gives rise to an equal protection claim.”<sup>29</sup> The United States Court of Appeals for the Ninth Circuit has also held that schools have the duty to protect students from bullying based on sexual orientation.<sup>30</sup>

However, education itself is not protected as a fundamental right under the U.S. Constitution.<sup>31</sup> In *San Antonio Independent School District v. Rodriguez*, the Supreme Court denied a constitutional challenge to a state scheme that allocated education funds based on property rights. The plaintiffs alleged wealth discrimination,<sup>32</sup> but the

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21. See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (holding that a law that excluded black men from juries violated the Fourteenth Amendment).

22. See *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (applying an “intermediate” level of scrutiny to a state law that applied a classification based on sex by allowing females of a certain age to purchase a particular kind of alcohol but prohibiting its sale to males of the same age).

23. *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

24. Connecticut recognizes sexual orientation as a suspect class. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431-32 (Conn. 2008) (holding that sexual orientation is a quasi-suspect class for equal protection purposes). Iowa also recognizes sexual orientation as a suspect class. See *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (“[S]exual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.”).

25. *In re Marriage Cases*, 183 P.3d 384, 385 (Cal. 2008).

26. *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1096 (C.D. Cal. 2003).

27. *Id.* at 1091-92.

28. *Id.* at 1094.

29. *Id.* at 1096.

30. See *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003).

31. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

32. See *id.* at 4-6.

Court stated that socioeconomic status is not a protected class.<sup>33</sup> The Court held that education is not a fundamental right despite the fact that it plays an important role in exercising other constitutional rights. The Court based this decision on the idea that socioeconomic status is not a protected class.<sup>34</sup> However, in recognizing that educational disparities are in need of reform, the Court reasoned, “[T]he ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.”<sup>35</sup> Consequently, implementation of education falls to the states, who can offer further protections for students. On the state level, California courts have held that education is a fundamental right of its citizens.<sup>36</sup>

States also have the right to create curricula but are limited by parents’ rights to guide the upbringing of their children. The Supreme Court recognized the right of parents to direct the rearing of their children in *Meyer v. Nebraska*<sup>37</sup> and further held that the right of the state to create curricula is limited by parents’ rights in *Pierce v. Society of Sisters*.<sup>38</sup> In *Pierce*, the Court held that Oregon’s mandatory public (as opposed to private) education scheme for particular age groups was unconstitutional.<sup>39</sup> The Court relied on *Meyer* and stated that the law directly intervened with a parent’s right “to direct the upbringing and education of children under their control.”<sup>40</sup> Likewise, the Supreme Court upheld Amish parents’ rights to exempt their children from an additional two years of mandatory education for religious reasons.<sup>41</sup> The court reasoned that foregoing two additional years would not unduly harm the children.<sup>42</sup>

However, the state has the power to prohibit the inclusion of materials in curricula for secular reasons. In *Hazelwood School District v. Kuhlmeier*, the Court held that the state could prohibit inclusion of materials that are a part of the curriculum as long as the action is “reasonably related to legitimate pedagogical concerns.”<sup>43</sup> However, the Court has not addressed whether a state’s proactive promotion of

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33. See *id.* at 25.

34. *Id.* at 18.

35. *Id.* at 59.

36. See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977).

37. See 262 U.S. 390, 399 (1923).

38. See 268 U.S. 510, 534-35 (1925).

39. *Id.*

40. *Id.*

41. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

42. *Id.*

43. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

tolerance in curricula is an action reasonably related to pedagogical concerns.

Conversely, the First Circuit held in *Parker v. Hurley* that public schools are not required to allow parents to exempt their students for religious reasons when a curriculum on families mentions same-sex families in materials for young students.<sup>44</sup> In that case, parents filed a violation of their rights under the Free Exercise Clause and their parental and privacy due process rights when the school exposed children to books that depicted families in which both parents are of the same sex.<sup>45</sup> The court reasoned that “[r]equiring a student to read a particular book is generally not coercive of free exercise rights,” especially when students are not required to agree with the material.<sup>46</sup>

The actual teaching of tolerance and equality of LGBTQ persons in curricula has faced even more resistance from parents and students with opposing views. In the higher education context, the United States Court of Appeals for the Eleventh Circuit held that such teaching did not violate the First Amendment.<sup>47</sup> In *Keeton v. Anderson-Wiley*, the court held that a university’s requirement that a graduate student in the counseling program complete LGBTQ sensitivity training as part of a remediation plan did not violate her First Amendment rights.<sup>48</sup> Jennifer Keeton was a psychology student who told professors that she planned to subject potential LGBTQ clients to remediation treatment, as the LGBTQ identity conflicted with her personal religious beliefs.<sup>49</sup> Keeton sued the university, claiming that the requirement violated her First Amendment right to free speech and free exercise of religion.<sup>50</sup> The court reasoned that the plan was not implemented to change *her* mind but to prevent her from using her profession to impose her religious beliefs on *other* minds.<sup>51</sup>

Many of the battles between those who want to teach tolerance of LGBTQ persons in elementary and high school classrooms and those who oppose the inclusion are occurring on the local level. Minnesota’s Anoka-Hennepin School District was the site of a highly publicized dispute over a policy that “required teachers to remain neutral when

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44. See *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008).

45. *Id.* at 90.

46. *Id.* at 106.

47. See *Keeton v. Anderson-Wiley*, 664 F.3d 865, 879-80 (11th Cir. 2011).

48. *Id.* at 880.

49. *Id.* at 868.

50. *Id.* at 871.

51. *Id.* at 872.

issues of sexual identity came up in the classroom.”<sup>52</sup> The policy had the “support of parents who believe homosexual conduct is immoral.”<sup>53</sup> Critics claimed that in light of recent student suicides and “reports of a hostile environment for LGBT students,” this law prevented teachers from acting to prevent bullying.<sup>54</sup> This resulted in a federal lawsuit alleging a violation of students’ rights to equal access to educational opportunities,<sup>55</sup> as well as a federal investigation of the alleged hostile environment.<sup>56</sup> But in February 2012, the school district agreed to replace the neutrality policy with the Respectful Learning Environment Policy, which requires teachers to direct respectful dialogue between students in classroom discussion when it becomes contentious.<sup>57</sup> It also calls on staff to “affirm the dignity and self-worth of all students.”<sup>58</sup> The Anoka-Hennepin School District also has a separate antibullying policy that includes cyberbullying prevention.<sup>59</sup>

### III. CALIFORNIA’S FAIR EDUCATION ACT AND ANTIBULLYING LEGISLATION

California’s S.B. 48, or the FAIR Education Act, has elements of the curricula at issue in both *Parker* and *Keeton*. S.B. 48 applies the general ideas of inclusion and the prohibition of discriminatory biases by technically amending the relevant provisions of the California Education Code.<sup>60</sup> The law was sponsored and introduced by Senator Mark Leno, passed in April 2011, and signed into law by Governor Jerry Brown in

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52. Steve Karnowski, *Minnesota School Board Ends Policy Blamed for Bullying Problems*, LEGALNEWS.COM (Feb. 15, 2012), <http://www.legalnews.com/detroit/1210190>. The policy has been in place since 1995. Shannon Cuttle, *Anoka-Hennepin School District Faces Federal Lawsuit over “Neutrality” Policy*, WASH. BLADE (July 25, 2011), <http://www.washingtonblade.com/2011/07/25/anoka-hennepin-school-district-faces-federal-lawsuit-over-neutrality-policy/>.

53. Karnowski, *supra* note 52.

54. Trudy Ring, *Minn. Sch. Dist. Reevaluates Discussion of Sexual Orientation Issues*, ADVOCATE (Dec. 9, 2011, 6:18 PM), <http://www.advocate.com/printArticle.aspx?id=244969>.

55. The lawsuits were filed by the Southern Poverty Law Center (SPLC), the National Center for Lesbian Rights (NCLR), and Faegre & Benson, LLP. Cuttle, *supra* note 52.

56. *Id.*

57. *Anoka-Hennepin Adopts New Respectful Learning Environment Policy*, OUTFRONT MINN. (Feb. 13, 2012), <http://outfront.org/news?module=news&showitem=216>; Respectful Learning Environment—Curriculum Policy, Anoka-Hennepin School District Instructional Curriculum 604.40 (Feb. 13, 2012), available at <http://www.anoka.k12.mn.us/education/components/scrapbook/default.php?sectiondetailid=284010>.

58. *Id.* (internal quotation marks omitted).

59. *Policy 514: Bullying and Cyberbullying Prohibition Policy*, ANOKA-HENNEPIN SCH. DIST., <http://www.anoka.k12.mn.us/education/components/docmgr/default.php?sectiondetailid=223567&fileitem=38328&catfilter=15023> (last visited Mar. 23, 2012).

60. See S.B. 48, 2010-11 Leg., Reg. Sess. (Cal. 2011).



July 2011.<sup>61</sup> The law contains an overall inclusion provision for social sciences instruction, a prohibition on promoting discriminatory bias of materials that reflect adversely on certain groups, a mandate that governing boards include the listed groups in the instructional materials, and a mandate that governing boards should not adopt materials that reflect adversely on the listed groups.

Specifically, S.B. 48 amended 51204.5 of the Education Code to expand on the groups to be included in instructional materials, emphasized here:

Instruction in social sciences shall include the early history of California and a study of the role and contributions of both men and women, Native Americans, African Americans, Mexican *Americans*, Asian *Americans*, Pacific Islanders, *European Americans*, *lesbian, gay, bisexual, and transgender Americans*, *persons with disabilities*, and members of other ethnic *and cultural* groups, to the economic, political, and social development of California and the United States of America, with particular emphasis on portraying the role of these groups in contemporary society.<sup>62</sup>

S.B. 48 also amends section 51501 to include “*race or ethnicity, gender, religion, disability, nationality, [and] sexual orientation,*” as groups against whom teachers and school districts are prohibited from discriminating.<sup>63</sup> Revisions include mandating in section 60040(b) that governing boards adopt “only instructional materials which, in their determination, accurately portray the cultural and racial diversity of our society.”<sup>64</sup> These materials must incorporate lesbian, gay, bisexual, and transgender Americans, among others, and are prohibited from “reflect[ing] adversely” on the listed groups.<sup>65</sup>

While the law does not state its reasons for focusing on social science curricula per se, materials distributed by its nonprofit sponsors provide details as to why the subject area is so important. These sponsors are Equality California (EQCA), a statewide LGBTQ rights advocacy group, and the Gay-Straight Alliance (GSA) Network, a national youth leadership organization “that connects school-based Gay-Straight Alliances (GSAs) to each other and community resources through peer

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61. *Id.*

62. *Id.* § 1; *Frequently Asked Questions: Senate Bill 48*, CAL. DEP’T OF EDUC., <http://www.cde.ca.gov/ci/er/cf/senatebill48Faq.asp> (last visited Nov. 9, 2012) (emphasizing the new terms added to section 51204.5 of the California Education Code).

63. *See* S.B. 48 §§ 2-3; *Frequently Asked Questions, supra* note 62 (emphasizing amendments to sections 51501 of the California Education Code).

64. *Id.* § 4.

65. *Id.* §§ 4-5.

support.”<sup>66</sup> The organizations point to the general import of learning inclusive information about people’s identities to creating a safe, respectful environment, as well as its ability to help LGBTQ students feel less isolated in school.<sup>67</sup> They base their claims on the 2003 Preventing School Harassment Survey, which reported that in “schools where the majority of youth report having learned about LGBT people in the curriculum, only 11% of students report being bullied, but that number more than doubles to 24% if the majority of students in a school say they haven’t learned about LGBT people.” Students are also more likely to feel confident contributing at school.<sup>68</sup>

It is also important to understand the statutory context of S.B. 48. The FAIR Education Act was passed just before California passed two crucial bills that modified California’s three antibullying laws, namely the California Student Safety and Violence Prevention Act of 2000, the Safe Place to Learn Act of 2007, and the Student Civil Rights Act of 2007.<sup>69</sup> Both A.B. 1156 and A.B. 9, or Seth’s Law, were passed in October 2011.<sup>70</sup> Section 1 of A.B. 1156 contains a preamble that guides the meaning of the bill:

The Legislature finds and declares all of the following:

- (a) A safe and civil school environment is necessary for pupils to learn and achieve.
- (b) Bullying causes physical, psychological, and emotional harm to pupils, and interferes with pupils’ ability to learn and participate in school activities.
- (c) Bullying has been linked to other forms of antisocial behavior, such as vandalism, shoplifting, truancy and dropping out of school, fighting, using drugs and alcohol, sexual harassment, and sexual violence.
- (d) Because of the negative outcomes associated with bullying in schools, pupils, parents, and school personnel should be informed about what behaviors constitute prohibited bullying.
- (e) If victims of bullying feel unsafe at the schools where they have been victimized, they should be accommodated if they desire to attend another school.<sup>71</sup>

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66. *Mission*, GAY-STRAIGHT ALLIANCE NETWORK, <http://gsanetwork.org> (last visited Mar. 23, 2012).

67. *FAIR Education Act (SB 48) Fact Sheet*, *supra* note 10.

68. *Id.* (citing Cal. Safe Schs. Coal., *LGBT Issues in the Curriculum Promotes School Safety*, CAL. STATE SCHS. COAL. RESEARCH BRIEF NO. 4 (2006)).

69. *See* A.B. 1156, 2011-12 Leg., Reg. Sess. (Cal. 2011); A.B. 9, 2011-2012 Leg., Reg. Sess. (Cal. 2011).

70. A.B. 1156, 2011 Cal. Assemb. B. (Westlaw); A.B. 9, 2011 Cal. Assemb. B. (Westlaw).

71. A.B. 1156, 2011 Cal. Assemb. B. (Westlaw).

A.B. 1156 requires the training of school personnel in bullying prevention<sup>72</sup> and outlines flexible standards that allow victims of bullying to transfer to other schools.<sup>73</sup> The law also amends the definition of bullying to include behavior that causes a “substantially detrimental effect” on a student’s mental health, academic performance, or ability to participate in school activities.<sup>74</sup>

Seth’s Law amends sections of the Safe Places To Learn Act, or section 234 of the Education Code.<sup>75</sup> Among the changes is the requirement that local districts adopt policies that prohibit discrimination and bullying based on the actual or perceived characteristics of “disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics.”<sup>76</sup> The law also mandates that the process of filing complaints include a means of investigating discrimination and bullying grievances and mandates that any staff who witness bullying must intervene.<sup>77</sup>

Despite the support and success of antibullying legislation in California, resistance from people who oppose inclusion of LGBTQ persons in curricula persists. An effort to overturn the law through a referendum on the June 2012 ballot failed in October 2011.<sup>78</sup> Recently, a full-scale countercampaign to overturn S.B. 48 by way of initiative also failed to gather enough votes to put a new law on the ballot.<sup>79</sup> In California, voters can propose new legislation through this process if they gather the requisite number of votes.<sup>80</sup> The new law drafted by opponents of S.B. 48 is called the Children Learning Accurate Social Science, or CLASS Act, which would require “accurate historical portrayals” of all individuals.<sup>81</sup> The Act proposed the removal of the

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72. *Id.* § 2.

73. *Id.* § 3.

74. *Id.* § 4.

75. See A.B. 9, 2011 Cal. Assemb. B. (Westlaw).

76. *Id.* § 2(a).

77. *Id.* § 2(b).

78. Patrick Range McDonald, ‘*Stop SB 48*’ Fails To Gather Enough Signatures for Repeal of California Gay History Law, LA WEEKLY (Oct. 12 2011, 3:02 PM), [http://blogs.laweekly.com/informer/2011/10/stop\\_sb\\_48\\_fair\\_act\\_1.php](http://blogs.laweekly.com/informer/2011/10/stop_sb_48_fair_act_1.php).

79. CLASS ACT, <http://classact2012.com> (last visited Aug. 7, 2012).

80. *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm#Initiatives> (last visited Mar. 24, 2012) (“An *initiative* is a proposal of a new law or constitutional amendment that is placed on the ballot by petition, that is, by collecting signatures of a certain number of citizens.”).

81. *What Is the Class Act?*, CLASS ACT, <http://classact2012.com/what-is-the-class-act> (last visited Aug. 7, 2012).

protected classes of groups from social sciences curricula and an emphasis on a so-called accurate portrayal of races and ethnicities while excluding LGBTQ persons and persons with disabilities from the law's language.<sup>82</sup> Despite this attempt, S.B. 48 still stands.

#### IV. VULNERABILITY AND THE LIMITS OF FORMAL EQUALITY

Martha Fineman's vulnerability approach offers a constructive framework to evaluate the effectiveness of S.B. 48 in attaining substantive equality for LGBTQ students. Fineman asserts that vulnerability as a concept should be the foundation of a legal framework that creates "a more egalitarian society" than current U.S. equal protection law affords its citizens.<sup>83</sup> Building on the feminist legal theory of dependency,<sup>84</sup> Fineman posits that this theory of vulnerability comes from human embodiment because it is "universal and constant, inherent in the human condition."<sup>85</sup> Specifically, vulnerability offers an answer to the question: "*What should be the political and legal implications of the fact that we are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration?*"<sup>86</sup> Unlike equal protection law, the vulnerability framework would "not focus[] only on discrimination against defined groups, but [be] concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions."<sup>87</sup> Thus, vulnerability creates a new means of approaching societal equality in the face of discrimination by focusing on the relationship between the law and the state instead of the relationship between the law and the individual.

Accordingly, the vulnerability framework implicates a more responsive state. Fineman develops this idea through two main critiques of equal protection law that are "conceptual impediments" to the implementation of a more responsive state.<sup>88</sup> First, she critiques the model's reliance on formal equality, or the effort of the law and the courts to enforce "sameness of treatment" among all people in the U.S.<sup>89</sup> Formal equality inadequately protects against discrimination because the

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82. *See id.*

83. Fineman, *supra* note 15, at 1.

84. *See id.* at 11 (critiquing the feminist notion of dependence as an alternative to the current framework).

85. *Id.* at 1.

86. *Id.* at 12 (emphasis added).

87. *Id.* at 1.

88. *Id.* at 2.

89. *Id.*

law is limited to protecting select groups of classes—race, sex, and ethnicity—from discrimination committed by state actors, precluding discrimination inflicted by private parties.<sup>90</sup> Equal protection law also does not challenge the status quo distribution of power and resources because it “not only fails to take into account existing inequality of circumstances, it also fails to disrupt persistent forms of inequality.”<sup>91</sup> When an individual who is a member of a protected class gains what is perceived as an advantage, it is deemed by the legal system as “a justification for abandoning the pursuit of substantive equality.”<sup>92</sup>

Fineman notes that equal protection law is further limited by “over- and under-inclusive” identity categories which cannot address the discrimination of unrecognized groups.<sup>93</sup> For example, racial categories include individuals who are privileged by some aspects of their identity, while other individuals who are significantly burdened by material conditions, such as poverty, are not recognized as protected under the law even though they exist among different identities.<sup>94</sup> Fineman calls these “lack-of-opportunity categories.”<sup>95</sup>

Second, Fineman critiques the concept of the “restrained state” embedded in equal protection law, which cannot interfere with institutions or spheres of activity deemed private, like the family.<sup>96</sup> Fineman postulates that the state is less involved in maintaining equality for the sake of protecting privacy and individual self-interest.<sup>97</sup> However, the state is in the best position to be the “guarantor” of equality.<sup>98</sup> This is because both private and public institutions and entities are “creatures of the state,”<sup>99</sup> and the state is generally not inhibited by the marketplace.<sup>100</sup> The state is positioned as “the ultimate source of public authority” over maintaining equality among institutions and entities.<sup>101</sup>

Fineman’s vulnerability framework, then, combines the idea of a more active state with the vulnerable subject, as both “personal and . . . social lives are marked and shaped by vulnerability.”<sup>102</sup> Building on the

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90. *Id.* at 3.

91. *Id.*

92. *Id.* at 20.

93. *Id.* at 4.

94. *Id.*

95. *Id.*

96. *Id.* at 5.

97. *Id.* at 6.

98. *Id.*

99. *Id.*

100. *Id.* at 8.

101. *Id.* at 6.

102. *Id.* at 10.

feminist theory of interdependence,<sup>103</sup> Fineman posits, “[t]he vision of the state that would emerge in such an engagement would be both more responsive to and responsible for the vulnerable subject, a reimagining that is essential if we are to attain a more equal society than currently exists in the United States.”<sup>104</sup> The vulnerable subject replaces the liberal subject, who is the foundation of equal protection law.<sup>105</sup> The liberal subject “is a competent social actor capable of playing multiple and concurrent societal roles” and is assumed to have the ability to enter into private contract, on which individual liberty is based.<sup>106</sup> Fineman argues that this conception of the individual is based on the adult stage of life that is “the least vulnerable.”<sup>107</sup>

While the liberal subject is a vital component of the democratic state, Fineman proposes that the level of autonomy on which it is based is a myth that destabilizes the goals of equality central to American democracy.<sup>108</sup> On the other hand, the main principle of the vulnerable subject is the “ever-constant possibility of dependency,”<sup>109</sup> which cannot be concealed and varies based on a person’s position in society, personal relationships, and her relationship to institutions.<sup>110</sup> Specifically, Fineman critiques the idea that the family should be the primary site of care and interdependence, because the family is an institution that is also vulnerable (i.e., subject to harm).<sup>111</sup>

Accordingly, the vulnerable subject leads to a focus on institutions as responsible for maintaining equality because they have been created as a response to the vulnerable human condition.<sup>112</sup> Utilizing Peadar Kirby’s concept of the three assets that institutions provide—physical, human, and social—Fineman illustrates how institutions that provide assets and respond to vulnerability “are brought into legal existence only through state mechanisms,” to establish that equal provision of these assets is the state’s responsibility.<sup>113</sup> Health and education are classified as physical assets that “facilitate the accumulation of material resources that help bolster individuals’ resilience in the face of vulnerability.”<sup>114</sup> Fineman

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103. *Id.* at 11.

104. *Id.* at 2.

105. *Id.* at 10-11.

106. *Id.*

107. *Id.* at 11-12.

108. *Id.* at 19.

109. *Id.* at 9.

110. *Id.* at 10.

111. *Id.* at 11.

112. *Id.* at 13.

113. *Id.* at 13-15.

114. *Id.* at 14.

argues that this analysis forms the basis for the “vocabulary” she uses to argue for state responsibility.<sup>115</sup>

In addition, Fineman posits that because these assets create systems of advantage and disadvantage, they “combine to create effects that are more devastating or more beneficial than the weight of each separate part.”<sup>116</sup> Consequently, Fineman’s thesis does not focus on the discrimination imparted on an individual inhabiting multiple identities, but on the discrimination imparted by “systems of power and privilege that interact to produce webs of advantages and disadvantages.”<sup>117</sup> These systems are more complex than the traditional explanations of the relationship between identity and discrimination can offer, and explain why, for example, some people overcome the disadvantages conferred by race or gender when they have accumulated the necessary assets to overcome them.<sup>118</sup> Thus, in Fineman’s vulnerability framework, “institutional arrangements will be the targets of protest and political mobilization, and interest groups need not be organized around differing identities.”<sup>119</sup> But focusing on these institutions does not mean that Fineman is arguing for an authoritarian state. Rather, she argues that it is possible to conceive of and create “an active state in non-authoritarian terms” if the responsibility is clearly defined.<sup>120</sup>

Fineman’s vulnerability analysis of any state action begins with “how the state has responded to, shaped, enabled, or curtailed its institutions,” with a particular focus on whether it has conferred privileges on any one group.<sup>121</sup> Moreover, such an approach is not only applicable to instances of discrimination, as is the case with equal protection law.<sup>122</sup> If a state has conferred privileges, then “there is an affirmative obligation for it to either justify the disparate circumstances or remedy them.”<sup>123</sup> This responsibility then falls to the legislature and the executive to carry out a “mandate to be more responsive to and reflective of vulnerability.”<sup>124</sup>

While Fineman also acknowledges that any change of the current equal protection system would inevitably “require a substantial

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115. *Id.* at 15.

116. *Id.*

117. *Id.* at 16.

118. *Id.*

119. *Id.* at 17.

120. *Id.* at 19.

121. *Id.* at 20-21.

122. *Id.* at 20.

123. *Id.* at 22.

124. *Id.* at 20.

reorientation of political culture [and] adjustments to legal institutions and theory,” she also posits that such an approach is already underway in particular political battles.<sup>125</sup> In the legal movement for marriage equality, one of the main arguments put forth by its advocates is that the institution of marriage unfairly confers the privileges of the institution on one group but not another.<sup>126</sup> Thus, “[t]hose benefits are ‘assets’ in a vulnerability thesis—material and relational advantages that arose from or were conferred by the way that the institution of marriage has been structured.”<sup>127</sup>

#### V. ANALYSIS OF CALIFORNIA’S FAIR EDUCATION ACT UNDER THE VULNERABILITY FRAMEWORK

If analyzed under the vulnerability framework, it is clear that S.B. 48 lays the foundation for a law that can work toward substantive equality of LGBTQ youth but is also limited in important respects. The law promotes a more substantive vision of equality because it stands as a political precedent against efforts like Minnesota’s teacher neutrality policy,<sup>128</sup> and it espouses an active state that takes responsibility for implementing an egalitarian learning environment. Alternatively, it also embodies the “conceptual impediments”<sup>129</sup> to equal protection raised by Fineman.

S.B. 48 promotes formal equality by enumerating identity groups against whom discrimination is prohibited.<sup>130</sup> But it does not “disrupt persistent forms of inequality”<sup>131</sup> in the underlying aspects of how a social science curriculum, or instruction in general, allocates privilege. The law’s enumeration of identity groups suffers from the same limits of “over- and under-inclusive”<sup>132</sup> identity categories, which cannot address the discrimination of unrecognized groups, such as impoverished students.<sup>133</sup> On the other hand, S.B. 48 is actually quite progressive in how it positions the state as responsible for maintaining an egalitarian society in that it requires instruction materials to be fundamentally inclusive. Unlike the restrained state under equal protection, this state acts as a progenitor of equality. The law implies this role for the state as

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125. *Id.*

126. *Id.* at 22.

127. *Id.*

128. *See* Ring, *supra* note 54.

129. Fineman, *supra* note 15, at 2.

130. *See* S.B. 48, 2010-11 Leg., Reg. Sess. (Cal. 2011).

131. Fineman, *supra* note 15, at 3.

132. *Id.* at 4.

133. *See id.*



it assumes that the previous conditions created by the state have allowed, or are in part responsible for, discriminatory or harassing behavior of the enumerated groups.

Yet an overt criticism of the status quo curricula and the “webs of advantages and disadvantages”<sup>134</sup> that the state confers are absent. We can presume that these are groups that have been historically oppressed in a society that privileges white, heterosexual male identity, particularly in status quo social science curricula. But despite the inclusion of these groups, if the status quo identity is continuously privileged, there will not be equality of outcome for them. While some may view the articulation of privilege that is the basis for the law as an unnecessary, or even a politically contentious act, its absence deprives the law of its full force in addressing why advantages have been conferred on one group and not another, thereby failing to address the underlying cause of the discrimination.

The most substantial shortcoming of S.B. 48, in its potential to attain substantive equality for LGBTQ youth, is its failure to place Fineman’s vulnerable subject at its center, to reflect the “ever-constant possibility of dependency.”<sup>135</sup> The liberal subject is at the center of S.B. 48, one who is competent and able to understand and grasp the import of the inclusion and the prohibition on discrimination.<sup>136</sup> The law implicates students, teachers, and school governing boards—three very different groups treated as equally capable.<sup>137</sup> Students are assumed to be impressionable enough to learn inclusion through social science class, despite any privileging of heterosexuality. Teachers are assumed to implement the law in a supportive way, and governing boards are assumed to be unrestrained by lack of resources.

The vulnerable subject can also function in this instance to take the responsibility off of the family as the site of responsibility for human vulnerability, because the family is also vulnerable.<sup>138</sup> The example of Seth Walsh illustrates that despite their best efforts, the family may not have the means to fully protect its members from pervasive societal discrimination.<sup>139</sup> While S.B. 48 does implicate a more active state, it fails to disrupt the institutional status quo in this regard. The curricula is credited with the sole power to change the root causes of discrimination

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134. *Id.* at 16.

135. *Id.* at 9.

136. *See id.* at 10.

137. *See* S.B. 48, 2010-11 Leg., Reg. Sess. (Cal. 2011) (Westlaw).

138. *See* Fineman, *supra* note 15, at 11.

139. Alexander, *supra* note 3.

in education. While LGBTQ students may better identify with a more inclusive curriculum, and exposure of other students to the LGBTQ identity will help to normalize it, there is no mandate that instruction include lessons on *why* the groups have been historically and systematically excluded. Mere inclusion leaves open the possibility that teachers will frame lessons in a manner that mutes the very societal problems the law seeks to address.

It is clear that the state legislature of California does not believe that altering the subject matter of social science is enough to prevent bullying, because it also passed A.B. 1156 and Seth's Law to address harassment directly. However, S.B. 48 can more directly connect education law to bullying prevention in its plain language. For one, the central role that social sciences curricula plays in this law makes it the nexus of equality, while there are many other subjects that can, and should, be amended to ensure substantive equality, such as physical education and the arts. While California may amend other sections of the Education Code in the future, adding a definitive antibullying provision in this law will assist these changes by making the law's overall purpose more explicit.

## VI. RECOMMENDATIONS

Under Fineman's vulnerability framework, gaining substantive equality for LGBTQ youth would ideally "require a substantial reorientation of political culture [and] adjustments to legal institutions and theory."<sup>140</sup> While such massive reordering is beyond the scope of this Comment, suggestions as to how laws like California's S.B. 48 can be written to articulate the privilege embedded in the institutions that create inequality are not. Just as the legal movement for marriage equality frames its demands in terms of gaining privileges granted by an institution,<sup>141</sup> S.B. 48 can be drafted under the present legal framework to work more directly toward substantive equality for LGBTQ youth by uprooting the unfair provision of privilege in educational curricula. The following are concrete recommendations.

(1) The law should include a provision that indicates a direct link to California's other antibullying initiatives.

Like the preamble in A.B. 1156,<sup>142</sup> S.B. 48 should include a provision stating its objective to be regarded as an antibullying measure. This will make a difference not only in how school districts and

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140. Fineman, *supra* note 15, at 20.

141. *Id.* at 22.

142. A.B. 1156, 2011-12 Leg., Reg. Sess. (Cal. 2011).

instructors interpret their responsibilities, but also in how courts interpret the law if and when they hear cases on noncompliance with the law or challenges to the law's validity. The provision should be structured in a way that states the reason these groups need to be included at all, whether it be presented in flush language or in the body of the law.

(2) Reorient the frame from one that prohibits discrimination of particular groups to one that prohibits the assignment of privilege to any one group.

In order to address the status quo of identity privilege that underlies social science curricula, the most radical suggestion would be to redraft the law so that the prohibition of privilege, not discrimination, is at issue. This would mean that instead of enumerating groups who have been historically left out of social sciences curricula, the law would state that no one identity group can be privileged over another. The following text is a suggestion of what the foundation of a potential law could include:

- (1) This law recognizes that the privileging of a particular identity has resulted in the unfair assignment of advantage, which has resulted in discrimination and disadvantage of those groups who are not afforded privilege.
- (2) No one race or ethnicity, no one gender, no one kind of singular identity shall be privileged over another in social science instruction materials. This law does not endorse a neutral standard that does not acknowledge the diversity of identities in social sciences and history, but mandates that no one identity should be presented as preferable to another.

This recommendation would advance an important counter to the alleged "accurate historical portrayals" of all individuals<sup>143</sup> that the proponents of the CLASS Act hoped would replace S.B. 48. Instead, this provision makes explicit to all citizens the values that public education espouses in order to maintain an egalitarian society.

(3) Explain why social science curriculum is the focus of the law.

Regardless of whether the law is completely reoriented in terms of privilege, it must define why the focus is on social sciences curricula. The law relies on research and statistics reporting that bullying rates are lower in environments that speak openly about LGBTQ people,<sup>144</sup> but gives little explanation as to why this is so. This avoids the law's potential to operate as a vehicle for actual change, rather than stand as a symbol of intention. It also avoids the scenario in which legislators can satisfy constituent demands that they address the bullying epidemic in

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143. *What Is the Class Act?*, *supra* note 81.

144. *FAIR Education Act (SB 48) Fact Sheet*, *supra* note 67.

demonstrating their show of support by voting for the bill, while little can actually be accomplished through the law.

(4) The text of S.B. 48 should more clearly define what it means to “promote a discriminatory bias,” or to “reflect adversely.”

If the frame of the law is not reoriented to focus on privilege, these definitions are vital. Without them, teachers on the ground can circumvent their mandate. While they cannot overtly teach that it is better or preferable to be heterosexual, they can teach the materials in a way that subverts an LGBTQ identity and presents it as culturally undesirable to be an LGBTQ person. For example, a teacher could emphasize the isolation and discrimination faced by a group in such a way that students perceive it to be an unsustainable identity to embrace. While students may also identify with such disadvantage, it is this kind of disfavor present in the heterosexist classroom that the law is meant to bar. It is no different than culturally privileging wealth, rather than exploring why poverty occurs so that students can better understand its disadvantages. Without this change, the law will operate to reinforce the status quo bias it was meant to prevent.

But a clear articulation of what it means to “promote a discriminatory bias,”<sup>145</sup> or to “reflect adversely,”<sup>146</sup> can prevent this reinforcement. While lawmakers may have chosen the right *kinds* of words, they need to give more direction on *how* to apply them. This will ensure that the law does not merely function as a placement of limits in the classroom, but actually incites cultural changes that curb bullying and the harassment of historically oppressed groups. Accordingly, the law should include either a mandate that teachers promote an environment in which no one identity is privileged, or a modification of the phrase “reflect adversely” to include the privileging of any identity. If coupled with the provision that prohibits the promotion of discriminatory bias, either change can more readily ensure that teachers frame the material in a way that commands respect for all groups, not merely the inclusion of disadvantaged groups.

(5) The law must include lessons on inclusion in order to truly be egalitarian.

The law cannot merely include the representation of groups without an account of why the inclusion, or change from the status quo, is necessary. Some teachers would presumably teach the reason for the inclusion without the mandate, but the lack of such a mandate leaves open the possibility that teachers can circumvent an egalitarian

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145. S.B. 48, 2010-11 Leg., Reg. Sess. (Cal. 2011) (Westlaw).

146. *Id.*

presentation of the groups. While S.B. 48 implicates a liberal subject, it also puts focus on the institution and its role in maintaining an egalitarian state. The law must be inclusive in the actual substance of social science curricula to facilitate true equality. It is otherwise disingenuous for the law to mandate the mention of groups without substantively including their history in the context of a system of advantages and disadvantages. The very subject of social science commands this inclusion.

## VII. CONCLUSION

California has responded to the plight of children like Seth Walsh, but it can do more. Any of the amendments proposed in this Comment can push California closer to providing equality of outcome for LGBTQ youth who are directly victimized by their peers and indirectly victimized by discrimination deeply ingrained in the institutions that shape them. This Comment does not suggest that the amendments would be easy to implement or welcomed by all, particularly in light of recent political backlash. But what is at stake is the development and survival of a generation of young people; for even as bullies are harassers, they too deserve an education that teaches them how to treat people with respect and dignity.

It is also true that without a radical restructuring of the political framework, the law has the potential to reinscribe inequality along the lines of identity. These critiques and amendments provide the potential to expose this weakness of the current political framework more explicitly. They lead legislators and the courts to see the limits that the equal protection framework faces in attaining true social equality more clearly. They offer a better reality for children like Seth Walsh—not after, but during their childhood.