

What First Amendment?

Alabama State Rep. Gerald Allen is no lawyer. But he must know that his proposed ban on pro-gay books is unconstitutional

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Alabamians had best stock up on copies of classic literature, including *The Picture of Dorian Gray*, *Leaves of Grass* and *The Color Purple*. If State Rep. Gerald Allen has his way, the books will no longer be available in Alabama libraries.

The Republican legislator from Cottondale has proposed a prohibition on the use of state resources for the "purchase of textbooks or library materials that recognize or promote homosexuality as an acceptable lifestyle."

And Allen isn't alone in his desire to ban literature. The American Library Association tracked more than 6,000 book bannings from 1999-2000, many of them based on sexual orientation content.

Allen claims that he wants to "protect" Alabama children from the "homosexual agenda" and believes that "our culture, how we know it today, is under attack from every angle." Clearly, his bill intends to suppress ideas contained in materials that are perceived to promote homosexuality.

But like so many attempts to ban literature, Allen's anti-gay bill comes with both practical and legal problems. How exactly would the State of Alabama define what constitutes promotion of homosexuality? Who would be empowered to make those determinations?

As Juanita Owens, the director of the Montgomery City-County Library, told the *Birmingham News*, "Half the books in the library could end up being banned. It's all based on how one interprets the material."

A broad interpretation of Allen's proposed law might ban *The Complete Works of William Shakespeare* for the Bard's slapstick treatment of cross-dressing.

Practical matters aside, Allen is certainly aware that his proposed statute violates a core tenet of the First Amendment — it's commonplace knowledge that the government is prohibited from stifling speech because of its message, idea or subject matter. [See *R.A.V. v. City of St. Paul*, 505 u.s. 377, 386 (1992)]

And Allen's bill represents the most egregious form of content-based regulation because it is viewpoint-discriminatory. [See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 u.s. 819, 829 (1995) (explaining that "[v]iewpoint discrimination is ... an egregious form of content discrimination").]

The bill would prohibit only those materials that promote homosexuality, leaving books that cast homosexuality in a negative light unscathed and on Alabama bookshelves.

The legislator would be wise to take a First Amendment lesson from his fellow politicians at the

city council in Wichita Falls, Tex. After a long campaign by special-interest groups, the council passed a resolution giving 300 library-card holders who had signed an anti-gay petition the authority to censor two books, *Heather Has Two Mommies* and *Daddy's Roommate*.

Within days of the resolution's passage, the two picture books, which profile families with gay parents, were moved from the youth section of the public library and placed in the adult section.

Library patrons, individually and on behalf of their children, filed suit to enjoin the resolution as a violation of their First Amendment rights. The district court agreed, finding that "[t]he resolution and the book removals burdened fully-protected speech on the basis of content and viewpoint" in violation of the First Amendment. [*Sund v. City of Wichita Falls, Texas*, 121 F. Supp.2d 530, 547 (n.d. Tex. 2000).]

The law requires that debates on public issues, like homosexuality, must be "uninhibited, robust and wide-open." [*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).] And this means folks like Rep. Allen can't fight the so-called "homosexual agenda" by legislating state-sanctioned censorship that drives "positive" gay and lesbian viewpoints from the marketplace of ideas.

Allen's blatantly unconstitutional proposal may earn him political capital from his anti-gay allies, but it is Alabama citizens who ultimately will pay the hefty legal bills their state will certainly incur if Allen's grandstanding becomes law.