NO PROMO HETERO: CHILDREN'S RIGHT TO BE QUEER

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This Article argues that the state has no legitimate interest in promoting heterosexuality or gender conformity during childhood. Although opponents of LGBT rights have longed cited this goal as one of the primary justifications for discrimination against LGBT people, it has no constitutional foundation upon which to stand.

Building upon a schema familiar to legal scholarship on LGBT rights, this Article challenges the state's interest in promoting heterosexuality in childhood by articulating a tripartite defense of children's homosexual speech, status, and conduct. It argues that these three aspects of children's homosexuality are connected to and protected by the Constitution's free speech, equal protection, and due process guarantees.

When the state attempts to justify policy by claiming that promoting heterosexuality in childhood is a legitimate state interest, it violates at least one if not all of these guarantees. When the policy targets children's homosexual speech, it is a form of viewpoint discrimination that violates the free speech protections of the First and Fourteenth Amendments. When the policy targets children's homosexual status, it is a form of animus against lesbian, gay, and bisexual people that violates the equal protection guarantees of the Fifth and Fourteenth Amendments. When the policy targets children's homosexual relationships, it is a form of moral disapproval of homosexual conduct that violates the due process protections of the Fifth and Fourteenth Amendments. Taken together, these constitutional guarantees require the state to maintain a neutral stance with respect to the sexual orientation of children's speech, status, and

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conduct. In doing so, they guarantee every child's equal liberty to be straight or queer.

After developing a similar critique of the state's interest in promoting gender conformity during childhood, this Article concludes by exploring the theoretical advantages, limitations, and implications of this constitutional framework. Drawing on one of queer theory's foundational texts, it argues that the paradigm of No Promo Hetero is more universal than traditional identity claims, yet more liberal than traditional diversity claims. By proceeding from premises that are both liberal and queer, this Article makes a case for the liberation of all children's queerness—as viewpoint, identity, and behavior—within existing paradigms of constitutional law.

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> *In our democracy . . . it is not the province of the State, even if it were* able *to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities. This approach views homosexuality in and of itself as a social harm that must be discouraged, . . . something that* Lawrence *specifically proscribes.*
>
> Judge Rosemary Barkett[1]

INTRODUCTION

This Article challenges one of the oldest axioms of discrimination against lesbian, gay, bisexual, and transgender (LGBT) people—the premise that the state has a legitimate interest in promoting heteronormativity during childhood. It argues that the state may not pursue this policy in childhood for the same reasons that it may not pursue this policy in adulthood: The state's promotion of heteronormativity is foreclosed by the Constitution's guarantees of free speech, equal protection, and due process. These doctrines require the state to remain neutral regarding the trajectory of children's sexual and gender development. Simply put, the state has no legitimate interest in encouraging children to be straight or in discouraging them from being queer.

Put differently, this Article argues that every child has a constitutional right to be queer. Like all children's rights—indeed, like

[1] Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc) (citing Lawrence v. Texas, 539 U.S. 558, 575, 578 (2003)).

all constitutional rights—a child's right to be queer is not absolute. It must be balanced against a parent's right to direct the care, custody, and control of her child and the state's interest in protecting all children's welfare. But within these parameters, every child has a right to an open future in sexual and gender development—an equal liberty to be straight or queer.[2]

For a very long time, our legal system has presumed otherwise. In a wide range of settings, officials have justified discrimination against LGBT people by invoking what might be called "the fear of the queer child"[3]—the premise that the state has a legitimate interest in promoting heteronormativity and discouraging queerness during childhood. The simplest version of this fear is that "exposure to homosexuality would turn children into homosexuals,"[4] but the idea is considerably more capacious, flexible, and nuanced than this flat-footed statement suggests. In the broadest sense, it includes the fears that exposing children to homosexuality and gender variance will make them more likely to develop homosexual desires, engage in homosexual acts, form homosexual relationships, identify as lesbian, gay, bisexual, or transgender, or deviate from traditional gender roles.

Notwithstanding the LGBT movement's remarkable progress in recent years, examples of this fear are not far to seek. In 2004, the Eleventh Circuit held that a Florida law prohibiting any "homosexual" from adopting children was justified by the State's interest "in shaping sexual and gender identity and in providing heterosexual role modeling."[5] In 2006, the New York Court of Appeals held that a law prohibiting same-sex couples from marrying was justified by the notion that "a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[6] Although courts are rarely willing to specify the "benefits" that heterosexual parents bestow, phrases like "role modeling" and "living models" are hardly ambiguous: By definition, a "model" is "an example for imitation or emulation," and a "role model" is "a person whose behavior in a

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2 *See* Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD?: CHILDREN'S RIGHTS, PARENTAL AUTHORITY AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980); Orly Rachmilovitz, *Masters of Their Own Destiny: Children's Identities, Parents' Assimilation Demands and State Intervention* 29, 51 (Boston Univ. Sch. of Law Pub. Law & Legal Theory Paper No. 13-35, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308988 (forthcoming 98 MINN. L. REV.).

3 Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013).

4 *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), *aff'd sub nom.*, Brown v. Perry, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

5 *Lofton*, 358 F.3d at 818.

6 Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

particular role is imitated by others."[7]

In popular and political debates over LGBT rights, more strident versions of these fears are still commonplace. In 2008, the sponsors of Proposition 8, a ballot initiative to prohibit same-sex couples from marrying in California, aired a television commercial in which a young girl told her mother: "Mom, guess what I learned in school today? . . . I learned how a *prince* married a *prince*, and *I* can marry a *princess*!"[8] In 2010, the Traditional Values Coalition warned Americans that if Congress passes the Employment Non-Discrimination Act—a bill that prohibits employment discrimination based on sexual orientation and gender identity—"every homosexual, bisexual, and transgender teacher will have free reign to indoctrinate our children into accepting these 'alternative lifestyles' as normal and good."[9] In 2012, the American Family Association objected that an anti-bullying program known as "Mix It Up at Lunch Day," which encourages students "to hang out with someone they normally might not speak to," was actually "a nationwide push to promote the homosexual lifestyle in public schools."[10]

Since the earliest days of the LGBT movement, advocates have responded to these fears by attempting to debunk them—by insisting that they are based on nothing more than myths and misunderstandings.[11] In one case after another, advocates have observed that the role modeling theory cannot be true, because "the vast majority of lesbian and gay adults were raised by heterosexual parents" and "the vast majority of children raised by lesbian and gay parents grow up to be heterosexual."[12] Above all, they have argued that children cannot be

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7 *Model Definition*, MERRIAM WEBSTER ONLINE, http://merriam-webster.com/dictionary/model (last visited Nov. 15, 2013); *Role Model Definition*, MERRIAM WEBSTER ONLINE, http://merriam-webster.com/dictionary/role+model (last visited Nov. 15, 2013).

8 *Yes On 8: It's Already Happened* (ProtectMarriage.com television advertisement 2008), *available at* http://www.youtube.com/watch?v=0PgjcgqFYP4; *Perry*, 704 F. Supp. 2d at 1003; Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 381 (2009).

9 *The Issues*, TRADITIONAL VALUES COALITION, http://web.archive.org/web/20100313120658/http://www.endahurtskids.com/issues (accessed through the Internet Archive index, as captured on Mar. 13, 2010).

10 Kim Severson, *Seeing a Gay Agenda, a Christian Group Protests an Anti-Bullying Program*, N.Y. TIMES, Oct. 15, 2012, at A15 (internal quotation marks omitted).

11 For a more detailed exploration of the LGBT movement's responses to indoctrination, role modeling, and public approval fears, see Rosky, *supra* note 3, at 665–84.

12 Brief of the American Psychological Ass'n et al. as Amici Curiae in Support of Plaintiff-Appellees and in Support of Affirmance at 20–21, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214). This claim has been included in numerous amicus briefs filed in support of challenges to laws prohibiting same-sex marriage and adoption by same-sex couples, and it has long been a staple of legal scholarship on lesbian and gay parenting. *See, e.g.*, *id.*; Brief of Amicus Curiae American Psychological Ass'n in Support of Plaintiffs-Appellees at 2–23, Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006) (No. 05-2604); Brief of Amici Curiae Am. Psychological Association et al. in Support of Plaintiffs-Appellees at 13, Dep't Human Servs. v. Howard, 238 S.W.3d 1 (Ark. 2006)

influenced through mechanisms such as indoctrination, role modeling, and public approval because an individual's sexual orientation and gender identity are fixed early in life and cannot be learned, taught, chosen, or changed.[13]

Without gainsaying the validity of these empirical claims, this Article develops a new line of constitutional attacks against the state's fear of queerness in childhood. Rather than assailing the factual premise that the state has the ability to influence children's sexual and gender development, it challenges the legal premise that the state has any justification for doing so. Based on principles of constitutional law that are commonly invoked to protect LGBT adults, it argues that the state may not promote heteronormativity among children, for the same reasons that it may not pursue this goal among individuals of any age. Properly construed, the First, Fifth, and Fourteenth Amendments oblige the state to be neutral regarding the trajectory of any individual's sexual or gender development. In short, whether children are straight or queer is none of the government's business.

Because the promotion of heteronormativity in childhood has long served as one of the primary justifications for discrimination against LGBT people, the practical implications of this argument are numerous. For several decades, opponents of LGBT rights have successfully invoked fears of children being influenced by indoctrination, role modeling, and public approval to justify a broad range of policies that discriminate against LGBT people—laws that deal not only with child welfare issues like marriage, parenting, and education, but even seemingly unrelated subjects like sodomy, employment, and housing.[14] If the promotion of heteronormativity is not even a *legitimate* state interest, then policies governing all of these subjects are vulnerable to constitutional attack.

(No. 05-814); Brief of American Psychological Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellants at 12, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (No. 17716); Brief of American Psychological Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellees at 36-38, Conaway v. Deane, 932 A.2d 571 (Md. 2007) (No. 44); Brief of American Psychological Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellants at 44–47, Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Amicus Curiae Brief of American Psychological Ass'n at 40-44, Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (No. 75934-1); Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 287; Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 160 (2001).

13 *See, e.g.*, Brief for Appellees at 63, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2010) (No. 10-16696) ("[T]he vast majority of gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual's sexual orientation have not been shown to be effective and instead pose a risk of harm to the individual." (internal quotation marks omitted)). For a withering critique of such arguments, see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

14 *See* Rosky, *supra* note 3, at 635–64.

Although the argument's scope is broad, the argument's burden turns out to be surprisingly modest. When the state's promotion of heteronormativity is subjected to constitutional review, it turns out be an exceptionally weak justification for discrimination against LGBT people. In almost every instance, opponents of LGBT rights have presented this objective as a free-standing justification for discriminatory policies: The state must do X because it will encourage children to be straight; the state must not do Y, because it would encourage children to be queer.[15] Today, this type of empirical prediction begs a line of legal questions that seem increasingly obvious: So what if it's true?[16] So what if a governmental policy makes children less likely to be straight or more likely to be queer? For the government's purposes—or indeed, for anyone's—what's wrong with children being or becoming queer?

As these questions suggest, the state's interest in promoting heteronormativity depends on the premise that straightness is better than queerness. But once this premise is taken for granted, it renders circular any justification that relies upon it: In effect, the argument invokes one premise to support another, but it fails to explain why or how either of these premises could be justified. If the promotion of heteronormativity in children is a legitimate state interest, then it must be justified on independent grounds—as a means to an end, not an end in itself.

The Article has six parts. Part I introduces a provisional framework for distinguishing among policies that target children's homosexuality as a form of speech, status, and conduct. It argues that each of these aspects of children's homosexuality is protected by at least one of three constitutional guarantees. When a policy targets children's homosexual speech, it is a form of viewpoint discrimination that violates the free speech protections of the First and Fourteenth Amendments.[17] When a policy targets children's homosexual status, it is a form of animus against lesbian, gay, and bisexual people that violates the equal

15 *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327, 1329 (2000).

16 *See* LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 63 (1994) ("It seems society is not yet ready for a more deeply challenging response to the question of whether the kids of homosexuals will grow up to be gay—namely, so what if they do?"); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 863 (2002) ("[N]either gay adults nor gay children will have achieved equality with their straight counterparts until the ultimate orientation of wavering children is a matter of state and social indifference.").

17 U.S. CONST. amend. I; *id.* amend. XIV, § 1. The Free Speech Clause applies to state governments, as well as the federal government, by virtue of "incorporation" into the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652 (1925).

protection guarantees of the Fifth and Fourteenth Amendments.[18] When a policy targets children's homosexual relationships, it is a form of moral disapproval of homosexual conduct that violates the substantive due process protections of the Fifth and Fourteenth Amendments.[19] Taken together, these guarantees demonstrate that the state has no legitimate interest in promoting heterosexuality among children—and conversely, that every child has a constitutional right to be queer.

Parts II through VI develop the content and the scope of this principle of constitutional law, while addressing a handful of objections, challenges, and particulars. Part II addresses a few minor stumbling blocks to constitutional claims based on children's homosexual status and conduct—the limiting language in *Romer v. Evans*,[20] *Lawrence v. Texas*,[21] and *United States v. Windsor*,[22] the Supreme Court's leading opinions on the rights of lesbian and gay people under the Fifth and Fourteenth Amendments. This Part argues that although these rulings contain language that judges have invoked to limit their scope, none of this limiting language is relevant to the question at hand. As the Court explained in *Romer*, laws that discriminate against a group based on animus offend a principle of constitutional law that is "conventional and venerable"—"a law must bear a rational relationship to a legitimate governmental purpose."[23] Even under a modest reading of *Romer*, *Lawrence*, and *Windsor*, the promotion of heterosexuality in children does not rank as a "legitimate" state interest. As a result, any law justified on this ground fails even the lowest standard of judicial review.

Part III confronts a more significant hurdle to constitutional claims based on children's homosexual conduct—the vexing question of how children could have a liberty to engage in *homo*sexual conduct, if they may not have a liberty to engage in *sexual* conduct of any kind. If one presumes that the state may discourage children from having any and all sexual relations, does that imply that the state may specifically discourage children from having homosexual relations? In this instance, does the state's broad authority to regulate all of children's sexual conduct encompass a more specific power to regulate only children's homosexual conduct? This Part considers three ways of resolving this

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18 U.S. CONST. amend. V; *id.* amend. XIV, § 1. The Equal Protection Clause applies to the federal government, as well as state governments, by virtue of "reverse incorporation" into the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

19 U.S. CONST. amend. V; *id.* amend. XIV, § 1. The Supreme Court has not distinguished between the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013).

20 517 U.S. 620 (1996).

21 539 U.S. 558 (2003).

22 133 S. Ct. 2675 (2013).

23 *Romer*, 517 U.S. at 635.

dilemma—by defending children's homosexual conduct as a form of speech, as a proxy for status, or as an instance of conduct itself. It argues that all of these claims are supported by the governing case law and should be advanced by LGBT litigators, scholars, and activists alongside each other. Even if children do not have a broad liberty to engage in sexual conduct, they still have an *equal* liberty to choose between homosexual or heterosexual conduct.

Stepping outside of this analytical framework, Part IV considers whether the state's promotion of heterosexuality in childhood can be justified on independent grounds—as a rational means of pursuing another objective, rather than as an end in itself. After briefly reviewing a few justifications that schools have advanced in First Amendment cases, this Part argues that the promotion of heterosexuality in childhood is not rationally related to the state's interests in public health, responsible procreation, or responsible parenting. On the contrary, the government has a more compelling interest in promoting *homosexuality* in childhood, to protect children from the risks of teenage pregnancy and parenthood.

Although this Article deals at more length with the state's promotion of heterosexuality, Part V turns to the state's interest in promoting gender conformity. As a matter of law or logic, there is no reason to think that this interest would fare any better under the doctrines laid out in Parts I through IV. If anything, the illegitimacy of this interest should be even clearer, because the Supreme Court has long held that state action may not be justified by reference to sex stereotypes.[24] To date, however, courts have been slow to apply these well-settled principles to discrimination against gender-variant plaintiffs—including gender-variant children—and the case law in this area is less developed. Drawing on Paisley Currah's work, this Part examines how the courts have favored children who present gender as the assertion of an "identity," rather than as the expression of a "viewpoint," or a type of behavior.[25] More recently, however, children have been able to successfully present gender as both identity and viewpoint, challenging the primacy of "gender identity" in this emerging body of constitutional law.

Part VI theorizes this Article's constitutional claims under the banner of "No Promo Hetero," a phrase borrowed from Lisa Duggan's

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24 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 516 (1996) ("The justification . . . . must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."); Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) ("A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.").

25 Paisley Currah, *Gender Pluralisms Under the Gender Umbrella*, *in* TRANSGENDER RIGHTS 3, 19 (Paisley Currah et al. eds., 2006).

trailblazing essay *Queering the State*.[26] This Part claims two advantages for the principle of No Promo Hetero—universalism and liberalism. On the one hand, No Promo Hetero is more universal than traditional identity claims, because it is not premised on the immutability of any child's sexuality or gender. Rather than claiming that the state has no ability to shape children's sexual or gender development, it insists that this question is irrelevant, because the state has no legitimate reason for doing so. On the other hand, No Promo Hetero is more liberal than many traditional diversity claims, because it does not call upon the state to endorse or applaud children's queerness, and it does not directly regulate the speech or conduct of private actors. Instead of insisting that there is nothing wrong with children's queerness, it maintains only that the rightness or wrongness of queerness is a moral and religious matter, which the state lacks the authority to resolve. By attacking only the *state*'s promotion of heteronormativity, the Article makes a comprehensive case for the liberation of all children's queerness within the prevailing parameters of constitutional law.

I. CHILDREN'S HOMOSEXUALITY AS CONSTITUTIONAL RIGHT

Discrimination against lesbian, gay, and bisexual people is sprawling; it is manifest in a wide variety of institutions, practices, doctrines, and discourses. At one time or another, the state's interest in promoting heterosexuality among children has been invoked to justify most, if not all, policies that discriminate in this manner. In order to analyze the legitimacy of this interest, it is useful to begin with a conceptual framework of the policies that it has been invoked to defend.

Building upon a schema familiar to legal scholarship on LGBT rights, this Part analyzes the state's interest in promoting heterosexuality in childhood—and conversely, children's right to homosexual development—in terms of speech, status, and conduct. It argues that these three aspects of homosexuality are connected to and protected by the Constitution's free speech, equal protection, and due process guarantees. When the state claims that promoting heterosexuality in childhood is a legitimate state interest, it violates at least one if not all of these guarantees.

A. *The Constitution of Homosexuality*

In legal scholarship on lesbian and gay rights, scholars have distinguished among policies that target homosexuality as a form of

26 Lisa Duggan, *Queering the State*, 39 SOC. TEXT 1, 8–9 (1994).

speech, status, and conduct.[27] Speech-based policies target people for *expressing* homosexual feelings, thoughts, or ideas—e.g., for identifying as lesbian, gay, or bisexual or supporting lesbian, gay, and bisexual rights.[28] Status-based policies target people for *being* homosexual, often without defining what it means to "be" homosexual.[29] Conduct-based policies target people for *engaging* in homosexual behavior—e.g., for hugging, kissing, or engaging in more overtly sexual behavior with a same-sex partner.[30]

In law and in life, the boundaries between speech, status, and conduct do not always exist—and when they do, they are often easily blurred. To take one of many examples: When a man identifies himself as "gay," his announcement may be intended or interpreted as a declaration of status, an expression of desire, an acknowledgment of conduct, or any combination thereof.[31] In light of these conceptual overlaps, it is easy to see that anti-homosexual policies may target lesbian, gay, and bisexual people in more ways than one, and thus, such policies may be subject to challenge on more than one ground.[32]

It is vital to remember, however, that the overlaps among these concepts are not complete, so each claim remains independently valid

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27 *See, e.g.*, Nan. D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1719 (1993) [hereinafter Hunter, *Identity*] ("[H]omosexuality is not merely, or either, status or conduct. It is also, independently, an idea."); *see also* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1617–41 (1993) (analyzing distinction between status and conduct); David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994) (analyzing distinction between speech and conduct); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993) (analyzing distinction between status and conduct); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000) (analyzing distinction between speech and status).

28 *See, e.g.*, Nat'l Gay Task Force v. Bd. of Ed. of Okla. City, 729 F.2d 1270, 1272 (10th Cir. 1984) (describing Oklahoma statute that prohibited teachers from engaging in "[p]ublic homosexual conduct," which it defined as "*advocating* . . . *encouraging* or *promoting* public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" (emphasis added) (internal quotation marks omitted)).

29 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 624 (1996) (describing amendment to Colorado Constitution that prohibited state and municipal authorities from granting "[p]rotected [s]tatus" based on "homosexual, lesbian or bisexual *orientation*," in addition to "homosexual, lesbian or bisexual . . . conduct, practices or relationships" (emphasis added) (internal quotation marks omitted)).

30 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 563 (2003) (describing Texas statute that prohibited individuals from engaging in "deviate sexual intercourse with another individual of the same sex" (internal quotation marks omitted)).

31 *See* JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY ANTI-GAY POLICY 55 (1999) (arguing that under the military's Don't Ask, Don't Tell policy, "a servicemember's statement, 'I am gay' . . . involves status *and* conduct").

32 *See* Cain, *supra* note 27, at 1617–41 (arguing that LGBT litigators should pursue constitutional claims based on status and conduct, rather than attempting to "bifurcate" the two concepts from one another).

and valuable. When a policy targets homosexual conduct, for example, it targets more than just lesbian, gay, and bisexual people; in addition, it targets anyone who engages in homosexual conduct *without* identifying as lesbian, gay, or even bisexual. For this reason and others,[33] it is useful to distinguish among anti-homosexual policies based on speech, status, and conduct, and to understand why the government has no legitimate interest in discouraging homosexuality in any of these forms.

The sections that follow develop the argument that depending on how the government's interest is formulated—as an attempt to target children's speech, status, or conduct—these policies will necessarily violate the Constitution's free speech, equal protection, or due process guarantees. Section B considers the government's interest in suppressing children's homosexual speech; Section C, children's homosexual status; and Section D, children's homosexual conduct.

In the course of this analysis, it becomes evident that each of these constitutional guarantees embodies a kind of baseline prohibition against the use of circular reasoning in constitutional law. Unsurprisingly, our Constitution forbids the government from restricting an individual's or a group's constitutional rights based on nothing more than discomfort, animus, or disapproval—even if these objections are voiced by the public at large, rather than the government itself. Under any standard of review, the government must provide independent justifications for restricting individual rights, rather than positing the denial of liberty or equality as a goal in itself.

B. *Free Speech*

Does the First Amendment allow the state to specifically target children's homosexual speech—to discourage children from expressing pro-gay opinions or same-sex sexual desires?

More than anywhere else, the state's authority to influence children's sexual and gender development has been delimited in cases applying the First Amendment in public schools. In the turmoil of the late 1960s and early 1970s, the Supreme Court decided a series of cases establishing that the First Amendment protects the speech rights of public school students, even when students were engaged in the advocacy of illegal conduct. First, in *Tinker v. Des Moines Independent Community School District*, the Court held that a school could not restrict a student's speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular

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[33] In addition, speech and conduct claims are less essentializing than status claims, because they do not depend on the premise that sexual orientation is immutable or fundamental to an individual's personhood. *See infra* Part VI.B.

viewpoint"; instead, the school was required to show that the student's speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[34] Next, in *Brandenburg v. Ohio*, the Court held that the government cannot prohibit individuals from engaging in "advocacy" of illegal conduct, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[35] Finally, in *Healy v. James*, the Court held that a state college could not restrict a group's speech and association rights "simply because it finds the views expressed by [the] group to be abhorrent."[36]

Shortly after *Healy* was decided, gay students across the country began organizing groups and seeking official recognition on college campuses.[37] When schools denied these requests, officials often claimed that the recognition of a gay student group would foster the spread of homosexuality on campus. In the first of these cases, *Gay Students Organization of the University of New Hampshire v. Bonner*, the University had initially agreed to recognize the Gay Students Organization (GSO), granting them the same privileges as other student groups.[38] But after the GSO sponsored a dance, the Governor objected, and the school barred the group from sponsoring any further "social functions" on campus.[39] When the students sued, the school argued that it had an "obligation and right to prevent activities which the people of New Hampshire find shocking and offensive"[40] and an interest "in preventing illegal activity, which may include 'deviate' sex acts, 'lascivious carriage,' and breach of the peace."[41]

The University's claims were rejected by the district court and again by a three-judge panel of the First Circuit. Applying *Healy*, the district court held that the school could not curtail the GSO's speech simply because it considered the group's message to be "abhorrent."[42] Applying *Tinker* and *Brandenburg*, the First Circuit added that "there ha[d] been no allegation that any . . . illegal acts took place at the GSO social events," and the school's policy could not be justified by "[m]ere 'undifferentiated fear or apprehension' of illegal conduct."[43]

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34 393 U.S. 503, 509 (1969) (internal quotations marks omitted).

35 395 U.S. 444, 447 (1969) (per curiam).

36 408 U.S. 169, 187–88 (1972).

37 Cain, *supra* note 27, at 1608–10; Hunter, *Identity*, *supra* note 27, at 1702.

38 509 F.2d 652, 654 (1st Cir. 1974).

39 *Id.*

40 *Id.* at 661.

41 *Id.* at 662.

42 Gay Students Org. of Univ. of N.H. v. Bonner, 367 F. Supp. 1088, 1102 (D.N.H. 1974), *aff'd as modified*, 509 F.2d 652 (1st Cir. 1974) (quoting Healy v. James, 408 U.S. 169, 187 (1972)).

43 *Gay Students*, 509 F.2d at 662 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

In a subsequent case, *Gay Lib v. University of Missouri*, the state's interest in discouraging homosexuality was more explicitly raised and rejected.[44] In 1971, a group known as Gay Lib applied for formal recognition as a student organization at the University of Missouri.[45] In the group's statement of purposes, the students expressed the intentions to "provide a dialogue between the homosexual and heterosexual members of the university community," "dispel the lack of information and develop an understanding of the homosexual," and "alleviate the unnecessary burden of shame felt by the local homosexual population."[46] Anticipating the University's objections, the group added the disclaimers that "Gay Lib does not seek to proselytize, convert, or recruit," and that "[a]s an educational group, Gay Lib does not advocate any violation of state statutes,"[47] an implicit reference to Missouri's sodomy law.

The University was not satisfied. In denying the group's request, the University reasoned that "[t]here are potential or latent homosexuals, i.e. persons who come into adolescence or young adulthood unaware that they have homosexual tendencies," and that "[w]hat happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual."[48] If Gay Lib were formally recognized, the University found that such recognition would: "(1) . . . tend to reinforce the personal identities of the homosexual members of those organizations . . . ; (2) tend to cause latent or potential homosexuals who become members to become overt homosexuals; [and] (3) tend to expand homosexual behavior which will cause increased violations" of Missouri's sodomy law.[49]

Gay Lib filed suit in federal court, arguing that the University's decision violated the group's First Amendment rights.[50] In 1976, the district court denied Gay Lib relief, based on the testimony of two psychoanalysts who predicted that formal recognition of the group would "tend to further homosexual behavior" and "promote such sexual contact."[51] Like the University, the experts reasoned that the group was likely "to reinforce the personal identity and behavior of the individual, bringing like people together,"[52] and that "wherever you have a

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44 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

45 Gay Lib v. Univ. of Mo., 416 F. Supp. 1350, 1353–54 (W.D. Mo. 1976), *rev'd*, 558 F.2d 848 (8th Cir. 1977).

46 *Id.* at 1354 n.1.

47 *Id.* at 1354 n.2.

48 *Id.* at 1359.

49 *Id.* at 1358 (internal quotation marks omitted).

50 *See id.* at 1353.

51 *Id.* at 1368–69 (internal quotation marks omitted).

52 *Id.* at 1368 (internal quotation marks omitted).

convocation of homosexuals, . . . you are going to have increased homosexual activities."[53] On appeal, the Eighth Circuit reversed this ruling, reasoning that the University's fears of homosexual recruitment and advocacy had not been sufficiently proved.[54] In particular, the court found that there was "no historical or empirical basis"[55] for the testimony of the two experts, and that "none of the purposes or aims of Gay Lib . . . evidences advocacy of present violations of state law."[56] Significantly, the court added that even if the expert predictions were factually accurate, they would still not be sufficient to justify the school's denial of Gay Lib's request: "Even accepting the opinions . . . at face value, we find it insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed . . . ."[57]

The Supreme Court denied certiorari in *Gay Lib*, allowing the Eighth Circuit's ruling to stand.[58] In a dissent from this ruling, then-Justice Rehnquist articulated an especially vivid example of the fear of homosexuality's spread among students.[59] Although he acknowledged that Gay Lib had disclaimed any intention "to proselytize, convert, or recruit,"[60] he reasoned that "the meeting together of individuals who consider themselves homosexual in an officially recognized university organization can have a distinctly different effect from the mere advocacy of repeal of the State's sodomy statute."[61] The effect he was referring to, of course, was the spread of homosexuality on the school's campus.

Justice Rehnquist went on to speculate that this risk might be especially high at universities: "As the University has recognized, this danger may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood."[62] To illustrate the virulent nature of homosexuality on college campuses, he then explained that from the University's point of view, the question of whether Gay Lib should be recognized was "akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle [sic] sufferers be

53 *Id.* at 1369 (internal quotation marks omitted).
54 Gay Lib v. Univ. of Mo., 558 F.2d 848, 854 (8th Cir. 1977).
55 *Id.*
56 *Id.* at 856.
57 *Id.* at 854.
58 Ratchford v. Gay Lib, 434 U.S. 1080 (1978).
59 *Id.* (Rehnquist, J., dissenting).
60 *Id.* at 1083.
61 *Id.*
62 *Id.*

quarantined."[63] Although he did not explicitly delineate the mechanism through which homosexuality would be transmitted, he clearly implied that the group's advocacy of gay rights would lead more students to develop homosexual desires, engage in homosexual acts, and identify as lesbian, gay, or bisexual.

Notwithstanding Justice Rehnquist's reservations, gay students have enjoyed an unblemished record in cases involving the recognition of student groups.[64] Most recently, in *Gay Lesbian Bisexual Alliance v. Pryor*, the Eleventh Circuit invalidated an Alabama law that denied "public funds" and the use of "public facilities" to "any organization or group that fosters or promotes a lifestyle or actions prohibited by [Alabama's] sodomy and sexual misconduct laws."[65] Applying the basic principles developed in cases like *Bonner* and *Gay Lib*, the court reasoned that the law was not viewpoint neutral, because it did not "prohibit discussion of the sodomy or sexual misconduct laws in general."[66] Although the law permitted funding for student groups that promoted "*compliance* with the sodomy or sexual misconduct laws," it prohibited funding for any group that promoted "*violation* of the sodomy or sexual misconduct laws."[67] "This is blatant viewpoint discrimination," the court held.[68] "The statute discriminates against one particular viewpoint . . . ."[69]

By the time that *Pryor* was decided, a national organization known as the Gay, Lesbian and Straight Education Network had begun building a network of Gay-Straight Alliances (GSAs) in high schools across the United States.[70] Within a few years, these new organizations had won another impressive string of victories under the First Amendment. In a series of cases litigated in Utah, California, and Kentucky, federal district courts have repeatedly recognized that the First Amendment protects the freedom of public school students to establish GSAs for the

63 *Id.* at 1084.

64 *See, e.g.*, Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997); Gay Student Servs. v. Tex. A & M Univ., 737 F.2d 1317, 1324–33 (5th Cir. 1984) (recognizing First Amendment right of association); Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977); Gay Alliance of Students v. Matthews, 544 F.2d 162, 165–67 (4th Cir. 1976) (holding that university's refusal to register gay student organization violated First and Fourteenth Amendments); Gay Activists Alliance v. Bd. of Regents of Univ. of Okla., 638 P.2d 1116, 1122–23 (Okla. 1981) (holding that student group has First Amendment right to organize and be recognized by university).

65 110 F.3d at 1545 (internal quotation marks omitted).

66 *Id.* at 1549.

67 *Id.*

68 *Id.*

69 *Id.*

70 KEVIN JENNINGS, MAMA'S BOY, PREACHER'S SON: A MEMOIR OF GROWING UP, COMING OUT, AND CHANGING AMERICA'S SCHOOLS 211–30 (2006).

purpose of expressing "gay-positive views."[71] As one of these courts explained, "[w]hatever forum the [school] may create for students' free expression of ideas, it may not pick and choose among . . . ideas or viewpoints."[72]

Remarkably, none of the high schools in these cases have even attempted to justify bans against GSAs by invoking a governmental interest in promoting heterosexuality or discouraging homosexuality among students. Conceding the validity of the rulings in *Bonner*, *Gay Lib*, and *Pryor*, schools have instead argued that restrictions against GSAs were "viewpoint neutral" and that the formation of GSAs would "materially and substantially interfere" with the school's activities.[73] All of these arguments have failed.

In *Boyd County High School Gay Straight Alliance v. Board of Education*, a federal court in Kentucky clarified that schools could not evade the First Amendment's bar against viewpoint discrimination by deferring to the objections of anti-gay students.[74] Under *Tinker*, the court explained, a GSA's application for recognition could be denied based only on a "disruption" caused by the GSA itself, rather than a disruption caused by the group's opponents.[75] To rule otherwise, the court reasoned, would be to grant the GSA's opponents a "heckler's veto."[76] Under this well-known doctrine, a school's refusal to recognize a GSA must be based upon something other than objections to the group's message—even if the objections are voiced by other students, rather than anyone employed by the school.[77]

In a closely related line of cases, federal courts have held that *Tinker* protects a gay student's "right to be out,"[78] in addition to the right of students to establish gay-straight alliances. In *Henkle v. Gregory*, Derek Henkle was a sophomore at Galena High School in Reno, Nevada, and he had appeared on a local television show about gay high school students.[79] When he returned to school, his classmates harassed him. When he reported this misconduct to school officials, they not only failed to protect him but "told him numerous times to keep his

71 Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 670 (E.D. Ky. 2003); Colin *ex rel.* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000); E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1175 (D. Utah 1999).

72 *E. High*, 81 F. Supp. 2d at 1170.

73 *See Boyd*, 258 F. Supp. 2d at 690–91; *Colin*, 83 F. Supp. 2d at 1140–41; *E. High*, 81 F. Supp. 2d at 1175.

74 258 F. Supp. 2d at 689–90.

75 *Id.*

76 *Id.* at 689.

77 *See id.*

78 STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS 23–40 (2010).

79 150 F. Supp. 2d 1067, 1069 (D. Nev. 2001).

sexuality to himself."[80] When Henkle requested a transfer to another school, school officials granted the transfer "conditioned on the fact that he keep his sexuality to himself."[81] In his effort to comply with these instructions, Henkle "removed buttons, pertaining to his sexuality, from his backpack."[82] In addition to claiming that the school's failure to protect him from bullying violated the Equal Protection Clause, Henkle claimed that the school's admonitions to keep his sexuality to himself violated his freedom of speech under the First Amendment.[83] The district court agreed: Denying a motion to dismiss Henkle's speech claim, the court explained that *Tinker* established "a broad right that would encompass the right of a high school student to express his sexuality."[84]

Most recently, a federal court in Florida clarified that *Tinker* protects any student's freedom to express pro-gay views—even students who do not identify as lesbian, gay, or bisexual. In *Gillman* ex rel. *Gillman v. School Board for Holmes County*, "Jane Doe" was beginning her senior year at Ponce de Leon High School, a public school in a rural community in the Florida panhandle.[85] On the first day of school, Jane told a teacher's aide that she had been taunted by a group of middle school students, who had called her a "dyke" and told her that "'dykes' . . . were 'nasty,' 'gross,' and 'sick.'"[86] The aide reported this incident to the principal, who called Jane to his office.[87] During this meeting, the principal asked Jane if she had told the teacher's aide that she was a lesbian; she said yes. Then he asked her if she was, in fact, a lesbian; she said yes.[88] The principal then told Jane that "it was not 'right' to be homosexual," and he asked if her parents knew.[89] When she said no, he asked for her parents' telephone number so that he could inform them, and he warned her to "stay away" from the middle school students or he would suspend her.[90] Jane left the principal's office in tears.[91]

The next day, Jane's classmates learned what the principal had said to her, and a false rumor circulated that Jane was absent from school because the principal had suspended her for being a lesbian.[92]

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80 *Id.* at 1075.
81 *Id.* at 1070.
82 *Id.* at 1075.
83 *Id.* at 1071.
84 *Id.* at 1076.
85 567 F. Supp. 2d 1359, 1362 (N.D. Fla. 2008).
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*

Numerous students expressed support for Jane by "writing 'GP' or 'Gay Pride' on their bodies, wearing t-shirts with messages supportive of gay rights, yelling 'Gay Pride' in the hallways, circulating petitions . . . and creating signs."[93] The principal responded with what a federal judge later described as a "witch hunt":[94] "He interviewed approximately thirty students, interrogated them about their sexual orientations, and . . . . instructed students who were homosexual not to discuss their sexual orientations."[95] In addition, he prohibited students from "wearing rainbow belts or writing 'Gay Pride' or 'GP' on their arms and notebooks," required them "to wash 'GP' or 'Gay Pride' from their arms," and "lifted the shirts of female students to verify that no such writings were present."[96] After his investigation was complete, he suspended eleven students for being involved in what had become known as the school's "Gay Pride" movement, on the ground that they belonged to an "illegal organization" that had been forbidden by the school board.[97] In one instance, he threatened the mother of one lesbian girl that he could "send [the girl] off to a private Christian school down in Tallahassee," or to the juvenile detention center, and advised the mother that "if there was a man in your house, [and] your children were in church, you wouldn't be having any of these gay issues."[98]

A heterosexual student named Heather Gillman defied the principal's warnings.[99] Gillman's cousin was a lesbian student at the same school, and her cousin was among the students whom the principal had suspended.[100] The following day, Gillman wore a rainbow belt and a handmade shirt with the slogan "I Support Gays" to school.[101] She asked the school board for permission to display rainbows, pink triangles, and a long list of pro-gay slogans.[102] The board replied that none of these symbols or slogans could be displayed because they indicated membership in an "illegal organization" and were "disruptive to the educational process."[103] Gillman sued, claiming that the school had violated her freedom of speech by discriminating against her viewpoint.[104]

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93 *Id.*
94 *Id.* at 1372.
95 *Id.* at 1363.
96 *Id.*
97 *Id.*
98 *Id.* (internal quotation marks omitted).
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 1363–64.
103 *Id.* at 1364.
104 *Id.*

The district court agreed.[105] After finding that Gillman prevailed on all claims, the judge emphasized that the principal's conduct "in the capacity of a role model and authority figure, is particularly deplorable in light of studies which confirm the vulnerability of gay and lesbian students."[106] To remedy the violation of Gillman's First Amendment rights, the court permanently enjoined the school from "restraining, prohibiting, or suppressing the Plaintiff or any other student . . . from expressing their support for the respect, equal treatment, and acceptance of gays and lesbians."[107] In addition, the court ordered the school to notify all of the school's students that they "are permitted to express their support for the respect, equal treatment, and acceptance of homosexuals."[108]

Strictly speaking, the constitutional fate of these claims has not been definitively resolved yet, because the Supreme Court has not specifically addressed a student's right to express pro-gay views and homosexual feelings in public schools. But for almost forty years, federal courts have consistently held that the First Amendment prohibits the state from discouraging the expression of pro-gay opinions and homosexual desires—even among children—because such a policy is tantamount to the suppression of a particular viewpoint. On the same day that *Healy* was decided, the Court explained that viewpoint discrimination is the paradigm of what the First Amendment prohibits: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[109]

C. *Equal Protection*

Does the Equal Protection Clause allow the state to specifically target children's homosexual status—to discourage children from being or becoming lesbian, gay, or bisexual?

1. *Romer v. Evans*: The Anti-Animus Principle

In *Romer v. Evans*, the Supreme Court struck down a law that discriminated based on homosexual, lesbian, and bisexual status on the ground that the law violated the Equal Protection Clause.[110] The law in

105 *Id.* at 1370.
106 *Id.*
107 *Id.* at 1379.
108 *Id.*
109 Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).
110 517 U.S. 620 (1996).

Romer was an amendment to the Colorado Constitution known as Amendment 2.[111] Titled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation," the law provided that "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" could not serve as a basis for any "claim of discrimination," among other things.[112] In effect, the law repealed a number of existing laws that had protected lesbian, gay, and bisexual people from discrimination in "housing, employment, education, public accommodations, and health and welfare services," and it barred any state or municipal entity from adopting such laws in the future.[113]

In striking down Amendment 2, the *Romer* Court emphasized the law's singular focus on a particular class, the "[s]weeping and comprehensive" effect of the law, and the discontinuity between the law's breadth and the State's justifications.[114] First, the Court explained that "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group,"[115] because "[i]t identifies persons by a single trait and then denies them protection across the board."[116] Next, the Court reasoned that the law's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[117] For these reasons, the Court said, Amendment 2 not only "fails" rational basis review, but "defies" and "confounds" it.[118] The Court explained: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[119] Because Amendment 2 was "a status-based enactment divorced from any factual context," the Court concluded that it was "a classification of persons undertaken for its own sake."[120] Instead of classifying lesbian and gay people "to further a proper legislative end," the law "classifie[d] homosexuals . . . to make them unequal to everyone else."[121]

Many scholars have correctly observed that *Romer* deviates from the traditional version of rational basis review in one important respect—namely, in determining which kinds of relationships between a

111 *Id.* at 623.
112 *Id.* at 624.
113 *Id.*
114 *Id.* at 627, 632.
115 *Id.* at 632.
116 *Id.* at 633.
117 *Id.* at 632.
118 *Id.* at 632–33.
119 *Id.* at 634 (alteration in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).
120 *Id.* at 635.
121 *Id.*

law's classification and the law's goal qualify as "rational."[122] Yet *Romer* does not vary from the traditional standard in another respect—in determining which kinds of interests qualify as "legitimate." As the *Romer* Court explained, the anti-animus principle that Colorado's Amendment 2 offended was "conventional and venerable."[123]

2. *Romer*'s Roots: *Department of Agriculture v. Moreno* and *City of Cleburne v. Cleburne Living Center*

More than twenty years before *Romer* was decided, the anti-animus principle was first articulated in the 1973 case of *United States Department of Agriculture v. Moreno*,[124] and it was reaffirmed in the 1985 case of *City of Cleburne v. Cleburne Living Center, Inc.*[125] And just this year, the principle was applied in the landmark gay rights case of *United States v. Windsor*.[126] By examining how the Court has articulated and applied this principle in *Moreno*, *Cleburne*, and *Windsor*, this Section explains why the anti-animus principle bars the state from invoking an interest in targeting children's homosexual status—an interest in discouraging children from becoming lesbian, gay, or bisexual, or encouraging children to become heterosexual.

In *Moreno*, the Court invoked the equal protection guarantees of the Fifth Amendment to invalidate a law "intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[127] The Court reasoned that the law "clearly cannot be sustained by reference to this congressional purpose," because "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[128] "[A] purpose to discriminate against hippies," the Court explained, could not justify the law "in and of itself . . . without reference to (some independent) considerations in the public interest."[129]

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122 For this reason, judges and commentators have often interpreted *Romer* as applying a different standard of judicial review, which is often referred to as "rational basis with bite." *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment) (claiming that *Romer* applied "a more searching form of rational basis review"); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2784 (2005) (claiming that *Romer* applied "rational basis [review] with bite").

123 *Romer*, 517 U.S. at 635.

124 413 U.S. 528 (1973).

125 473 U.S. 432 (1985).

126 133 S. Ct. 2675 (2013).

127 *Moreno*, 413 U.S. at 534.

128 *Id.*

129 *Id.* at 534–35 (quoting Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)) (internal quotation marks omitted).

Although the term "independent" was placed within parentheses, the Court's usage of this term is significant, because it helps to pinpoint the logical flaw of justifications based on animus. In order to qualify as a valid state interest, the law's objective must be able to stand by itself and for itself—wholly independent from the classification that the law has enacted. Otherwise, the state's justification would be self-serving, if not circular; it would restate and rely upon the policy's result in order to justify it. By clarifying that the state's interest must be "independent" in order to qualify as "legitimate," *Moreno* lays bare a fundamental axiom of judicial review. In one form or another, the Supreme Court has recognized this principle as a basic requirement of the Constitution's free speech, equal protection, and due process guarantees. The parallel to the First Amendment's prohibition against viewpoint discrimination is apparent: Just as a speech-based law cannot be justified by the state's objections to the speaker's message, a status-based law cannot be justified by animus against the targeted class.

After *Moreno*, the Court next invoked this constitutional prohibition against animus in *City of Cleburne*, when it invalidated a city ordinance that required a special-use permit for "the operation of a group home for the mentally retarded."[130] After finding that the zoning ordinance was not rationally related to any of "the city's legitimate interests,"[131] the Court concluded that the ordinance was based on nothing more than "an irrational prejudice against the mentally retarded."[132] Quoting *Moreno*, the Court explained that "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests."[133]

In the course of this analysis, the *Cleburne* Court rejected one particular state interest that sheds light on the anti-animus principle elaborated in this line of cases—"the negative attitude of the majority of property owners located within 200 feet" of the proposed location for the group home.[134] As the Court explained, the Equal Protection Clause did not permit the city to act upon the public's "mere negative attitudes, or fear," unsubstantiated by other factors.[135] Echoing the First Amendment's prohibition against granting a "heckler's veto,"[136] the Court explained: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[137]

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130 *Cleburne*, 473 U.S. at 435.

131 *Id.* at 448.

132 *Id.* at 450.

133 *Id.* at 446–47 (alteration in original) (citation omitted) (quoting *Moreno*, 413 U.S. at 534).

134 *Id.* at 448.

135 *Id.*

136 *See supra* note 76 and accompanying text.

137 *Cleburne*, 473 U.S. at 448 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)) (internal quotation marks omitted). The Court's quotation to *Palmore v. Sidoti* in this context is

3. *Romer* Redux: *United States v. Windsor*

Most recently, in *United States v. Windsor*, the Court invoked the anti-animus principle to invalidate the Defense of Marriage Act (DOMA), a federal law that defined "marriage" as "a legal union between one man and one woman as husband and wife."[138] In analyzing this law, the Court began by observing that the definition of marriage was traditionally a power served to the states, rather than the federal government: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[139] By refusing to recognize the marriages into which same-sex couples had lawfully entered, DOMA rejected a long-standing tradition in which "the Federal Government . . . has deferred to state-law policy decisions with respect to domestic relations."[140] By granting the right to marry to same-sex couples, states had sought to confer "a dignity and status of immense import" upon a new class of persons; by refusing to recognize these marriages under federal law, DOMA sought "to injure the same class the State seeks to protect."[141]

Turning to the application of the Fifth Amendment's "basic due process and equal protection principles,"[142] the Court invoked two versions of the anti-animus principle from *Moreno* and *Romer*. Quoting *Moreno*, the Court rehearsed the now-familiar statement that discrimination cannot be justified by "a bare congressional desire to harm a politically unpopular group."[143] Quoting *Romer*, the Court added that "[i]n determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration."[144] In this particular case, the Court explained that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" was

significant because *Palmore* involved discrimination based on race, which is subject to strict scrutiny under the Equal Protection Clause. *Palmore*, 466 U.S. at 432–33. In *Palmore*, the trial court had denied a mother custody because she was living with a man of another race. *Id.* at 431. The court had reasoned that the child's best interests would be served by granting custody to the father because the child would be taunted and stigmatized for living in an interracial household. *Id.* The Court unanimously rejected this rationale: "The Constitution cannot control such prejudices but neither can it tolerate them." *Id.* at 433. By applying this principle in *Cleburne*, the Court established that justifications based on "private bias" cannot satisfy any standard of judicial review.

138 Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

139 United States v. Windsor, 133 S. Ct. 2675, 2689–90 (2013).

140 *Id.* at 2691.

141 *Id.* at 2692.

142 *Id.* at 2693.

143 *Id.* (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)) (internal quotation marks omitted).

144 *Id.* (second alteration in original) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

"strong evidence" that the law was based on "disapproval" of same-sex couples.[145]

Drawing an analogy between DOMA and Colorado's Amendment 2, the *Windsor* Court emphasized that DOMA's effect was unusually broad. Compared to previous definitions of marriage in federal laws, "DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[146] Because "DOMA writes inequality into the entire United States Code," it constitutes "a system-wide enactment with no identified connection to any particular area of federal law."[147]

In contrast to the Court's cautious rhetoric in previous cases, the *Windsor* Court was not bashful about identifying animus as the law's intended effect. With unusual frequency and candor, the Court repeatedly stressed that DOMA's "purpose and effect" was "to disparage and to injure"[148] same-sex couples—"to impose a disadvantage, a separate status, and so a stigma" upon them,[149] and to treat the marriages into which they had entered as "second-class,"[150] "second-tier,"[151] and "less worthy than the marriages of others."[152] As if that were not enough, the Court added that the law actually harmed the children of same-sex couples, instead of protecting them from homosexual influences. In unusually blunt language, the Court found that DOMA "humiliates tens of thousands of children now being raised by same-sex couples,"[153] and "brings financial harm to children of same-sex couples" by raising "the cost of health care for families" and denying "benefits allowed to families upon the loss of a spouse and parent."[154]

4. Animus: The Prevention of Gay People, or a World Without Homosexuals

When the state's interest in promoting heterosexuality is framed in terms of children's homosexual status—as an attempt to encourage children to become (or be) heterosexual, or to discourage them from becoming (or being) lesbian, gay, or bisexual—it runs afoul of the principle articulated in this line of cases. To take one example: In the

145 *Id.*
146 *Id.* at 2690.
147 *Id.* at 2694.
148 *Id.* at 2696.
149 *Id.* at 2693.
150 *Id.*
151 *Id.* at 2694.
152 *Id.* at 2696.
153 *Id.* at 2694.
154 *Id.* at 2695.

recent challenge to California's Proposition 8, a federal court found that "[t]he Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may *become* gay or lesbian"[155] and that "Proposition 8 played on a fear that exposure to homosexuality would *turn* children into homosexuals."[156]

As the trial court in the Prop 8 case seemed to recognize, such objections to children becoming lesbian, gay, or bisexual are nothing more than thinly-veiled objections to the development of more lesbian, gay, and bisexual people.[157] Because the court found that "sexual orientation is not related to an individual's ability to contribute to society or perform in the workplace," it ruled that "California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California."[158]

This analysis holds true regardless of the context in which the objection to homosexuality is articulated, or the particular mechanism by which one imagines that homosexuality is transmitted—through indoctrination, role modeling, or the rising tide of public approval. When objections to children's homosexuality are articulated in these terms, they represent a desire to minimize the number of people who become lesbian, gay, and bisexual—and thus, the number of people who will someday be lesbian, gay, and bisexual. It is difficult to think of a clearer example of animosity toward a class than the simple fear that the class will gain additional members—other than the hope that the class will lose existing members, which is closely related.[159]

To the best of my knowledge, no court has explicitly applied this constitutional principle in the context of childhood—i.e., no court has held that the Constitution's equal protection guarantees bar the state from relying upon an interest in discouraging children from being or

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155 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 988 (N.D. Cal. 2010), *aff'd sub nom.*, Brown v. Perry, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (emphasis added).

156 *Id.* at 1003 (emphasis added).

157 An analogy may be useful: Suppose Congress passed a law that specifically aimed to prevent HIV infection among minors. In theory, one might attack this law as a form of discrimination based on HIV status—i.e., a legislative attempt to minimize the number of people infected with HIV. Yet in this case, the law could be easily defended on independent grounds—namely, that HIV shortens an individual's life by attacking the immune system, rendering the individual vulnerable to common infections. This is precisely what is lacking when the state asserts an interest in discouraging children from being or becoming lesbian, gay, or bisexual—an independent reason for preventing homosexuality's spread.

158 *Perry*, 704 F. Supp. 2d at 967 (internal quotation marks omitted).

159 *Cf.* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 42 (1990) (arguing that "the scope of institutions whose programmatic undertaking is to prevent the development of gay people is unimaginably large" and that the nature/nurture debate is characterized by "the overarching, hygienic Western fantasy of a world without any more homosexuals in it").

becoming lesbian, gay, or bisexual.[160] But the constitutional foundations for this principle were developed in *Nabozny v. Podlesny*,[161] a Seventh Circuit ruling published in the same year as *Romer*.

5. *Nabozny v. Podlesny*: *Romer* for Kids

In *Nabozny*, the court held that a gay teenager stated a valid claim under the Equal Protection Clause by alleging that school administrators had failed to protect him from a relentless campaign of bullying.[162] In the seventh grade, after Jamie Nabozny came out as gay, his classmates subjected him to a mock rape during class, assaulted him in a bathroom, urinated on him, and kicked him in the stomach so many times that he required surgery for internal bleeding.[163] When Nabozny reported these incidents to school officials, they took no steps to discipline the offending students or protect him from further harassment. During middle school, Nabozny's principal told him that "boys will be boys" and that if he was "going to be so openly gay," then he should "expect" such behavior.[164] During high school, an assistant principal laughed when Nabozny reported this harassment and told Nabozny that he deserved it.[165]

Nabozny's victory in the Seventh Circuit was a victory for gay people of all ages, but it was a special milestone for gay minors. Recounting the facts, the court unhaltingly recognized the gay identity of a thirteen-year-old child: "Around the time that Nabozny entered the seventh grade, Nabozny realized that he is gay. Many of Nabozny's fellow classmates soon realized it too."[166] Analyzing Nabozny's equal protection claims, the court found that "[t]here can be little doubt that homosexuals are an identifiable minority" and "discrimination against Nabozny based on his sexual orientation . . . was unlawful . . . . absent at least a rational basis for the discrimination."[167] In light of Nabozny's allegations, the court had no trouble finding that "the discriminatory treatment was motivated by . . . Nabozny's sexual orientation."[168]

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160 In *Perry v. Schwarzenegger*, Chief Judge Vaughn Walker came tantalizingly close. *See Perry*, 704 F. Supp. 2d at 1002–03; Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 954–55 (2010) (arguing that Judge Walker's opinion lays the foundations for claiming that under *Romer*, the state has no legitimate interest in discouraging children from becoming lesbian, gay, or bisexual).

161 92 F.3d 446 (7th Cir. 1996).

162 *Id.* at 458.

163 *Id.* at 451–52.

164 *Id.* at 451 (internal quotation marks omitted).

165 *Id.* at 452.

166 *Id.* at 451.

167 *Id.* at 457.

168 *Id.*

Applying rational basis review, the court reasoned, "[w]e are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one."[169] In rejecting the defendants' qualified immunity defense, the court emphasized that the relevant constitutional principles were already "well established" and "self-evident" even before *Romer* was decided,[170] and moreover, that they had been articulated by the Supreme Court "[a]s early as 1886."[171] After the court reinstated Nabozny's claims, a jury found that the school officials were liable for failing to protect him.[172] Before the jury had a chance to award damages, the defendants settled Nabozny's claims for $900,000—more than three times the amount originally sought.[173]

Since *Nabozny* was decided, it has been widely followed by federal courts. Similar decisions have been reached by the Ninth Circuit and federal district courts in California, Indiana, Ohio, and Minnesota.[174] With the benefit of these rulings, gay students have won settlements ranging from $40,000 to $1,100,000 against school districts that have failed to protect them from anti-gay bullying.[175] Thanks to the Seventh Circuit, it is now widely accepted that when a school fails to protect a student from harassment because he is lesbian, gay, or bisexual, the student can bring a valid claim for discrimination based on sexual orientation under the Equal Protection Clause.

Strictly speaking, however, none of these cases reject the promotion of heterosexuality as a justification for a school's failure to

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169 *Id.* at 458.

170 *Id.* at 457.

171 *Id.* at 458 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886)).

172 *See* Terry Wilson, *Gay-Bashing Victim Awarded $1 Million for School Incident*, CHI. TRIB. (Nov. 21, 1996), http://articles.chicagotribune.com/1996-11-21/news/9611210032_1_jamie-nabozny-chicago-public-schools-ashland-school-district; *see also Nabozny v. Podlesny*, LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/nabozny-v-podlesny (last visited Nov. 9, 2013).

173 BIEGEL, *supra* note 78, at 12; *Nabozny v. Podlesny*, *supra* note 172; Wilson, *supra* note 172.

174 Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003); Seiwert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942 (S.D. Ind. 2007); Schroeder *ex rel.* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869 (N.D. Ohio 2003); Massey v. Banning Unified Sch. Dist., 256 F. Supp. 2d 1090 (C.D. Cal. 2003); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000); O.H. v. Oakland Unified Sch. Dist., No. C-99-5123 JCS, 2000 WL 33376299 (N.D. Cal. Apr. 14, 2000). In addition, federal courts have recognized similar claims brought by gay students under Title IX of the Civil Rights Act, which prohibits sex discrimination in federally funded schools. *See, e.g.*, Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000); Snelling v. Fall Mountain Reg'l Sch. Dist., No. Civ. 99-448-JD, 2001 WL 276975 (D.N.H. Mar. 21, 2001); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

175 GAY, LESBIAN & STRAIGHT EDUC. NETWORK ET AL., FIFTEEN EXPENSIVE REASONS WHY SAFE SCHOOLS LAWS AND POLICIES ARE IN YOUR DISTRICT'S BEST INTERESTS (2013), *available at* http://www.nclrights.org/wp-content/uploads/2013/07/15reasons.pdf.

protect a student from bullying. When a gay student alleges that school officials have failed to protect him, the school does not even attempt to justify this alleged failure as any kind of intentional policy or practice. In *Nabozny*, for example, the school officials did not argue that they had allowed Nabozny to be bullied in order to keep him in the closet or discourage him from becoming gay or bisexual.[176] Such explanations may well have been honest, but they would surely not have been legitimate justifications for failing to protect Nabozny from bullying. Regardless of the school's motives, the irrationality of failing to protect a gay student (or indeed, any student) from bullying speaks for itself.

Yet there is little reason to presume that the principle articulated in *Nabozny* is limited to cases involving a school's failure to protect a gay student from bullying and harassment, or to other such patently indefensible practices. Under *Romer* and *Windsor*, the state does not have any legitimate interest in discouraging children from being lesbian, gay, or bisexual, or encouraging them to be heterosexual—not by any methods, however implausible, ill-conceived, or banal they may be. The desire to discourage children from becoming gay is nothing more than an especially old and insidious form of animus against lesbian, gay, and bisexual people; it is not a legitimate state interest under the Constitution's equal protection guarantees. If discrimination against LGBT people is to be justified, then it must be linked to an interest that is *independent* of the state's desire to encourage children to become heterosexual.[177]

D. *Due Process*

It is well-settled that the state has broad authority to discourage children from engaging in sexual conduct, such as through the prohibition of statutory rape, child molestation, and child pornography offenses.[178] But do the Constitution's due process guarantees allow the state to specifically target children's *homo*sexual conduct—to specifically discourage children from engaging in *homo*sexual relations and

176 *Nabozny*, 92 F.3d at 458 ("We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one.").

177 For a discussion of whether this policy may be justified on independent grounds, see *infra* Part IV.

178 *See, e.g.*, Michael v. Superior Court of Sonoma Cnty., 450 U.S. 464 (1981) (upholding statutory rape law); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding law prohibiting the distribution of pornography to minors). *See generally* Carey v. Population Servs., Int'l, 431 U.S. 678, 694 n.17 (1977) (plurality opinion) ("[I]n the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults.").

relationships, as opposed to sexual relations and relationships of any kind?

In *Lawrence v. Texas*, the Supreme Court struck down a law that prohibited homosexual sodomy as a violation of the Due Process Clause.[179] The law in *Lawrence* was a Texas statute that criminalized "deviate sexual intercourse" between persons of the same sex; two men had been convicted under the law for engaging in "anal sex" with each other.[180]

Throughout the proceedings, the men had challenged these convictions under both the Equal Protection Clause and Due Process Clause—as a form of discrimination against gay and lesbian people, and as an infringement on an individual's liberty to engage in homosexual relations and relationships.[181] To justify the law, Texas argued that it was rationally related to "the legitimate governmental interest [in the] promotion of morality"[182]—the same interest that the Supreme Court had invoked seventeen years earlier to justify a sodomy law in *Bowers v. Hardwick*.[183]

Rather than deciding the case under the Equal Protection Clause—and thus, leaving the holding of *Bowers* untouched—the *Lawrence* Court signaled that it was deciding the case under the Due Process Clause: "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . . ."[184] Analogizing the men's claim to the liberty interests protected in *Griswold v. Connecticut*,[185] *Eisenstadt v. Baird*,[186] *Roe v. Wade*,[187] and *Carey v. Population Services International*,[188] the Court emphasized that the Texas law sought "to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[189]

While the opinion's standard of review is admittedly vague,[190] the Court's rejection of morality as a justification for the law is much

179 539 U.S. 558 (2003).

180 *Id.* at 563.

181 *Id.*

182 Respondent's Brief at 42, *Lawrence*, 539 U.S. 558 (No. 02-102).

183 478 U.S. 186, 196 (1986) (holding that under rational basis standard, Georgia sodomy statute was justified by "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable").

184 *Lawrence*, 539 U.S. at 564.

185 381 U.S. 479 (1965).

186 405 U.S. 438 (1972).

187 410 U.S. 113 (1973).

188 431 U.S. 678 (1977).

189 *Lawrence*, 539 U.S. at 565–67.

190 *Compare* Witt v. Dep't of the Air Force, 527 F.3d 806, 816 (9th Cir. 2008) ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review."), *with* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1236

clearer. After criticizing the "historical grounds relied upon in *Bowers*," the Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," and that "[f]or many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles."[191] The Court insisted, however, that "[t]hese considerations do not answer the question before us," because "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[192] Quoting *Planned Parenthood v. Casey*, the Court rejected the State's moral justifications for the Texas sodomy law: "Our obligation is to define the liberty of all, not to mandate our own moral code."[193]

Toward the end of the opinion, the Court returned to this subject, adopting a more explicit rejection of the State's interest in promoting moral disapproval of homosexual conduct. Quoting one of the dissenting opinions from *Bowers*, the Court flatly rejected the notion that a law prohibiting a type of conduct could be justified by reference to the majority's belief that the conduct is immoral: "Our prior cases make [this] proposition[] abundantly clear[:] . . . . [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."[194] Shortly thereafter, the Court held that the statute was not justified by any "legitimate state interest": "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[195]

(11th Cir. 2004) ("[T]he *Lawrence* opinion did not employ fundamental-rights analysis and . . . it ultimately applied rational-basis review, rather than strict scrutiny, to the challenged statute."). *See generally* Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103 (2004); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

191 *Lawrence*, 539 U.S. at 571.

192 *Id.*

193 *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)) (internal quotation marks omitted).

194 *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (2003) (Stevens, J., dissenting)) (internal quotation marks omitted).

195 *Id.* at 578. Admittedly, federal judges remain divided about whether *Lawrence* rejected public morality as a legitimate state interest in all circumstances, or whether the holding should be more narrowly construed. *See, e.g.*, *id.* at 599 (Scalia, J., dissenting) (stating that the majority's opinion in *Lawrence* "effectively decrees the end of all morals legislation" by asserting that "the promotion of majoritarian sexual morality is not even a *legitimate* state interest"); Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 15 (1st Cir. 2012) ("For generations, moral disapproval has been taken as an adequate basis for legislation . . . . [b]ut, speaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis."); Cook v. Gates, 528 F.3d 42, 53 (1st Cir. 2008) ("*Lawrence*'s holding can only be squared with the Supreme Court's acknowledgment of morality as a rational basis by concluding that a *protected* liberty interest

More recently, in *United States v. Windsor*, the Court reaffirmed *Lawrence*'s rejection of moral disapproval as a justification for policies that target homosexual conduct.[196] Because *Windsor* involved a challenge to a federal statute, it was brought under the Fifth Amendment's Due Process Clause, and the Court's ruling was explicitly based on "due process" as well as "equal protection" principles.[197] In striking down the law, the Court explicitly noted that Congress had offered moral justifications for the law—"moral disapproval of homosexuality," "a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality," and "an interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws."[198] Closely tracking the holding of *Lawrence*, the Court again found that "no *legitimate* purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect."[199]

When the objection to children's homosexuality is framed in terms of children's conduct—as a specific interest in discouraging children from engaging in *homo*sexual conduct, rather than a broad interest in discouraging children from engaging in *sexual* conduct of any kind—it violates the Court's rejection of moral disapproval under *Lawrence* and *Windsor*. Standing by itself, the state's interest in discouraging homosexual conduct is not a legitimate state interest, because it is not independent from the state's or society's moral objections to the conduct itself. If moral disapproval of homosexual conduct is not even a legitimate state interest, then it cannot justify policies that specifically target that conduct. For these purposes, it does not matter whether the state is targeting the homosexual conduct of children or adults.

In this sense, *Lawrence*'s rejection of moral disapproval closely parallels *Romer*'s rejection of animus against lesbian and gay people,[200] as well as the First Amendment's rejection of the heckler's veto in cases involving gay students.[201] Writing separately in *Lawrence*, Justice

was at stake, and therefore a *rational* basis for the law was not sufficient." (emphasis added)); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 & n.33 (5th Cir. 2008) (holding that under *Lawrence*, "public morality cannot justify a law that regulates an individual's private sexual conduct and does not relate to prostitution, the potential for injury or coercion, or public conduct"); Williams v. Morgan, 478 F.3d 1316, 1323 (11th Cir. 2007) (holding that "public morality survives as a rational basis for legislation even after *Lawrence*").

196 133 S. Ct. 2675, 2693 (2013).

197 *Id.*; *see* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219 (2013) (arguing that "if we look more closely at *Windsor*, we see that it is conceptually, if not doctrinally, a right-to-marry case").

198 *Id.* (quoting H.R. REP. NO. 104-664, at 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2920) (internal quotation marks omitted).

199 *Id.* at 2696 (emphasis added).

200 *See supra* Part I.C.1.

201 *See supra* note 76 and corresponding text.

O'Connor aptly described the fallacy of moral justifications for sodomy laws: "Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy."[202] When the state prohibits a particular kind of conduct, it cannot justify this policy by invoking "moral disapproval" of that conduct, because that justification is so self-serving as to be effectively circular. It is as if the people of Texas were saying, "it's a crime because we don't like it" or worse still, "it's a crime because we said so." It is legislation by fiat, a classic case of governing by *ipse dixit*.

One year after *Lawrence* was decided, the Kansas Supreme Court applied this principle to minors in *State v. Limon*, a case involving a teenager's homosexual conduct.[203] In this case, a gay teenager named Matthew Limon had been convicted for engaging in "consensual oral contact with the genitalia" of another teenager under the Kansas sodomy law.[204] At the time of the incident, Limon was eighteen years old, and his partner M.A.R. was fifteen years old.[205] Limon argued that he should have been charged under the State's unlawful voluntary sexual relations law, rather than the State's sodomy law.[206] This other statute, commonly referred to as the "Romeo and Juliet" law, provided lighter penalties for teenagers who engaged in consensual intercourse, sodomy, or lewd touching.[207] Unfortunately for Limon, however, the Romeo and Juliet law applied only when "the victim and offender are members of the opposite sex."[208] Because Limon and M.A.R. were both male, Limon's conduct did not fall within the provisions of the Romeo and Juliet law.

After a bench trial, Limon was sentenced to a prison term of 206 months, a parole term of sixty months, and required to register as a "persistent sexual offender."[209] If Limon or M.A.R. had been female, Limon would have received a sentence of only thirteen to fifteen months and would not have been required to register as a sex offender.[210]

To defend this disparity in punishment, the State argued that the law was justified by the State's interest in "the protection and preservation of the traditional sexual mores of society"—an apparent reference to the public's moral disapproval of homosexual conduct.[211]

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202 Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment).

203 122 P.3d 22 (Kan. 2005).

204 *Id.* at 24.

205 *Id.*

206 *See id.*

207 *Id.*

208 *Id.* (citing KAN. STAT. ANN. §21-3522 (repealed 2010)).

209 *Id.* at 25.

210 *Id.*

211 *Id.* at 33; *see also* Supplemental Brief of Appellee at 12, *Limon*, 122 P.3d 22 (No. 00-85898-S) (arguing that the Romeo and Juliet law "is rationally related to the State's legitimate power to protect not only its children, but to protect its inherent view of public morality").

Applying rational basis review, the Kansas Supreme Court held that this interest could not justify Limon's sentence because "[t]he *Lawrence* decision rejected a morality-based rationale as a legitimate State interest."[212]

II. WHAT *WINDSOR* WROUGHT: UNLIMITING *ROMER* AND *LAWRENCE*

In the years since *Romer* and *Lawrence* were decided, lower courts have been divided about how broadly these rulings should be interpreted. To limit *Romer*'s rejection of animus, courts have emphasized that Colorado Amendment 2 was "sweeping and comprehensive" and that the law's breadth figured prominently in the Court's conclusion that it lacked any rational basis.[213] To limit *Lawrence*'s rejection of moral disapproval, courts have observed that the Texas sodomy statute was a criminal law and that the opinion concluded with a cautionary list of factual scenarios that "the present case does not involve."[214]

In *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit distinguished *Romer* and *Lawrence* on both of these grounds, in the course of upholding a Florida law that prohibited any "homosexual" from adopting children based on the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."[215] While the adoption law was later invalidated in state court proceedings,[216] *Lofton* remains the leading federal opinion on whether states may

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212 *Limon*, 122 P.3d at 34.

213 *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 868 (8th Cir. 2006) (distinguishing Colorado's Amendment 2 from an amendment to Nebraska Constitution banning the recognition of same-sex marriages, civil unions, and domestic partnerships); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (distinguishing Colorado's Amendment 2 from municipal charter amendment banning the adoption of antidiscrimination protections).

214 Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see, e.g.*, *Bruning*, 455 F.3d at 868 n.3 ("The *Lawrence* majority . . . was careful to note that the Texas statute at issue 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'" (quoting *Lawrence*, 539 U.S. at 578)); Lewis v. Harris, 908 A.2d 196, 210 (N.J. 2006) ("The *Lawrence* Court . . . pointedly noted that the case did 'not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'" (quoting *Lawrence*, 539 U.S. at 578)); Andersen v. King Cnty., 138 P.3d 963, 979 (Wash. 2006) ("[T]he [*Lawrence*] Court specifically said the case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'" (quoting *Lawrence*, 539 U.S. at 578)); *see also* L.A.M. v. B.M., 906 So.2d 942, 946 (Ala. Civ. App. 2004) (arguing that *Lawrence* does not apply to custody determinations because "*Lawrence* addressed the application of a criminal law").

215 358 F.3d 804, 817–18, 826–27 (11th Cir. 2004).

216 Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

constitutionally prohibit lesbian and gay people from adopting.[217] Given that the ruling rested on the state's interest in promoting heterosexuality during childhood—by providing children with "heterosexual role model[s]"[218]—it is worth considering the doctrinal distinctions on which *Lofton* relies. This Part argues that both of these distinctions lack merit, and in any event, they cannot survive the Supreme Court's recent ruling in *Windsor*.

A. *Unlimiting* Romer

To distinguish *Lofton* from *Romer*, the Eleventh Circuit reasoned that "unlike Colorado's Amendment 2," Florida's law was "not so '[s]weeping and comprehensive' as to render Florida's rationales for the statute 'inexplicable by anything but animus' toward its homosexual residents."[219] In contrast to Colorado's law, the court explained, "the Florida classification is limited to the narrow and discrete context of . . . adoption and, more importantly, has a plausible connection with the state's asserted interest."[220] In particular, the court found that the law's prohibition against "homosexual" persons adopting children was rationally related to the State's concerns about "the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models."[221] Read in this manner, *Romer* would be a poor bulwark against the state's interest in promoting heterosexuality among children, which has been invoked to justify a wide range of policies that discriminate against LGBT people.

For present purposes, however, the breadth of Colorado's Amendment 2 is a red herring. Whatever merits the *Lofton* court's distinction may otherwise have in other contexts,[222] the distinction does nothing to legitimize the state's interest "in shaping sexual and gender identity and in providing heterosexual role modeling."[223] Even if Colorado's law was broader than Florida's, that does not transform the

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217 WILLIAM RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 742 (4th ed. 2011).

218 *Lofton*, 358 F.3d at 818.

219 *Id.* at 826 (alteration in original) (quoting Romer v. Evans, 517 U.S. 620, 627, 632 (1996)).

220 *Id.* (footnote omitted).

221 *Id.* at 822 (internal quotation marks omitted).

222 Although the merits of this distinction are not logically relevant to my argument, I do not mean to concede them by passing over them here. In *Perry v. Brown*, the Ninth Circuit disagreed sharply with the Eleventh Circuit's analysis. *See* Perry v. Brown, 671 F.3d 1052, 1081 (9th Cir. 2012), *vacated and remanded sub nom.*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) ("Proposition 8 is no less problematic than Amendment 2 merely because its effect is narrower; to the contrary, the surgical precision with which it excises a right belonging to gay and lesbian couples makes it even more suspect."). Moreover, as I argue below, the *Lofton* court's reading of *Romer* was eviscerated by *Windsor*. *See infra* Part II.C.

223 *Lofton*, 358 F.3d at 818.

promotion of heterosexuality into a legitimate state interest. When this interest is couched in terms of children's "sexual and gender *identity*,"[224] it is nothing more than an animus against the targeted class—an attempt to limit the number of children who grow up to be lesbian, gay, or bisexual, while increasing the number of children who grow up to be heterosexual.[225] Even under a narrow reading of *Romer*, there is little reason to think that the state has a legitimate interest "in shaping sexual and gender identity and in providing heterosexual role modeling."[226]

B. *Unlimiting* Lawrence

To distinguish *Lofton* from *Lawrence*, the Eleventh Circuit quoted the *Lawrence* Court's warning that "[t]he present case does not involve *minors*."[227] This statement appeared in the penultimate paragraph of the *Lawrence* opinion, immediately after the Court announced that "*Bowers v. Hardwick* should be and now is overruled":

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[228]

To sharpen the contrast between minors and adults, the *Lawrence* Court then explained: "The case does involve two *adults* who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."[229]

In the Eleventh Circuit's view, the plaintiff's challenge to Florida's adoption law involved "not only consenting adults, but minors as well"

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224 *Id.* (emphasis added).

225 *See supra* Part I.C.4.

226 *Lofton*, 358 F.3d at 818; *see supra* Part I.C.4.

227 *Lofton*, 358 F.3d at 817 (emphasis added) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

228 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

229 *Id.* (emphasis added). Throughout the opinion, the Court repeatedly emphasized that the case involved adults. *See id.* at 564 ("The petitioners were *adults* at the time of the alleged offense." (emphasis added)); *id.* ("We conclude the case should be resolved by determining whether the petitioners were free as *adults* to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . . ." (emphasis added)); *id.* at 567 ("[*A*]*dults* may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons." (emphasis added)); *id.* at 569 ("Laws prohibiting sodomy do not seem to have been enforced against consenting *adults* acting in private." (emphasis added)); *id.* at 572 ("[L]iberty gives substantial protection to *adult* persons in deciding how to conduct their private lives in matters pertaining to sex." (emphasis added)); *id.* at 576 ("Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual *adults* to engage in intimate, consensual conduct." (emphasis added)).

and was distinguishable from *Lawrence* on this ground.[230] But this is a strained reading of the *Lawrence* Court's disclaimer that "[t]he present case does not involve minors."[231] Given the sexual nature of the Texas sodomy law—and indeed, the sexual nature of all the other examples on the *Lawrence* Court's list—it seems fairly clear that the Court meant to distinguish the Texas sodomy law from laws that govern *sexual* relations with minors.

The most obvious examples of such laws would be prohibitions against statutory rape, child sexual abuse, child pornography, and perhaps the distribution of pornography to minors. Given that all of the examples on the list involved sexual conduct, it seems doubtful that the Court meant to distinguish sodomy laws from other policies that "involve minors" only in a much broader sense, such as adoption and foster care statutes, custody and visitation standards, or presumably the employment of teachers, coaches, and other role models. Earlier in the opinion, the Court had warmly suggested that homosexual conduct "can be but one element in a personal bond that is more enduring"[232] and had bemoaned that sodomy laws had served as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[233] In light of the benevolent attitude toward homosexuality betrayed in these passages, it beggars belief to suppose that when the Court observed that "[t]he present case does not involve minors,"[234] it meant to juxtapose gay parents with statutory rapists and child molesters.

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230 *Lofton*, 358 F.3d at 817.

231 *Lawrence*, 539 U.S. at 578.

232 *Id.* at 567. Dissenting from *Lawrence*, Justice Scalia makes a similar observation about the majority's tone, and the likely implications of the majority's analysis in subsequent cases:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring"; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? . . . This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.

Id. at 604–05 (Scalia, J., dissenting) (first and second alterations in original) (citations omitted) (quoting *id.* at 567, 578).

233 *Id.* at 575 (majority opinion).

234 *Id.* at 578.

C. *What* Windsor *Wrought*

In any event, the Eleventh Circuit's attempt to distinguish Florida's adoption ban from the laws challenged in *Romer* and *Lawrence* is not likely to survive the Supreme Court's recent ruling in *Windsor*. In striking down DOMA, the Court emphatically declared that the law was based on nothing more than "improper animus"—indeed, a desire to "injure" same-sex couples by imposing a "stigma" upon them—and explicitly rejected Congress's attempts to offer "moral" justifications for the law.[235]

If the Supreme Court had been inclined to read *Romer* and *Lawrence* narrowly in *Windsor*—as applying only to laws as broad as Colorado's Amendment 2, or as intrusive as Texas's sodomy law—it could have attempted to do so.[236] Although DOMA touched upon more than 1,000 federal laws, it was concerned only with the federal recognition of marriages—not with discrimination in "housing, employment, education, public accommodations, and health and welfare services," like Colorado's Amendment 2, which implicated an "almost limitless number of transactions and endeavors."[237] And by defining marriage exclusively as "a legal union between one man and one woman,"[238] DOMA squarely addressed one of the issues that the *Lawrence* Court had carefully sidestepped—"whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[239]

To be sure, *Windsor* included a fair share of limiting language, much like *Romer* and *Lawrence*. For several pages, the majority's opinion emphasized that prior to DOMA, the power to define marriage had traditionally been reserved to the states.[240] Whenever possible, the majority noted that DOMA was designed to "injure" marriages that the states had legally recognized,[241] and moreover, that the law sought to

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235 United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

236 Of course, by saying that the *Windsor* Court could have "attempted" to distinguish *Romer* and *Lawrence*, I do not mean to suggest that the distinctions are valid. On the contrary, I mean to argue that the *Lofton* Court's narrow reading of *Romer* and *Lawrence* was unprincipled.

237 *Compare Windsor*, 133 S. Ct. at 2694, *with* Romer v. Evans, 517 U.S. 620, 624, 631 (1996). As the *Windsor* Court implied, however, DOMA's effect was much broader than this contrast suggests. Although *Windsor* involved a challenge to the application of the federal estate tax, the Court correctly noted that DOMA controlled a vast range of laws, including "laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits." *Windsor*, 133 S. Ct. at 2694.

238 Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by Windsor*, 133 S. Ct. 2675.

239 *Lawrence*, 539 U.S. at 578.

240 *Windsor*, 133 S. Ct. at 2689–92.

241 *Id.* at 2692, 2693, 2696.

"influence a state's decision as to how to shape its own marriage laws."[242] More than once, the Court suggested this federal intrusion into the domain of marriage law was "unusual,"[243] and that "[d]iscriminations of an unusual character"[244] were especially relevant "[i]n determining whether a law is motived by an improper animus."[245] In the penultimate paragraph, the majority stressed that DOMA was directed at the class of "persons who are joined in same-sex marriages made lawful by the State,"[246] and cautioned that "[t]his opinion and its holding are confined to those lawful marriages."[247]

In a pair of dissenting opinions, Chief Justice Roberts and Justice Scalia offered opposing viewpoints on whether the majority's disclaimers about federalism should be taken seriously. On the one hand, Chief Justice Roberts claimed that the majority's judgment was "based on federalism,"[248] and he emphasized that the majority's analysis "leads no further."[249] Justice Scalia, by contrast, reminded readers that he had been a member of the Court when *Romer* and *Lawrence* were decided, and he had heard "such 'bald, unreasoned disclaimer[s]' before"[250] in both cases. Dissenting from *Lawrence*, he had predicted that "[i]f moral disapprobation of homosexual conduct is 'no legitimate state interest,'" then the state would not be able to offer any justification "for denying the benefits of marriage to homosexual couples."[251] Now that his prediction had come to pass, he added that "no one should be fooled" about what *Windsor* wrought:[252] In a challenge to state laws against same-sex marriage, he predicted, "[h]ow easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status."[253]

While this debate about *Windsor*'s scope may one day decide the constitutionality of same-sex marriage bans, it does nothing to rescue the state's interest "in shaping sexual and gender identity and in providing heterosexual role modeling."[254] Whatever *Windsor* portends about the constitutionality of state laws against same-sex marriage, it

242 *Id.* at 2693 (quoting Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 12–13 (1st Cir. 2012)) (internal quotation marks omitted).

243 *Id.* at 2692–93.

244 *Id.* at 2693 (alteration in original) (quoting Romer, 517 U.S. at 633) (internal quotation marks omitted).

245 *Id.*

246 *Id.* at 2695.

247 *Id.* at 2696.

248 *Id.* at 2697 (Roberts, C.J., dissenting).

249 *Id.* at 2696.

250 *Id.* at 2709 (Scalia, J., dissenting) (alteration in original) (quoting Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting)).

251 *Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting).

252 *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting).

253 *Id.* at 2709.

254 Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004).

emphatically reaffirms the "basic due process and equal protection principles" articulated in *Romer* and *Lawrence*: Under the Constitution's equal protection guarantees, a law may not be based on "animus" against lesbian, gay, or bisexual people; under the Constitution's due process protections, a law may not be based on "moral disapproval" of homosexual conduct. When the state's interest "in shaping sexual and gender identity" is framed in terms of children's status or conduct, it runs afoul of these basic principles of equal protection and due process.

III. CONSTITUTIONAL CONFLATIONS: DEFENDING CHILDREN'S CONDUCT AS SPEECH, STATUS, AND CONDUCT

The Court's caveat that *Lawrence* did not "involve minors" begs a set of more vexing questions about the state's regulation of homosexuality in childhood: If the state may broadly discourage children from engaging in sexual conduct, then may it specifically discourage children from engaging in homosexual conduct? Does the existence of the greater power entail the existence of a lesser power, which is more specific? If not, why not? Whether or not children have a broad liberty to engage in sexual conduct, might they still have an equal liberty to choose between homosexual and heterosexual conduct? Even though *Lawrence* did not "involve minors," does the Constitution offer any protections for children's liberty to engage in homosexual conduct at all?

These questions are not idle. They have been addressed by federal courts in First Amendment challenges brought by lesbian and gay high school students, and in *State v. Limon*,[255] they were squarely posed to the Kansas Supreme Court. This Part examines three distinct ways to defend children's homosexual conduct against policies that specifically target it—as a form of speech, a proxy for status, and a type of conduct. Each of these claims is constitutionally valid and merits attention from scholars, lawyers, and activists. They reinforce one another, but they are not redundant, because they protect independent aspects of liberty and equality in children's lives. When all three of these claims are placed alongside each other, they offer a withering critique of the state's interest in targeting children's homosexual conduct and a broad foundation for children's right to be queer.

255 122 P.3d 22 (Kan. 2005).

A. *First Amendment: Conduct as Speech*

It is well-settled that the First Amendment protects "symbolic speech" or "communicative conduct."[256] In *Spence v. Washington*, the Supreme Court held that conduct is "communicative" when it is intended to convey a message and the message is likely to be understood by others.[257] In *United States v. O'Brien*, the Court established that restrictions on communicative conduct must be justified by an "important governmental interest" that is "unrelated to the suppression of free expression," and that restrictions on communicative conduct must be "no greater than is essential to the furtherance of that interest."[258]

The seminal case that applies the First Amendment to children's homosexual conduct is *Fricke v. Lynch*, a 1980 case involving a gay high school student's request to bring a male date to his senior prom in Rhode Island.[259] When Aaron Fricke's request was refused by the school's principal, Richard Lynch, Fricke filed suit in federal court, alleging that the principal's decision had violated his First Amendment rights.[260]

Applying the *O'Brien* standard, the district court began by finding that the act of attending the prom with another male was conduct that had "significant expressive content."[261] To support this finding, the court cited Fricke's testimony that "he wants to go because he feels he has a right to attend and participate just like all the other students and that it would be dishonest to his own sexual identity to take a girl to the dance."[262] In addition, the court noted, "he feels his attendance would have a certain political element and would be a statement for equal rights and human rights."[263] Although the court admitted that Fricke's "explanation of his 'message' was hesitant," it emphasized that "he [was] sincerely although perhaps not irrevocably committed to a homosexual orientation and that attending the dance with another young man would be a political statement."[264]

Turning to the principal's reasons for refusing Fricke's request, the court found that Lynch's action was not based on "his personal views on

256 *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1097–1120 (4th ed. 2011).
257 418 U.S. 405, 410–11 (1974).
258 391 U.S. 367, 376–77 (1968).
259 491 F. Supp. 381, 382 (D.R.I. 1980).
260 *Id.* at 382–83.
261 *Id.* at 384.
262 *Id.* at 385.
263 *Id.*
264 *Id.*

homosexuality."[265] If Lynch had denied Fricke's request based on his disapproval of homosexual conduct, his decision would have violated *O'Brien*'s requirement that the state's interest must be "unrelated to the suppression of free expression."[266] As the court explained, *O'Brien* prohibited the school from relying on any interest "in squelching a particular message because it objects to its content."[267]

Instead, the court found that the principal had acted based on his sincere belief that there was "a significant possibility that some students will attempt to injure Aaron and [his date] Paul."[268] However, the court refused to accept the legitimacy of this interest, because it was tantamount to "suppressing certain speech activity because of the reaction its message may engender."[269] In addition to finding that "the school can take appropriate security measures to control the risk,"[270] the court held that the principal had acted based upon "an undifferentiated fear or apprehension of disturbance" in violation of *Tinker*.[271] "To rule otherwise," the court explained, "would completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard."[272]

Needless to say, a minor's right to engage in sexually expressive conduct is not without limits, especially when the minor's conduct takes place at school. Although the Supreme Court has been solicitous of a student's freedom to express political viewpoints, it has been more reluctant to protect student speech that includes sexual content.[273] In *Bethel School District No. 403 v. Fraser*, the Court upheld a student's suspension for giving a speech filled with sexual innuendo at an assembly of students.[274] Distinguishing *Tinker*, the Court emphasized that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[275] Similarly, in *Hazelwood School District v. Kuhlmeier*, the Court upheld a principal's refusal to print two articles in a student newspaper, based upon the principal's concern that "the article's references to sexual

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.* at 384.

269 *Id.* at 385.

270 *Id.*

271 *Id.* at 387 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)) (internal quotation marks omitted).

272 *Id.*

273 *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968) (rejecting claim that a law prohibiting the sale of "girlie" magazines to minors less than 17 years old violated a minor's right to "free expression" under the First Amendment).

274 478 U.S. 675 (1986).

275 *Id.* at 683.

activity and birth control were inappropriate for some of the younger students at the school."[276]

In *Nguon v. Wolf*, a federal district court in California applied *Tinker* and *Hazelwood* to the novel question of whether the First Amendment protects a lesbian student's right to engage in public displays of affection during school.[277] In this case, Charlene Nguon was a junior at Santiago High School in Garden Grove, California.[278] She claimed that the school had violated her rights under the First Amendment and the Equal Protection Clause by disciplining her for engaging in "inappropriate public displays of affection" (IPDA) with her girlfriend, while ignoring heterosexual couples who had been engaging in similar conduct.[279]

The court began by recognizing that *Tinker* protects a student's "right to express his or her sexuality," relying on cases like *Fricke*, *Boyd*, and *Henkle*, which involved gay students attending proms, forming organizations, and wearing pro-gay buttons.[280] Because Nguon's "on-campus public displays of affection . . . were intended to express [her] gay sexual orientation," the court reasoned that they were a form of expressive conduct.[281] The court observed, however, that the school's regulation of sexual expression was "not limited to the formulation in *Tinker*."[282] Under *Hazelwood*, "[a] school need not tolerate *student speech that is inconsistent with its basic educational mission*, even though the government could not censor similar speech outside the school."[283]

Turning to Nguon's allegations, the court observed that Nguon and her girlfriend had never been disciplined for engaging in modest affectionate displays, such as sharing a "morning kiss," "holding hands at lunch, pecks on the cheek, short hugs, or sitting in each other's laps."[284] Given that they had regularly engaged in such conduct—and

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276 484 U.S. 260, 263 (1988). One of the articles described "three Hazelwood East students' experiences with pregnancy," and the other discussed "the impact of divorce on students at the school." *Id.* To justify his decision, the principal expressed concerns that the pregnant students might be "identifiable," in addition to his concern that the story was "inappropriate." *Id.* After finding that the newspaper was created to serve as "a supervised learning experience for journalism students"—that is, a nonpublic forum—the Court held that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner." *Id.* at 270.

277 517 F. Supp. 2d 1177 (C.D. Cal. 2007).

278 *Id.* at 1179.

279 *Id.* at 1181–86.

280 *Id.* at 1188 (citing Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Ed., 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003); Henkle v. Gregory, 150 F. Supp. 2d 1067, 1076 (D. Nev. 2001); Fricke v. Lynch, 491 F. Supp. 381, 385–86 (D.R.I. 1980)). For a discussion of *Boyd* and *Henkle*, see *supra* Part I.B.

281 *Nguon*, 517 F. Supp. 2d at 1188.

282 *Id.*

283 *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)) (internal quotation marks omitted).

284 *Id.* at 1189.

moreover, that this conduct "surely expressed their sexual orientation"—the court found that the school had not "sought to eradicate expressions of sexuality, or even expressions of gay sexuality" altogether.[285]

Instead, the court found that Nguon and her girlfriend had been disciplined only for more overtly sexual displays, such as "French kissing, making out, and groping" each other.[286] Although the court hinted that such conduct "may be appropriate on a spring afternoon in a public park,"[287] it found that the school was allowed to prohibit such conduct on campus under *Hazelwood*: "IPDA is inconsistent with the mission of a school, and . . . may be legitimately regulated by school official[s] consistent with students' First Amendment rights."[288]

In response to Nguon's claim that the school's IPDA policy was enforced in a discriminatory manner, the court found that this allegation was belied by the record: "[T]he School Defendants neither disciplined on a discriminatory basis nor did they engage in deliberate indifference with regard to IPDA engaged in by heterosexual couples."[289] Based on this factual finding, the court concluded that the school had not discriminated against Charlene based on her sexual orientation or her viewpoint.[290] Throughout this analysis, the court took for granted that any discrimination against lesbian and gay students would violate the Equal Protection Clause—and similarly, that any discrimination against the display of same-sex affections would violate the First Amendment.

In considering Nguon's claims, the court emphasized that a student's right to engage in sexual conduct was not unlimited, because "not all conduct with a sexual component is necessarily protected expressive conduct."[291] Relying on a line of cases denying First Amendment protections to public sex acts, the court opined, "[h]aving sex, without more, is not expressive conduct protected by the First Amendment."[292] Although the court acknowledged that "French kissing, making out, and groping . . . . obviously fall short of having sex,"[293] it noted that such conduct was "far more explicit" than the types of expressive conduct that courts had protected in previous cases—wearing pro-gay buttons, establishing GSAs, and attending dances with

285 *Id.*
286 *Id.*
287 *Id.* at 1190.
288 *Id.* at 1189.
289 *Id.* at 1187.
290 *Id.* at 1188, 1190–91.
291 *Id.* at 1189.
292 *Id.* (quoting 832 Corp. v. Gloucester Twp., 404 F. Supp. 2d 614, 626 (D.N.J. 2005)) (internal quotation marks omitted).
293 *Id.*

same-sex partners.[294] Proceeding from the assumption that "French kissing, making out, and groping are . . . expressive conduct," the court found that such conduct was "inconsistent with the mission of the school."[295]

Without resolving the extent of a student's "right to express his or her sexuality"[296] by engaging in sexual conduct, *Nguon* established that public schools must apply limitations on this right in a neutral manner. Even if a school were permitted to totally bar students from expressing any "sexuality" on campus, it could not privilege the expression of one sexuality over another.

B. *Equal Protection: Conduct as Status*

In *State v. Limon*, the Kansas Supreme Court was asked to consider whether the State could discourage children from engaging in even more explicit forms of homosexual conduct—sodomy and lewd touching.[297] To appreciate the complex interplay between equal protection and due process in *Limon*, it is helpful to understand the procedural chronology of *Limon* and *Lawrence*.

When Matthew Limon first appealed his sentence, *Lawrence* had not yet been decided, so the Kansas sodomy law was still valid under *Bowers v. Hardwick*.[298] Rather than challenging his conviction as a deprivation of due process, Limon challenged his sentence as a denial of equal protection.[299] Relying on the broad equal protection guarantees of the Kansas Constitution and Bill of Rights,[300] he argued that by punishing homosexual conduct more harshly than heterosexual conduct, the State was discriminating against "homosexual teenagers,"[301] and indeed, all "homosexuals."[302] In effect, he tried to litigate "around" the Supreme Court's holding in *Bowers* by recasting the law's prohibition of homosexual conduct as a form of discrimination based on homosexual status.[303]

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294 *Id.*

295 *Id.* at 1190.

296 *Id.* at 1188.

297 122 P.3d 22 (Kan. 2005).

298 *Id.* at 25 (citing State v. Limon, 41 P.3d 303 (Kan. Ct. App. 2002) (unpublished table opinion)).

299 Brief of Appellant at 1, State v. Limon, 41 P.3d 303 (Kan. Ct. App. 2001) (No. 00-85898-A).

300 *See id.* at 1, 4.

301 *Id.* at 12, 31.

302 *Id.* at 11–31. Arguing in the alternative, Limon claimed that "homosexuals" were a "suspect," "quasi-suspect," or at least "an identifiable class of Kansans" under the Kansas Bill of Rights, and that the disparity in Limon's punishment could not satisfy "strict scrutiny," "intermediate scrutiny," or even "rational basis review." *Id.*

303 Cain, *supra* note 27, at 1617–21.

In his first appeal, this strategy was not successful. The Kansas Court of Appeals affirmed his sentence, relying on the continuing validity of *Bowers*.[304] When the Kansas Supreme Court denied review, Limon appealed to the U.S. Supreme Court.[305] While his petition was pending, the U.S. Supreme Court decided *Lawrence*.[306] The following day, the U.S. Supreme Court granted Limon's petition for certiorari, vacated the judgment against him, and remanded to the Kansas Court of Appeals "for further consideration in light of *Lawrence*."[307]

In light of the U.S. Supreme Court's instructions, one might have expected Limon to challenge his sentence under *Lawrence* as well as *Romer*—as a violation of due process, as well as equal protection. But in his second appeal, Limon stuck to his guns: He reiterated his claim that the law discriminated against "gay teenagers" without any rational basis, in violation of *Romer*.[308] This time around, he added that his equal protection claim was now bolstered by the *Lawrence* Court's recent rejection of "moral disapproval" as a justification for sodomy laws.[309] But rather than supplementing his equal protection claim with a due process claim, he emphasized that the law "has nothing to do with punishing specific *conduct* and everything to do with punishing a specific group of *people*—gay teenagers."[310]

As Limon acknowledged in his brief, this argument closely paralleled the reasoning that Justice O'Connor had adopted in *Lawrence*.[311] Concurring only in the majority's judgment, Justice O'Connor would have invalidated the Texas sodomy law under the Equal Protection Clause rather than the Due Process Clause.[312] Relying principally on *Romer*, she explained: "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[313] Although Texas had claimed that the law discriminated "only against homosexual *conduct*" and not "against homosexual *persons*,"[314] Justice O'Connor claimed that this distinction did not make any constitutional

304 State v. Limon, 122 P.3d 22, 25 (Kan. 2005) (citing *Limon*, 41 P.3d 303).

305 *Id.*

306 *Id.* (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

307 Limon v. Kansas, 539 U.S. 955 (2003).

308 Defendant-Appellant's Supplemental Brief on Review at 2–5, *Limon*, 122 P.3d 22 (No. 00-85898-S). Limon initially made his equal protection argument before the Kansas Court of Appeals, which rejected it, affirming his conviction once again. State v. Limon, 83 P.3d 229, 234 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005). Limon then made the equal protection argument before the Kansas Supreme Court. Defendant-Appellant's Supplemental Brief on Review, *supra*.

309 Defendant-Appellant's Supplemental Brief on Review, *supra* note 308, at 5–6.

310 *Id.* at 6 (emphasis added).

311 *Id.* at 7.

312 Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in judgment).

313 *Id.* at 582.

314 *Id.* at 583 (emphasis added).

difference: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[315] Based on this conflation of conduct with status,[316] Justice O'Connor concluded the Texas sodomy law was based on "[m]oral disapproval of a *group*"—rather than moral disapproval of *conduct*—which "cannot be a legitimate governmental interest under the Equal Protection Clause."[317] Quoting liberally from *Romer*, she concluded that "[t]he Texas sodomy law 'raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'"[318]

Strictly speaking, Justice O'Connor stood alone in adopting this analytical framework. In *Lawrence*, the majority voted to strike down the Texas law under the Due Process Clause, not the Equal Protection Clause.[319] In dicta, however, the Court paused briefly to discuss Justice O'Connor's "alternative argument" that the law violated the Equal Protection Clause.[320] After acknowledging that this was "a tenable argument" and recognizing that equal protection and due process "are linked in important respects,"[321] the Court subtly signaled that it was not impressed by the State's proposed distinction between conduct and status: "When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres."[322]

Ignoring these cues, the Kansas Court of Appeals rejected Limon's claim that the law targeted "gay teenagers."[323] The two-judge majority wrote separate opinions, but both judges found that Limon's case was "factually and legally distinguishable" from *Lawrence*.[324] Factually, the judges noted that *Lawrence* involved sexual activity between two *adults*, while Limon's case involved sexual activity performed on a *minor*.[325] As one judge observed, the *Lawrence* Court had emphasized the distinction

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315 *Id.*

316 *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 461–65 (2012) (discussing the "conduct-status conflation").

317 *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in judgment) (emphasis added).

318 *Id.* (second alteration in original) (quoting Romer v. Evans, 517 U.S. 620, 634 (1996)).

319 *Id.* at 564 (majority opinion).

320 *See id.* at 574.

321 *Id.* at 574–75.

322 *Id.* at 575 (emphasis added). In addition, the Court noted that the "continuance [of *Bowers*] as precedent demeans the lives of homosexual persons." *Id.*

323 State v. Limon, 83 P.3d 229, 235 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

324 *Id.* at 234; *see id.* at 241 (Malone, J., concurring).

325 *Id.* at 234 (majority opinion); *id*. at 241 (Malone, J., concurring).

between "minors" and "adults" in the opinion itself.[326] Legally, the judges noted that the *Lawrence* majority had struck down the Texas statute under the Due Process Clause, whereas Limon was challenging the Kansas statute under the Equal Protection Clause.[327] Finally, both judges suggested that the law was targeting Limon's homosexual conduct rather than his status as a gay teenager. One judge objected that Limon had labeled his victim "homosexual or bisexual"; this was "unfair," the judge reasoned, because the two boys had "only one same-sex encounter" and the victim "might have become confused."[328] The other judge agreed that "at this age a child's sexual orientation is more than likely not fully developed."[329]

On appeal, by contrast, the Kansas Supreme Court embraced Limon's conflation of conduct with status, invalidating the Romeo and Juliet law under the Equal Protection Clause.[330] Although Kansas had argued that the law "applies only to conduct and does not discriminate against . . . homosexual persons," the court reasoned that criminalizing homosexual conduct was tantamount to targeting lesbian and gay people as a class.[331] The court recognized that *Lawrence* involved adults, but insisted that "the demeaning and stigmatizing effect upon which the *Lawrence* Court focused is at least equally applicable to teenagers," if not more so.[332] With respect to the distinction between due process and equal protection, the court noted that "the *Lawrence* majority . . . signaled application of the principles to equal protection analysis" by indicating that the two doctrines were "linked in important respects."[333]

Subsequent cases have only shored up *Limon*'s conflation of conduct with status. In *Christian Legal Society v. Martinez*,[334] this framework was explicitly embraced by a majority of the U.S. Supreme Court. In this case, University of California's Hastings Law School had denied official recognition to a group of Christian law students because they had refused to admit "anyone who engages in 'unrepentant homosexual conduct,'" in violation of the school's rule that student organizations must remain open to all students.[335] When the group contended that "it does not exclude individuals because of sexual

326 *Id.* at 234 (majority opinion) (citing *Lawrence*, 539 U.S. at 578).

327 *Id.*; *id.* at 241 (Malone, J., concurring).

328 *Id.* at 236 (majority opinion).

329 *Id.* at 242 (Malone, J., concurring).

330 State v. Limon, 122 P.3d 22 (Kan. 2005).

331 *Id.* at 28–29.

332 *Id.* at 29.

333 *Id.* at 34 (quoting Lawrence v. Texas, 539 U.S. 558, 575 (2003)) (internal quotation marks omitted).

334 130 S. Ct. 2971 (2010).

335 *Id.* at 2979–80.

orientation, but rather on the basis of a conjunction of *conduct* and the belief that the conduct is not wrong," the Court responded that this distinction was constitutionally meaningless.[336] "Our decisions have declined to distinguish between status and conduct in this context," the Court observed.[337] In support of this principle, the Court cited the *Lawrence* majority's subtle observation that criminalizing "homosexual *conduct*" was an invitation to discriminate against "homosexual *persons*,"[338] as well as Justice O'Connor's explicit claim that prohibiting "conduct that is closely correlated with being homosexual" is equivalent to targeting "gay persons as a class."[339]

C. *Due Process: Conduct as Conduct*

Even aside from the *Martinez* Court's stamp of approval, the conduct/status conflation has much to commend it. After all, it is surely correct that homosexual conduct is "closely correlated" with homosexual status and that the Fourteenth Amendment's liberty and equality guarantees are "linked in important respects."[340] In light of these connections, there is little reason to doubt that linking conduct to status permits advocates to honestly and powerfully articulate the interests and injuries of lesbian and gay people in constitutional terms.[341] If Matthew Limon identified himself as a "gay teenager,"[342] for example, then lawyers should be willing to represent him, and judges should be willing to recognize him, in such terms. Moreover, if Limon identified himself as a gay teenager, then there is no question that he was "stigmatiz[ed]" and "demean[ed]" by the disparity in the Romeo and Juliet law.[343] Justice O'Connor is correct: When the law targets

336 *Id.* at 2990 (emphasis added) (internal quotation marks omitted).

337 *Id.*

338 *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 575 (2003)) (internal quotation marks omitted).

339 *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment)) (internal quotation marks omitted).

340 Lawrence v. Texas, 539 U.S. 558, 575 (2003) (majority opinion); *id.* at 583 (O'Connor, J., concurring in judgment). On the connections between the Equal Protection Clause and the Due Process Clause, see Tribe, *supra* note 190, at 1898, 1902–16; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011).

341 As Professor Michael Boucai observes, the same logic may not apply to bisexuals, depending on how the conduct/status conflation is articulated. *See* Boucai, *supra* note 316, at 461–64 (observing that "[a]s presently articulated [in same-sex marriage cases], the conduct-status equation excludes bisexuals," but insisting that "it is perfectly coherent—and legally accurate—to insist that a law that discriminates against homosexuals and bisexuals is still a law that discriminates on the basis of sexual orientation").

342 *See* Defendant-Appellant's Supplemental Brief on Review, *supra* note 308, at 2.

343 State v. Limon, 122 P.3d 22, 28 (Kan. 2005) (citing *Lawrence*, 539 U.S. at 578).

children's homosexual conduct, it targets more than just conduct; it shames lesbian and gay children as a class.

But in Limon's briefs, conduct and status were not just conflated; the former was wholly subsumed by the latter.[344] Even after the Supreme Court remanded his appeal "for further consideration in light of *Lawrence*,"[345] Limon's lawyers made only a claim under the Equal Protection Clause, without adding a parallel claim under the Due Process Clause.[346] That would have been bad enough, but they made matters worse: By going so far as to say that the Romeo and Juliet law had "*nothing* to do with punishing specific *conduct*," they gratuitously discredited the liberty interest that they had declined to assert.[347]

Suppose, for example, that Limon had not considered himself to be a "gay teenager." Should he be required to identify himself in these terms in order to challenge the constitutionality of his punishment?[348] Do all teenagers have the liberty to choose homosexual conduct, or is this right only reserved for "gay teenagers"? Whatever one thinks about Justice O'Connor's concurrence in *Lawrence*, it is worth remembering what the *Lawrence* Court actually held.[349] By striking down the Texas law under the Due Process Clause rather than the Equal Protection Clause, *Lawrence* established "the liberty of persons to choose" homosexual relations and relationships.[350] As the Court observed, this is "the liberty of all," not just a freedom for lesbian, gay, and bisexual people.[351]

Without casting aspersions on Limon's equal protection claim, this Article develops the alternative claim that *Lawrence* protects every child's equal liberty[352] to choose between homosexual and heterosexual conduct. Even though *Lawrence* did not "involve minors," and even though children may not have the liberty to engage in any kind of sexual

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344 *Cf.* Boucai, *supra* note 316, at 423 ("*Lawrence*'s recognition that liberty and equality are often related . . . . is not . . . an invitation to collapse one value into the other . . . ." (footnote omitted)).

345 Limon v. Kansas, 539 U.S. 955 (2003).

346 *See* Defendant-Appellant's Supplemental Brief on Review, *supra* note 308.

347 *See id.* at 6 (emphasis added).

348 *See* Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115, 118 (David Kairys ed., 3d ed. 1998).

349 *See* Boucai, *supra* note 316, at 417–18, 429 (observing that in same-sex marriage litigation, the holding of *Lawrence* is often neglected in favor of the conduct/status conflation presented in O'Connor's concurrence).

350 Lawrence v. Texas, 539 U.S. 558, 567 (2003).

351 *Id.* at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850, (1992)) (internal quotation marks omitted). For a brilliant exposition of this reading of *Lawrence*, see Boucai, *supra* note 316, at 421–26.

352 I borrow the phrase "equal liberty" from Professor Tribe's eloquent essay on *Lawrence*. *See* Tribe, *supra* note 190, at 1897–98 ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity.").

conduct, the Due Process Clause still protects children's liberty to decide whether they will engage in homosexual or heterosexual conduct—to the extent that they engage in, or are permitted to engage in, sexual conduct at all. To parse the same principle in more libertarian terms, the state may not specifically discourage children from engaging in homosexual conduct, even though it may broadly discourage them from engaging in sexual conduct of any kind.

The Supreme Court has long recognized that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[353] When the state acts *parens patriae*, it "may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[354] Yet there is no question that children have the right to "liberty" under the Due Process Clause. As the Court has explained, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[355] In the late 1970s, the Court was twice asked to consider the extent of children's liberty under the substantive component of the Due Process Clause. Both cases are relevant here, insofar as they touch upon the state's authority to discourage children from engaging in sexual conduct.

In *Planned Parenthood of Central Missouri v. Danforth*, the Court invalidated a Missouri law that prohibited an unmarried female under eighteen years old from obtaining an abortion without a parent's written consent.[356] Although the Court recognized that "the State has somewhat broader authority to regulate the activities of children than of adults," it insisted that "[m]inors, as well as adults . . . possess constitutional rights."[357] To justify the law's infringement upon these rights, the Court held that the state must show that there is a "significant state interest in conditioning an abortion on the consent of a parent . . . that is not present in the case of an adult."[358] The Court was careful to emphasize that "our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent."[359] But by imposing a

353 Prince v. Massachusetts, 321 U.S. 158, 170 (1944); *see also* Carey v. Population Servs., Int'l, 431 U.S. 678, 692 (1977) (plurality opinion); Ginsberg v. New York, 390 U.S. 629, 638 (1968).

354 *Prince*, 321 U.S. at 166 (footnotes omitted).

355 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976); *see also* H.L. v. Matheson, 450 U.S. 398, 435 (1981) ("It is . . . settled that the right to privacy, like many constitutional rights, extends to minors." (footnote omitted)); Bellotti v. Baird, 443 U.S. 622, 633–34 (1979).

356 *Danforth*, 428 U.S. 52.

357 *Id.* at 74.

358 *Id.* at 75.

359 *Id.*

"blanket"[360] consent requirement upon all minors, the Missouri law violated "the right of privacy of the competent minor mature enough to have become pregnant."[361]

The following year, in *Carey v. Population Services International*, the Court invalidated a New York law that prohibited the distribution of contraceptives to anyone under sixteen years old.[362] Seven Justices voted to strike down the law, but they did not agree which standard of review should be applied. Writing for a plurality of four Justices, Justice Brennan claimed that the law "burdens the exercise of a fundamental right,"[363] but applied a standard that was "less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults."[364] Borrowing from the standard set forth in *Danforth*, he wrote, "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'"[365]

In support of the law, the State argued that it had a significant interest in discouraging minors from engaging in sexual conduct; it claimed that banning access to contraceptives was a rational means of pursuing this goal.[366] Yet for a number of reasons, the plurality was not convinced that banning access to contraceptives was a rational way of discouraging minors from engaging in sexual conduct. First, the plurality was troubled by "[t]he argument . . . that minors' sexual activity may be deterred by increasing the hazards attendant on it," because this principle "would support a ban on abortions for minors,"[367] which *Danforth* had already prohibited. Second, they doubted whether "limiting access to contraceptives will in fact substantially discourage early sexual behavior."[368] Emphasizing that the State had "no evidence" of this "deterrent effect," the plurality concluded that the law was not "a rational means" of achieving the State's interest, so it could not be sustained.[369]

Writing separately, Justices Powell, Stevens, and White agreed that the law was unconstitutional, but they were sharply critical of the plurality's analysis.[370] Rather than applying a new form of heightened

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360 *Id.* at 74.

361 *Id.* at 75.

362 431 U.S. 678 (1977).

363 *Id.* at 696.

364 *Id.* at 693 n.15.

365 *Id.* at 693 (omission in original) (quoting *Danforth*, 428 U.S. at 79).

366 *Id.* at 694.

367 *Id.*

368 *Id.* at 695.

369 *Id.* at 695–96.

370 *Id.* at 702 (White, J., concurring in part and concurring in result in part); *id.* at 707 (Powell, J., concurring in part and concurring in the judgment); *id.* at 712 (Stevens, J., concurring in part and concurring in the judgment).

scrutiny, they would have invalidated the law under rational basis review. Invoking "[c]ommon sense," Justice Stevens reasoned that "many young people will engage in sexual activity regardless of what the New York Legislature does,"[371] and Justice White found no evidence that the law "measurably contributes to the deterrent purposes which the State advances."[372] Justice Powell found that the law unjustifiably infringed upon the a parent's right to direct the upbringing of his or her child by prohibiting parents from distributing contraceptives to their children.[373]

Taken together, *Carey* and *Lawrence* demonstrate that moral disapproval of children's homosexual conduct is not a legitimate state interest under the Due Process Clause. In *Carey*, seven Justices agreed that any law that regulates the sexual activity of minors must at least satisfy rational basis review, if not a higher standard. In *Lawrence*, the Court held that a law that prohibits homosexual conduct could not be

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371 *Id.* at 714 (Stevens, J., concurring in part and concurring in judgment).

372 *Id.* at 702 (White, J., concurring in part and concurring in result).

373 *Id.* at 708 (Powell, J., concurring in part and concurring in judgment). Above all, the Justices in *Carey* sparred sharply over the scope of the state's authority to discourage sexual activity among minors. In a bold move, the plaintiffs had claimed that "the State's policy to discourage sexual activity of minors is itself unconstitutional" because "the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior." *Id.* at 694 n.17 (plurality opinion). Taken to its logical extreme, this claim would have swept aside many laws that the Court had not yet considered—not only adultery and sodomy laws, but statutory rape and child sexual abuse laws. *See id.* ("[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults."). Without resolving these questions, the plurality noted that "in the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults." *Id.* (citing Ginsberg v. New York, 390 U.S. 629 (1968)). After observing that "[t]he question of the extent of state power to regulate conduct of minors . . . is a vexing one, perhaps not susceptible of precise answer," *id.* at 692, the plurality proceeded from "the assumption that the Constitution does not bar state regulation of the sexual behavior of minors," *id.* at 694 n.17.

The concurring Justices, by contrast, would have emphatically declared that the state has a compelling interest in discouraging minors from engaging in sexual behavior. Rather than leaving this question unresolved, Justices White and Stevens would have rejected "as 'frivolous' [the plaintiff's] argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State." *Id.* at 702–03 (White, J., concurring in part and concurring in result); *id.* at 713 (Stevens, J., concurring in part and concurring in judgment). Similarly, Justice Powell saw "no justification for subjecting restrictions on the sexual activity of the young to heightened judicial review." *Id.* at 705. (Powell, J., concurring in part and concurring in judgment). Like Justices White and Stevens, he concluded that "the relevant question in any case where state laws impinge on the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests." *Id.* at 707.

While this debate has important implications for the scope of children's liberty to engage in sexual conduct, it is not relevant to the state's interest in discouraging children from engaging in *homo*sexual conduct. As explained in the text, seven Justices in *Carey* agreed that any law that regulates the sexual activity of minors must at least satisfy rational basis review. Because the state has no specific interest in discouraging children from engaging in homosexual conduct, it cannot rely upon this interest to satisfy rational basis review.

justified by the majority's belief that homosexual conduct is immoral, because such a justification is tautological.[374]

In *Limon*, the modest principles of *Carey* and *Lawrence* would have been more than sufficient to dispose of the State's interests in "the protection and preservation of the traditional sexual mores of society" and the "preservation of the historical notions of appropriate sexual development of children."[375] Just as the State's law could not be justified by animus against lesbian and gay teenagers under the Equal Protection Clause, it could not be justified by moral disapproval of homosexual conduct under the Due Process Clause.[376] Even if the state has a broad interest in discouraging minors from engaging in sexual conduct, it does not have a particular interest in discouraging them from engaging in homosexual conduct. Regardless of whether the Due Process Clause grants children the liberty to engage in sexual relations, it grants them an equal liberty to choose between homosexual and heterosexual relations.

IV. PROMOTING HETEROSEXUALITY IN CHILDHOOD: A MEANS TO AN END?

Until this point, this Article has focused on attacking the premise that the state has a legitimate interest in promoting heterosexuality in childhood. It has argued that promoting heterosexuality cannot serve as an end in itself, because the state may not rely on self-serving

374 *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003).

375 State v. Limon, 122 P.3d 22, 33–34 (Kan. 2005).

376 Indeed, even though Limon chose not to challenge his punishment under the Due Process Clause, the Kansas Supreme Court implied that *Carey* undermined the State's claim that the Romeo and Juliet law promoted "the moral and sexual development of children." *Id.* at 35. As the court explained, "the *Carey* rationale suggests that even when the articulated interest is the protection of minors, there still must be a connection between the State's interest and the classification and, if the burden would not be allowed if placed upon an adult, the State's interest must be unique to children." *Id.* In light of this requirement, the court reasoned that "unless the justifications for criminalizing homosexual activity between teenagers . . . are somehow different than the justifications for criminalizing adult homosexual activity, those justifications must fail." *Id.* In the absence of any showing that "homosexual sexual activity is more harmful to minors than adults," the court found that the disparity in Limon's punishment failed even the minimal requirements of rational basis review. *Id.*

As soon as the court laid out this requirement, however, it slipped back into Limon's equal protection analysis, which was based on Justice O'Connor's conflation of conduct with status. For example, the court referred to "the exclusion of *gay* teens" from the Romeo and Juliet Law and claimed that under *Lawrence*, "moral disapproval of a *group* cannot be a legitimate governmental interest." *Id.* (emphasis added). In addition, the court gratuitously held that the State's policy was not rationally related to children's sexual development, because it concluded that a teenager's sexual orientation is immutable: "[S]exual orientation is already settled by the time a child turns 14, . . . sexual orientation is not affected by the sexual experiences teenagers have, and . . . efforts to pressure teens into changing their sexual orientation are not effective." *Id.*

justifications for restricting constitutional rights. Regardless of how this justification is framed—in terms of status, conduct, or speech—it is an empty argument that cannot satisfy any standard of judicial review.

This Part briefly examines whether the state could justify the promotion of heterosexuality in childhood on independent grounds—as a means to an end, rather than an end in itself. After briefly surveying the justifications that school officials have proffered in First Amendment cases, it turns to three independent justifications that Kansas offered in defense of the Romeo and Juliet law in *State v. Limon*—the state's interest in promoting public health, procreation, and parenting.

A. *Back to School: Advocacy of Illegal Conduct, Material and Substantial Interference, and the Heckler's Veto*

In First Amendment cases involving GSAs and gay students, schools have been trying to come up with independent justifications for discouraging homosexuality for nearly four decades, but they have not been successful. In *Bonner*, the First Circuit held that a school could not prevent gay students from hosting social functions simply because the school and the community viewed homosexuality as "abhorrent or offensive."[377] In subsequent cases, schools responded by attempting to offer alternative, independent justifications for such policies. In cases like *Gay Lib* and *Pryor*, for example, schools claimed that recognizing gay student organizations would lead more students to engage in sodomy,[378] which was still criminalized in some jurisdictions as recently as ten years ago.[379] When courts rejected these claims, schools then argued that allowing pro-gay expression would trigger bullying and harassment from other students, which would "materially and substantially interfere" with school discipline.[380] When courts rejected these claims as a variation on the "heckler's veto,"[381] schools were left

377 Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 662 (1st Cir. 1974). For a discussion of *Bonner* see *supra* Part I.B.

378 Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1545, 1547–49 (11th Cir. 1997); Gay Lib v. Univ. of Mo., 416 F. Supp. 1350, 1370 (W.D. Mo. 1976), *overruled by* 558 F.2d 848 (8th Cir. 1977). For discussions of *Gay Lib* and *Pryor* see *supra* Part I.B.

379 Lawrence v. Texas, 539 U.S. 558, 573 (2003) (observing that thirteen states had sodomy laws in 2003).

380 Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003); Colin *ex rel.* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000); E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1191–93 (D. Utah 1999). For a discussion of *Boyd* and related cases see *supra* Part I.B.

381 *Boyd*, 258 F. Supp. 2d at 689.

without any independent justifications for specifically targeting the expression of gay students and pro-gay views.[382]

B. *Back to Kansas: Public Health, Procreation, and Parenting*

To the best of my knowledge, *Limon* is the only case in which a state has presented any genuinely independent justifications for promoting heterosexuality in children. This is hardly surprising, given that the Romeo and Juliet law was so clearly and precisely directed at pursuing this goal. By lowering the penalties for teenagers who engaged in heterosexual conduct, while maintaining higher penalties for teenagers who engaged in homosexual conduct, the Kansas State Legislature squarely posed the question of whether the State could offer any independent reason for promoting heterosexuality in children.

As the Kansas Supreme Court explained, the State offered six justifications for specifically targeting homosexual conduct among minors:

> (1) the protection and preservation of the traditional sexual mores of society; (2) preservation of the historical notions of appropriate sexual development of children; (3) protection of teenagers against coercive relationships; (4) protection of teenagers from the increased health risks that accompany sexual activity; (5) promotion of parental responsibility and procreation; and (6) protection of those in group homes.[383]

As explained in Parts I through III, the first and second interests are not even legitimate because they are circular: The first is based on society's moral disapproval of homosexual conduct, which *Lawrence* rejects;[384] the second is based on the desire to minimize the number of lesbian and gay people, which *Romer* rejects.[385] The remaining interests are both legitimate and independent, but the question remains whether any of them is rationally related to the State's policy of targeting homosexual conduct among minors.

The third and sixth justifications barely merit analysis, because they are plainly irrelevant to this objective. To be sure, the state has a strong interest in protecting minors from rape, sexual assault, and other forms of sexual abuse, and it has an interest in protecting people who

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382 In an echo of the public pool closings from the civil rights era, some schools have taken the remarkable step of banning all extra-curricular activities from campus. This has led to protracted litigation over which clubs qualify as "curricular" and "non-curricular." *See, e.g.*, *E. High*, 81 F. Supp. 2d at 1177–85.

383 Limon v. State, 122 P.3d 22, 33–34 (Kan. 2005).

384 *See supra* Parts I.D, III.C.

385 *See supra* Parts I.C, III.B.

live in group homes.[386] (At the time of Limon's offense, he and M.A.R. were living in a home for minors with developmental disabilities.) But as the Kansas Supreme Court explained, neither of these interests had anything to do with the disparity in Limon's punishment.[387] Limon was convicted under the State's sodomy law rather than the voluntary sexual relations laws for only one reason: He had engaged in sexual activity with another male. The homosexual nature of his conduct did not render his conduct "coercive,"[388] and his conviction was not based on the fact that the conduct occurred in a group home.[389]

1. Public Health

This leaves only the fourth and fifth justifications—public health, procreation, and parenting. The first thing to note about these justifications is that they are familiar: They closely track the justifications offered for discouraging homosexual conduct among consenting adults. In *Bowers* and *Lawrence*, sodomy laws were defended as measures designed to prevent the spread of sexually transmitted diseases.[390] In same-sex marriage cases, laws that prohibit same-sex couples from marrying are routinely defended as efforts to promote "responsible procreation,"[391] "optimal" parenting,[392] and "biological parent[ing]."[393]

With respect to public health, the State claimed that homosexual conduct posed a higher risk of HIV infection than heterosexual

386 *Limon*, 122 P.3d at 35, 38.

387 *Id.*

388 *Id.* at 36.

389 *Id.* at 38.

390 *See, e.g.*, Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent at 15–16, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) (arguing that Texas sodomy law was "rationally related to protecting the public health" because "men who have sex with men, perhaps 2 percent of the U.S. population, account for 60 percent of Texas men with HIV/AIDS, 63 percent of the cumulative number of AIDS cases in U.S. men, and over 51 percent of all U.S. AIDS cases" (citation omitted) (internal quotation marks omitted)); Brief of Petitioner Michael J. Bowers Attorney General of Georgia at 37, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (arguing that Georgia sodomy law was justified by "the relationship of homosexual sodomy in the transmission of [AIDS] and other diseases such as anorectal gonorrhea, Hepatitis A, Hepatitis B, enteric protozoal diseases, and Cytomegalovirus").

391 *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006).

392 *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 983 (Mass. 2003) (Cordy, J., dissenting).

393 *See, e.g.*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 47–48, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter BLAG Brief]; Defendant-Intervenors' Trial Memorandum at 8–9, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW).

conduct.[394] By discouraging minors from engaging in homosexual conduct, the State claimed, the law was protecting minors from HIV risk.[395] But as the court explained, the connection between homosexual conduct and HIV risk was weak, so the State's policy was both over- and under-inclusive.[396] First, "the risk of transmission of the HIV infection through female to female contact is negligible."[397] Second, "[t]here is a near-zero chance of acquiring the HIV infection through the conduct which gave rise to this case, oral sex between males, or through cunnilingus."[398] Finally, even "the risk of HIV transmission during anal sex with an infected partner is the same," regardless of whether the conduct is heterosexual or homosexual.[399]

Even if the State's policy is viewed in more positive terms—as a form of leniency for heterosexual conduct, rather than a heightened punishment for homosexual conduct—the public health argument does not fare any better. In a glib moment, the *Limon* court observed that the state's Romeo and Juliet law was "[o]bviously" not designed to prevent teenage pregnancies, given that it lowered the penalties for heterosexual intercourse among teenagers.[400] Emphasizing that pregnancy was a far more prevalent phenomenon than HIV infection among teenagers in Kansas—and referring to teenage pregnancy as a "public health risk"[401]—the court implied that there was little logic in the legislature's decision to address one problem while ignoring the other.[402]

The court's aside about teenage pregnancy reveals that the state's conception of "public health" is profoundly sexist, in addition to being heterosexist. For girls, the "homosexual lifestyle" is significantly (indeed, vastly) more healthy than its heterosexual counterpart. To the extent that girls engage exclusively in homosexual conduct, they face dramatically lower risks of HIV infection and pregnancy,[403] as well as

394 *Limon*, 122 P.3d at 36. While the State's argument could have been framed in terms of other sexually transmitted diseases, the argument's weaknesses are aptly illustrated by the example of HIV.

395 *See id.*

396 *Id.*

397 *Id.*

398 *Id.* at 37.

399 *Id.*

400 *Id.*

401 *Id.* Studies have shown that teenage pregnancy exposes girls to significantly higher risks of high blood pressure, preeclampsia, and postpartum depression. *See* Aubrey J. Cunnington, *What's So Bad About Teenage Pregnancy?*, 27 J. FAM. PLAN. & REPROD. HEALTH CARE 36 (2001); William M. Gilbert et al., *Birth Outcomes in Teenage Pregnancies*, 16 J. MATERNAL-FETAL & NEONATAL MED. 265 (2004).

402 *Limon*, 122 P.3d at 37.

403 *See, e.g.*, George F. Lemp et al., *HIV Seroprevalence and Risk Behaviors Among Lesbians and Bisexual Women in San Francisco and Berkeley, California*, 85 AM. J. PUB. HEALTH 1549, 1549 (1995).

rape, sexual assault, and domestic or intimate partner violence.[404] By any measure, these are significant health benefits that have the potential to transform women's lives. If anything, the state has a legitimate interest in discouraging girls from engaging in *heterosexual* conduct.

It is only by focusing exclusively on male homosexual conduct—and specifically on the receptive role in anal sex—that the State's public health argument can find even a conceivable footing in the realities of HIV risk.[405] Even then, the argument still ignores the fact that unlike heterosexual sex, homosexual sex presents no risk of teenage pregnancies.

The irony is evident: Opponents of LGBT rights have often argued that "homosexuals cannot reproduce, so they must recruit," to justify a broad range of policies that discriminate against LGBT adults.[406] In the context of childhood, however, heterosexuality's procreative power seems misplaced—or at least, it is not obviously advantageous, as commonly presumed.

2. Procreation and Parenting

This brings us to the State's last justification for discouraging minors from engaging in homosexual conduct—the "promotion of parental responsibility and procreation."[407] Although these are common justification for laws against same-sex marriage,[408] they are bizarre ways

404 *See, e.g.*, Patricia Tjaden et al., *Comparing Violence Over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants*, 14 VIOLENCE & VICTIMS 413 (1999) (finding that intimate partner violence is less-likely among lesbian couples and intimate partner violence is primarily perpetuated by men).

405 *See* Heller v. Doe, 509 U.S. 312, 321 (1993) (holding that even under rational basis review, the state's justification "must find some footing in the realities of the subject addressed by the legislation"). By noting these disconnects in the State's public health argument, I do not mean to suggest that there are *no* correlations between homosexual acts and HIV risks or other STD risks. In one recent study of twenty-one cities, 19% of men who have sex with men were infected with HIV, and nearly half of them were unaware that they were infected. Teresa J. Finlayson et al., *HIV Risk, Prevention, and Testing Behaviors Among Men Who Have Sex with Men—National HIV Behavioral Surveillance System, 21 U.S. Cities, United States, 2008*, 60 MORBIDITY & MORTALITY WKLY. REP.: SURVEILLANCE SUMMARIES 1, 1 (2011). My broader contention is that even if such correlations exist, they have very little to do with the fear of the queer child, so they cannot justify the state's policy of promoting heterosexuality and gender conformity in childhood. The fear of the queer child is too old and broad to be justified as a response to anything so new and specific as the HIV epidemic. *See* David Halperin, *Deviant Teaching*, *in* A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES 146 (George E. Haggerty & Molly McGarry eds., 2007); Rosky, *supra* note 3, at 618–20.

406 *See, e.g.*, DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 303 (1999) (quoting Anita Bryant's claim that "since homosexuals cannot reproduce, they must recruit").

407 *Limon*, 122 P.3d at 34.

408 Opponents of same-sex marriage often describe this justification as the state's interest in promoting "responsible procreation." *See, e.g.*, Defendant-Intervenors' Notice of Motion and

to justify policies directed at the sexual activity of minors. As Limon argued, "this justification . . . make[s] no sense since the State's interest is to discourage teen pregnancies, not encourage them."[409] In this context, the state's interest in promoting "responsible" procreation and parenting seems oxymoronic.[410] How can the state promote "responsible" procreation and parenting by steering minors toward heterosexual sex?

In theory, the State could have tried to resolve this paradox by broadening the timeframe of the policy's objectives. In *Perry v. Schwarzenegger*, for example, the sponsors of Proposition 8 claimed that "[f]ostering relationships that are capable of producing offspring is a vital social and governmental interest . . . [because] procreation is essential to our survival."[411] In this stripped down version of the procreation argument, Kansas might have claimed that the Romeo and Juliet law would encourage teenagers to develop heterosexual desires, form heterosexual relationships, and engage in heterosexual conduct—but only later in life, once they were adults. By encouraging boys to date girls and vice-versa, the state might marginally increase the likelihood that children will grow up to be parents.

The standard objections to this kind of argument are familiar, and they need not be belabored: As many courts have observed,

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Motion for Summary Judgment, and Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 123, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), 2009 U.S. Dist. Ct. Motions LEXIS 92330 [hereinafter Defendant-Intervenors' Motion for Summary Judgment].

409 *Id.* at 37.

410 When Limon initially appealed to the Kansas Court of Appeals, one judge tried to sidestep this paradox by observing that "sexual contact between minors and young adults can lead to unwanted pregnancies." State v. Limon, 83 P.3d 229, 237 (Kan. Ct. App. 2004). "When a child is born," he explained, "the minor is often unable to financially support the newborn child." *Id.* Under such circumstances, he reasoned, "incarcerating the young adult parent for a long period would be counterproductive to the requirement that a parent has a duty to provide support to his or her minor child." *Id.* Because "same-sex relationships do not generally lead to unwanted pregnancies," he concluded, "the need to release the same-sex offender from incarceration is absent." *Id.*

This argument nicely dramatizes the absurdity of the "responsible procreation" justification for laws against same-sex marriage. In *Hernandez v. Robles*, the New York Court of Appeals held that because "[h]eterosexual intercourse has a natural tendency to lead to the birth of children" and "such relationships are all too often casual or temporary," the State "could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other." 855 N.E.2d 1, 7 (N.Y. 2006). "[T]his rationale for marriage does not apply with comparable force to same-sex couples," the court explained, because "they do not become parents as a result of accident or impulse." *Id.* In *Limon*, the judge invoked this perverse logic not as a justification for withholding marriage, but as the basis for imprisoning an eighteen year-old male for seventeen years. For a thorough analysis of this argument's flaws, see Edward Stein, *The Accident Procreation Argument for Withholding Legal Recognition of Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403 (2009).

411 Defendant-Intervenors' Motion for Summary Judgment, *supra* note 408, at 115.

heterosexuality does not guarantee procreation and homosexuality does not preclude it.[412] The Supreme Court has not yet resolved whether these objections are fatal to all policies that discriminate against lesbian and gay people under rational basis review or whether such policies should be subjected to heightened scrutiny under one theory or another.

This Article does not aim to resolve these weighty questions, but rather to show that they are no less relevant to children than they are to adults. For many years, our legal system has presumed that the state has a legitimate interest in promoting heterosexuality in children, without bothering to justify this preference on other grounds. Discrimination against lesbian, gay, and bisexual people should stand or fall upon independent justifications, rather than resting on the unchallenged premise that the state may encourage children to be straight and discourage them from being queer.

V. PROMOTING GENDER CONFORMITY IN CHILDHOOD

If the state may not promote heterosexuality in childhood, then what about gender conformity? Although the issue of gender conformity appears late in this Article, it is not an afterthought. Because the concepts of sexuality and gender are so intertwined—especially during childhood—an analysis of one would not be complete without a corresponding analysis of the other. By definition, the concept of sexual orientation depends on an underlying concept of gender or sex.[413] To determine a person's sexual orientation, one must determine the person's sex and the sex of the people to whom he or she is attracted. As a result, it is impossible to make distinctions based on sexual orientation without making distinctions based on sex. In this sense, the state's interest in promoting heterosexuality in children is itself a form of discrimination based on sex: By promoting heterosexuality in children, the state is encouraging children to identify with one particular sex—male or female—and pursue relations and relationships with the other sex.

Yet the links between sexuality and gender are grounded in history, as well as logic. As many historians have observed, the conflation of sex, gender, and sexual orientation is a long-standing tradition in Western cultures.[414] In the late nineteenth-century, as sexologists developed the

412 *See, e.g.*, *Perry*, 704 F. Supp. 2d at 1000 ("Same-sex couples can have (or adopt) and raise children."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("Our laws of civil marriage . . . . contain[] no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus.").

413 *See, e.g.*, Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 485–87 (2001).

414 *See* Francisco Valdes, *Queers, Dykes, Sissies, and Tomboys: Deconstructing the Conflation*

modern concept of "homosexuality," they originally posited that same-sex desire was but one symptom of "sexual inversion"—a disorder in which a woman's brain was trapped in a man's body, or vice-versa.[415] It was only in the early twentieth century that the concept of "the homosexual" was popularized,[416] and even today, the legal and social boundaries between sexuality and gender remain incomplete, unstable, and impermanent.[417]

This dynamic is rarely more apparent than in discussions of childhood, where the concepts of sexuality and gender are so "intimately entangled" that they can barely be distinguished.[418] Examples abound: The playground practice of boys branding each other as "sissies" and "fags"; the widespread practice of inferring a person's homosexuality from his or her failure to conform to traditional gender norms; or the justification of anti-gay marriage laws by reference to the state's interest in providing children with "a parental authority figure of each gender."[419]

In recent years, the state's interest in promoting children's gender conformity has become increasingly salient in debates over LGBT rights. In response to the rising social acceptance of lesbian, gay, and bisexual people, opponents of gay parenting have lately begun to back away from explicit claims about providing children with "heterosexual role modeling,"[420] in favor of vague claims about providing children with "parental role models of both sexes."[421] During this same period, opponents of antidiscrimination laws have shifted from Anita Bryant's claim that children would be "recruited" by homosexual teachers,[422] in favor of strikingly similar claims about children being indoctrinated by "men dressed as women," "drag queens," and "cross-dressing teachers."[423] In light of this now-common dynamic in anti-LGBT rhetoric, it would be both a legal and moral failing to mount a constitutional defense of children's homosexuality without offering a parallel defense of children's gender variance.

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of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 CALIF. L. REV. 1 (1995).

415 George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58–59 SALMAGUNDI 114 (1982–83).

416 DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15–18 (1990).

417 Valdes, *supra* note 414.

418 Eve Kosofsky Sedgwick, *How To Bring Your Kids Up Gay*, 29 SOC. TEXT 18, 20 (1991).

419 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 1000 (Mass. 2003) (Cordy, J., dissenting).

420 Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d. 804, 818 (11th Cir. 2004).

421 BLAG Brief, *supra* note 393, at 48; *see also* Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.").

422 CLENDINEN & NAGOURNEY, *supra* note 406, at 299.

423 *The Issues*, TRADITIONAL VALUES COALITION, *supra* note 9.

A. *The Constitution of Gender Variance*

The threshold question is how to conceptualize children's gender variance in constitutional terms—i.e., terms that are cognizable within the Supreme Court's free speech, equal protection, and due process jurisprudence. In this context, the concept of "gender identity" seems to correspond well enough to the concept of "homosexual status": It refers to a person's internal sense of being male, female, or something else—roughly as "sexual orientation" refers to a person's internal sense of being lesbian, gay, or bisexual.[424] But the distinction between "speech" and "conduct" seems less helpful here. While scholars across many disciplines have distinguished "gender identity" from the more external, social aspect of gender—which is variously referred to as "gender role,"[425] "gender expression,"[426] or "gender behavior"[427]—the latter is widely understood to encompass both an individual's speech and conduct. In the context of gender, it seems clear that our actions are inherently expressive—in Judith Butler's famous words, they are the "performance" of gender[428]—which renders any distinction between speech and conduct likely to be legally trivial, if not meaningless. To reflect this double entendre, this Article uses the term "gender role" to refer to the external, social aspect of gender that a person manifests in both speech and conduct—in word and in deed.

In constitutional terms, the question is whether the state has any legitimate interest in encouraging every child to identify as male and adopt a masculine role, or identify as female and adopt a feminine role, in conformity with the child's designated birth sex. When this issue is viewed purely as a matter of law and logic, it seems fairly straightforward. Reading Supreme Court opinions, it is abundantly clear that the state may not invoke concerns about children's gender conformity as a legitimate state interest. In a long line of cases, the Court has held that state action may not be justified by "overbroad generalizations about the different talents, capacities, or preferences of

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424 *See, e.g.*, AM. PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 1 (2012), *available at* http://www.apa.org/topics/sexuality/transgender.pdf.

425 *See, e.g.*, LINDA L. LINDSEY, GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE (5th ed. 2010).

426 *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 424, at 1.

427 *See, e.g.*, Nicole Crawford, *Understanding Children's Atypical Gender Behavior*, 34 MONITOR 40 (2003), *available at* http://www.apa.org/monitor/sep03/children.aspx.

428 JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 178–79 (1999) (arguing that "the action of gender requires a performance that is *repeated*" and that "[g]ender ought not to be construed as a stable identity or locus of agency from which various acts follow; rather, gender is an identity tenuously constituted in time, instituted in an exterior space through a *stylized repetition of acts*").

males and females"[429] or "fixed notions concerning the roles and abilities of males and females."[430] Nearly forty years ago, the Court expressly recognized that this principle applies to children as well as adults: "A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[431] Whatever exceptions the Court may allow for policies based on "[p]hysical differences between men and women,"[432] the state's interest in teaching boys to be masculine and girls to be feminine is not among them.[433]

The more challenging question is whether courts have the courage to act upon this conviction by upholding children's right to deviate from traditional gender identities and roles. It would be an understatement to say that cases specifically addressing this question are rare. Although studies indicate that discrimination against transgender students remains prevalent in public schools, there has not yet been a single reported case involving a constitutional dispute between a school and a student who identifies as "transgender," "transsexual," or as an individual with "gender identity disorder" or "gender dysphoria."[434]

To date, the leading case on this subject remains *Doe v. Yunits*, an unpublished ruling from thirteen years ago.[435] In *Doe*, a Massachusetts state court held that the State Constitution's guarantees of free expression and liberty protected a transgender student's right to attend

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429 United States v. Virginia, 518 U.S. 515, 533 (1996).

430 Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); *see also* Orr v. Orr, 440 U.S. 268, 283 (1979) (rejecting stereotypes about the "proper place" of women (internal quotation marks omitted)); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (rejecting "archaic and overbroad generalizations" (internal quotation marks omitted)); Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975) (same); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (same); Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (plurality opinion) (rejecting "gross, stereotyped distinctions between the sexes").

431 Stanton v. Stanton, 421 U.S. 7, 14–15 (1975).

432 *Virginia*, 518 U.S. at 533 ("Physical differences between men and women . . . are enduring . . . . Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, [or] to advance full development of the talent and capacities of our Nation's people." (third and fourth alterations in original) (citations omitted) (internal quotation marks omitted)).

433 *See* Susan Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 131–32 (2005); Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003).

434 *See, e.g.*, GAY, LESBIAN, & STRAIGHT EDUC. NETWORK, 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 16 (2011), *available at* http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf (reporting that "[o]ver half (56.9%) of students [in a national survey] heard teachers or other staff make negative comments about a student's gender expression at school").

435 No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom.*, Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

school in girls' clothing, in spite of the principal's strident and persistent objections.[436]

By juxtaposing *Doe* with a less successful case involving a high school student's right to challenge traditional gender roles, Section B of this Part examines the extent to which the First Amendment protects a child's right to deviate from traditional gender identities and roles. Drawing on the work of Professor Paisley Currah, this Section argues that courts have often privileged First Amendment claims based on children's gender identity, rather than claims based on children's gender roles. On a more expansive and hopeful note, Section C turns to *McMillien v. Itawamba County School District*, a recent case in which a court upheld a lesbian student's right to attend her prom while wearing a tuxedo, as an expression of her viewpoint that "students should not be forced to wear clothes that conform to traditional gender norms."[437] Finally, Sections D and E briefly consider the prospects of defending children's gender variance as a form of status or conduct under the Constitution's equal protection and due process guarantees.

B. *Gender Identity and the First Amendment: Gender as Status*

In 1998, Pat Doe began attending the seventh grade at public school in Brockton, Massachusetts.[438] Although Pat was biologically male, she "began to express her female gender identity by wearing girls' make up, shirts, and fashion accessories to school."[439] The school had a dress code that prohibited "clothing which could be disruptive or distractive to the educational process or which could affect the safety of students."[440] When the principal noticed Pat wearing girls' clothing, he would often send her home to change. On some days she changed and came back to school; on other days, she stayed home, "too upset to return."[441]

After seeing a therapist, Pat was diagnosed with gender identity disorder. Her therapist determined that it was medically necessary for Pat to wear clothing consistent with her female gender identity and that failing to do so could be psychologically harmful. When Pat returned to eighth grade in the fall, the principal instructed her to come to his office every day so that he could approve her appearance.[442] After awhile, Pat stopped attending school altogether, citing the "hostile environment"

436 *Id.*
437 702 F. Supp. 2d 699, 702 (N.D. Miss. 2010).
438 *Doe*, 2000 WL 33162199, at *1.
439 *Id.*
440 *Id.* (internal quotation marks omitted).
441 *Id.*
442 *Id.*

created by the principal.[443] Because of her many absences, she was required to repeat the eighth grade the following year.

Throughout this period, Pat experienced trouble with her classmates. In one instance, a boy claimed that Pat had been "spreading rumors that the two had engaged in oral sex," and the boy had to be restrained from punching her.[444] In another incident, Pat "persistently blew kisses" to another boy, and officials had to break up a fight between them.[445] In yet another case, Pat "grabbed the buttock" of a boy in the cafeteria.[446] More generally, Pat had "been known to primp, pose, apply make up, and flirt with other students in class" and call attention to herself "by yelling and dancing in the halls."[447] Finally, she had "been suspended at least three times for using the ladies' restroom after being warned not to."[448]

When Pat return to school in 2000, the principal informed her that "she would not be allowed to attend South Junior High if she were to wear any outfits disruptive to the educational process, specifically padded bras, skirts or dresses, or wigs."[449] Pat sought a preliminary injunction in state court, alleging that the principal's actions violated the free expression, liberty, and sex discrimination clauses of the Massachusetts Declaration of Rights.[450]

The court began by observing that the analysis of the free expression guarantee under the Massachusetts Declaration of Rights is "guided by federal free speech analysis."[451] First, the court held that Pat was likely to establish that wearing clothing and accessories "traditionally associated with the female gender" was a form of "expressive" conduct, because she was "expressing her identification with that gender."[452] Next, the court found that the school's policy was neither viewpoint-neutral nor content-neutral "because biological females who wear items such as tight skirts to school are unlikely to be disciplined by school officials."[453] Similarly, in response to the school's claim that Pat's clothing would "materially and substantially interfere[] with the work of the school,"[454] the court reasoned that "if a female student came to school in a frilly dress or blouse, make-up, or padded

443 *Id.*
444 *Id.*
445 *Id.*
446 *Id.*
447 *Id.*
448 *Id.*
449 *Id.* at *2.
450 *Id.*
451 *Id.* at *3.
452 *Id.*
453 *Id.* at *4.
454 *Id.* (internal quotation marks omitted).

bra, she would go . . . unnoticed by school officials."[455] The court acknowledged that Pat had engaged in "detrimental" behavior at times, but insisted that she could be punished only for her "misconduct" rather than her expression of "gender identity through dress."[456] Finally, in response to the school's claim that other students had threatened to beat up the "boy who dressed like a girl," the court ruled that the school was obligated to protect Pat from other students, rather than granting her classmates a "heckler's veto."[457]

After holding that Pat was likely to prevail on her free expression claim, the court reached the same conclusion about her liberty and equality claims. Analyzing her liberty claim, the court observed that "[a] liberty interest . . . has been recognized to protect a male student's right to wear his hair as he wishes."[458] Because Pat was likely to show that her attire was not distracting, the court held that the school's interests in maintaining discipline were not strong enough to overcome her "recognized liberty interest in appearance."[459] Considering her equality claim, the court found that she was "being discriminated against on the basis of her sex, which is biologically male."[460] Rejecting the school's claim that dress codes fostered "conformity with community standards,"[461] the court refused to "allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort."[462] In the court's view, the school was enforcing the dress code "in a gender discriminatory manner" by refusing to recognize the plaintiff's identity as female.[463]

By highlighting the court's ruling in *Doe v. Yunits*, I do not mean to imply that it is the tip of an iceberg, or that the First Amendment offers a clear avenue through which litigators can vindicate the free expression of transgender and gender-variant students. In *Tinker* itself, the Supreme Court contrasted a student's political expression with clothing, grooming, and deportment: "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."[464] In subsequent rulings, lower courts have often cited this language from *Tinker* to dismiss student

455 *Id.*
456 *Id.* at *5.
457 *Id.* (internal quotation marks omitted).
458 *Id.* at *6 (citing Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970)).
459 *Id.*
460 *Id.*
461 *Id.* at *7.
462 *Id.*
463 *Id.*
464 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507–08 (1969).

challenges to a school's clothing, hair style, and deportment regulations.[465]

In a recent essay, Paisley Currah reports that only four years after *Doe* was decided, a student named Nikki Youngblood lost a case in Hillsborough County, Florida.[466] As Currah explains, the contrast between *Doe* and *Youngblood* is instructive.[467] When Nikki showed up for her senior yearbook photo wearing a shirt and a tie, she was told that "she could not have her picture taken unless she complied with the school's yearbook dress-code policy, which required all girls to wear a revealing, velvetlike, scoop-neck drape for their portraits."[468] Faced with these options, Nikki chose to forego the photo. Neither her name nor her photo appeared in the yearbook. "It's like I never went to Robinson," she later explained.[469]

Like Doe, Youngblood brought free expression and equal protection claims against her school.[470] Youngblood's lawyers did not claim that she was diagnosed with gender identity disorder, but they emphasized that her gender variance had been present from a "very young age."[471] They argued that her desire to wear a shirt and tie was intended to send a "message" that "women do not have to conform to gender stereotypes."[472] The judge not only rejected her claims but belittled them, finding that there was "no constitutionally protected right for a female to wear a shirt and tie for senior portraits."[473] Citing a case decided thirty years earlier, the judge compared the school's yearbook policy to a hair length requirement for boys, finding that the former required "even less justification" than the latter.[474] In the judge's view, a hair length policy "affects students 24-hours a day, seven days a week, nine months a year," but a yearbook policy was no more than a fleeting infringement on a student's interests.[475]

By contrasting *Youngblood* with *Doe*, Currah reveals how our legal system's investment in identity politics—specifically, in the protection of groups that exhibit "obvious, immutable, or distinguishing characteristics"[476]—can influence both the shape and the fate of First

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465 Currah, *supra* note 25, at 19.

466 Youngblood v. Sch. Bd. of Hillsborough Cnty., Fla., No. 8:02-CV-1089 (M.D. Fla. Sept. 24, 2002); Currah, *supra* note 25, at 7.

467 Currah, *supra* note 25, at 7.

468 *Id.*

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

470 *Youngblood*, No. 8:02-CV-1089, slip op. at 2.

471 Currah, *supra* note 25, at 10 (internal quotation marks omitted).

472 *Id.* at 10–11 (internal quotation marks omitted).

473 *Youngblood*, No. 8:02-CV-1089, slip op. at 7; Currah, *supra* note 25 at 11.

474 *Youngblood*, No. 8:02-CV-1089, slip op. at 5–7 (citing Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972)); Currah, *supra* note 25 at 11.

475 *Youngblood*, No. 8:02-CV-1089, slip op. at 6; Currah, *supra* note 25 at 11.

476 Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987).

Amendment claims brought by transgender students.[477] In *Doe*, the plaintiff won because she was diagnosed with gender identity disorder; expressing her "identity" became a medical need. In *Youngblood*, the plaintiff lost because she had no diagnosis—she was expressing nothing more than a "message," which the court casually trivialized. Illustrating this contrast, the *Doe* court observed that the plaintiff was expressing something that was "not merely personal preference," but "her very identity," "her quintessence," and her "selfhood."[478] This is not just essentialism; it is quintessentialism: The court upholds Doe's right to express her gender, but only because it is a pure expression of her self.[479] Even as the court vindicated the plaintiff's right to "freely" express her gender identity, it grounded her freedom on the claim that her gender identity was fixed early in life and could not be changed.[480] In effect, courts have been more willing to protect gender as an identity or status—as an unchosen or immutable trait—rather than as the expression of a particular viewpoint.

As Professor Currah observes, this dynamic is not likely to please queer theorists, many of whom are critical of the law's investment in identity politics, and have urged LGBT advocates to exploit "the liberatory potential of the free speech clause of the First Amendment."[481] Because a transgender student's "identity-based claims remain more juridically intelligible in the way they link identities to bodies," he explains, such status-based claims "often produce better results."[482] While Currah is careful not to suggest that "arguments based on free expression should not be made by transgender rights advocates," he warns that it may be a long time before such claims are recognized.[483]

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477 Currah, *supra* note 25, at 10–13.

478 Doe v. Yuntis, No. 001060A, 2000 WL 33162199, at *3, *7 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom.*, Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

479 *Quintessence Definition*, MERRIAM WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/quintessence (last visited Sept. 21, 2013) (defining "quintessence" as "the essence of a thing in its purest and most concentrated form").

480 To some extent, one might detect a similar logic at work in *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980), discussed *supra* Part III.A, where the court stressed that Fricke "is exclusively homosexual and could not conscientiously date girls" and that "it would be dishonest to his own sexual identity to take a girl to the dance." 491 F. Supp. at 383, 385. Yet even in these passages, the court was careful to note that "it was possible he might someday be bisexual," and he was "perhaps not irrevocably committed to a homosexual orientation." *Id.* at 383, 385. In addition, the court emphasized that it was upholding Fricke's right to attend the dance as an expression of a particular viewpoint: "[H]is attendance would have a certain political element and would be a statement for equal rights and human rights" and "attending the dance with another young man would be a political statement." *Id.* at 385.

481 Currah, *supra* note 25, at 18.

482 *Id.* at 13.

483 *Id.* at 20

C. *Gender Roles and the First Amendment: Gender as Viewpoint*

But hope springs for queer theory yet—in Mississippi, of all places. Only three years ago, in the highly publicized case *McMillen v. Itawamba County School District*, a federal judge upheld a lesbian student's right to bring her girlfriend to the prom while wearing a tuxedo.[484] By vindicating the student's homosexuality and gender variance as both status and speech—i.e., identity and viewpoint—this ruling blazed a new path toward the protection of every child's right to be queer.

In 2010, Constance McMillen was a senior at Itawamba Agricultural High School in Fulton, Mississippi.[485] Since eighth grade, she had "openly identified" as a lesbian at school.[486] In the fall of her senior year, she asked her girlfriend, a fellow student at Itawamba, to be her prom date.[487]

The Itawamba prom was scheduled to be held on April 2, 2010; in February, McMillen asked an assistant principal for permission to attend with her girlfriend.[488] The assistant principal informed her that "they could attend with two guys as their dates but could not attend together as a couple."[489] McMillen reiterated her request to the principal and superintendent; they told her that "the two could attend separately but not together as a couple," and moreover, "she and her girlfriend would not be allowed to slow dance together because it could 'push people's buttons.'"[490] The superintendent warned her that "if she and her girlfriend made anyone uncomfortable while at the prom, they would be 'kicked out.'"[491] During this meeting, McMillen also asked whether she would be permitted to wear a tuxedo to the prom in lieu of a dress. The principal and the superintendent informed her that "only boys were allowed to wear tuxedos."[492] After checking with the Board of Education, the superintendent added that "girls were not allowed to even wear slacks and a nice top but must wear a dress."[493]

McMillen contacted the ACLU, which sent a letter to the school and the board demanding that both policies be changed.[494] Rather than changing the policies, the Itawamba School Board issued a press release

484 702 F. Supp. 2d 699 (N.D. Miss. 2010).
485 *Id.* at 701.
486 *Id.*
487 *Id.*
488 *Id.*
489 *Id.*
490 *Id.*
491 *Id.*
492 *Id.*
493 *Id.*
494 *Id.*

announcing that the prom would be cancelled.[495] Citing "the distractions to the educational process caused by recent events," as well as concerns about "the education, safety, and well being of our students," the Board announced that "the Itawamba School District has decided to not host a prom at Itawamba Agricultural High School this year."[496] Calling to mind the closings of public pools in the civil rights era,[497] the Board invited parents to arrange a private prom off campus: "It is our hope that private citizens will organize an event for the juniors and seniors."[498]

McMillen's challenge serves as an object lesson in how one might present status and speech claims alongside one another, without trying to resolve any underlying tension between them.[499] While McMillen primarily challenged the school's actions as a means of suppressing her constitutionally protected viewpoint, she did not hesitate to explain the profound and personal injuries that the school had inflicted on her identity, or her sense of self.[500] At a hearing on her motion for a preliminary injunction, McMillen testified that she thought it was important to attend prom because it is a "part of high school that everyone remembers" and she wanted to share that experience with her girlfriend.[501] She insisted that "she does not want to hide her sexual orientation," and she objected that "the school is attempting to force her to pretend that she is someone she is not by going with a male date."[502] She explained: "[I]f [I] cannot share the prom experience with [my] girlfriend then there is not any point in going."[503] Finally, she insisted that "gay students have the same right as straight students to not only attend the prom with the person they are dating but also to dance with that person."[504]

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495 *Id.* at 701–02.

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

497 *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971).

498 *McMillen*, 702 F. Supp. 2d at 701 (internal quotation marks omitted). Although the school argued that "the School Board did not cancel the prom but merely 'withdrew its sponsorship[,]'" the court dismissed this argument as "nothing more than semantics." *Id.* at 702. In addition, the court found no evidence to support the board's claim that hosting the prom would "disrupt its ability to govern local schools and provide and manage a public education program for all students." *Id.* at 705 (internal quotation marks omitted).

499 *Cf.* SEDGWICK, *supra* note 159, at 13 (arguing for "a multi-pronged movement . . . whose minority-model and universalist-model strategies . . . proceed in parallel without any high premium placed on ideological rationalization between them"); *id.* at 41 (arguing that "gay-affirmative work does well when it aims to minimize its reliance on any particular account of the origin of sexual preference and identity in individuals").

500 *See McMillen*, 702 F. Supp. 2d at 702.

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

502 *Id.*

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

504 *Id.*

Turning to her desire to wear a tuxedo, McMillen argued that "students should not be forced to wear clothes that conform to traditional gender norms."[505] She testified that she wanted to wear a tuxedo to the prom to send a message to her community that "it's perfectly okay for a woman to wear a tuxedo, and that the school shouldn't be allowed to make girls wear a dress if that's not what they are comfortable in."[506] Just as she would not attend the prom without her girlfriend, she testified that she "does not want to attend the prom if [the school] does not allow female students to wear tuxedos."[507]

Notwithstanding the legal system's investment in identity politics, the court embraced all of McMillen's constitutional claims, without privileging one over another. Emphasizing the constitutional connections between speech and status, the court began an analysis of McMillen's speech claims by invoking *Romer*'s holding that "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[508] In characterizing McMillen's claims, the court allowed her identity and her viewpoint to play off one another, without collapsing the latter into the former: "Constance claims Defendants . . . censor[ed] her peaceful expression of social and political viewpoints central to her sexuality."[509] Citing *Fricke*, the court noted that McMillen's claims closely tracked Aaron Fricke's beliefs that "it would be dishonest to his own sexual *identity* to take a girl to the dance" and "his attendance would have a certain political element and would be a statement for equal rights and human rights."[510] Turning to McMillen's claim that she should be permitted to wear a tuxedo, the court did not shy away from recognizing her freedom to dissent from traditional gender roles: "Constance requested permission to wear a tuxedo . . . with the intent of communicating to the school community her social and political views that women should not be constrained to wear clothing that has traditionally been deemed 'female' attire."[511]

In a tragic twist, however, *McMillen* also serves as an object lesson in the limits of judicial power, and more generally, the law's limited ability to affect social norms.[512] After finding the school liable on all of

505 *Id.*

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

507 *Id.*

508 *Id.* at 703 (alterations in original) (quoting Romer v. Evans, 517 U.S. 620, 634–35 (1996)) (internal quotation marks omitted).

509 *Id.*

510 *Id.* (emphasis added) (quoting Fricke v. Lynch, 491 F. Supp. 381, 385 (D.R.I. 1980)) (internal quotation marks omitted).

511 *Id.* at 704.

512 *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE

McMillen's claims, the court concluded that it would not be in the "public interest" to issue an injunction against the school, based on the school's claim that "a parent sponsored prom which is open to *all* [the school's] students had been planned and is scheduled for April 2, 2010."[513] Although the court admitted that "the details of the 'private' prom are unknown to the Court," it relied on the school's "representations . . . that *all* [the school's] students, including the Plaintiff, are welcome and encouraged to attend."[514] In light of these claims, the court reasoned that compelling the school to take over sponsorship of the prom "would only confuse and confound the community on the issue."[515] Given that "[p]arents have taken the initiative to plan and pay for a 'private' prom," the court was reluctant to "defeat the purpose and efforts of those individuals."[516]

Unfortunately, the court's confidence in the community and the school was misplaced. On April 2, McMillen and her girlfriend showed up to the "private" prom, only to discover that they had been tricked.[517] While only a handful of unpopular students attended the event with McMillen and her girlfriend, the rest of the senior class was gathering 30 miles away in a local community center, at a secret event arranged by parents and staff.[518] A few months after McMillen resumed her lawsuit, the school settled the case by paying $35,000 and adopting a policy that prohibits discrimination based on sexual orientation, gender identity, and gender expression within the school district.[519] In an ominous sign that this struggle continues, a neighboring county's school board authorized parents to take over sponsorship of all future proms.[520]

DISPUTES viii (1991) (arguing that "people frequently resolve their disputes . . . without paying any attention to the laws that apply to those disputes"); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (identifying a series of constraints that prevent courts from producing significant social reforms).

513 *McMillen*, 702 F. Supp. 2d at 706.

514 *Id.*

515 *Id.*

516 *Id.*

517 Sheila Byrd, *Miss. Board Denies Staging 'Sham' Prom for Lesbian*, BOSTON.COM (May 24, 2010), http://www.boston.com/news/education/k_12/articles/2010/05/24/miss_board_denies_staging_sham_prom_for_lesbian.

518 Neal Broverman, *ACLU Investigating Fake Prom*, ADVOCATE (Apr. 5, 2010), http://www.advocate.com/news/daily-news/2010/04/05/aclu-investigating-fake-prom; *Mississippi School Pays Damages to Lesbian Teen Over Prom Dispute*, CNN (July 20, 2010), http://www.cnn.com/2010/CRIME/07/20/mississippi.lesbian.settlement/index.html; Mary Elizabeth Williams, *Fake Prom Staged to Trick Lesbian Kids*, SALON (Apr. 6, 2010), http://www.salon.com/2010/04/06/constance_mcmillen_fake_prom. In a remarkable display of how social hierarchies intersect, the fake prom was attended by two students with learning disabilities, in addition to McMillen and her girlfriend. Broverman, *supra*; Williams, *supra.*

519 *Lesbian High School Student Constance McMillen Gets $35,000 Settlement For Canceled Prom*, HUFFINGTON POST (July 20, 2010), http://www.huffingtonpost.com/2010/07/20/constance-mcmillen-settlement_n_653331.html

520 Byrd, *supra* note 517.

D. *Equal Protection: Transgender Status*

Of course, there is no special need to defend children's gender variance only under the First Amendment, without also bringing parallel claims under the Constitution's equal protection and due process guarantees. In the recent case *Glenn v. Brumby*, the Eleventh Circuit held that discrimination based on gender identity is a form of discrimination based on sex, which is therefore subject to heightened scrutiny under the Equal Protection Clause.[521] Other courts have not yet had an opportunity to address this issue, but several have applied this framework for analyzing gender-identity claims under Title VII of the Civil Rights Act.[522]

For present purposes, however, the application of heightened scrutiny and the analogy to sex discrimination is overkill. In light of the basic principle articulated in *Moreno*, *Cleburne*, *Romer*, and *Windsor*, there is no reason to think that equal protection applies to children who are transgender any less forcefully than it applies to children who are lesbian, gay, or bisexual. Given that these cases were decided under rational basis review, they establish a principle that applies in the same manner to discrimination against any class.[523] Under this principle, the state could not have a legitimate interest in discouraging children from *being* transgender, because this kind of justification fails any standard of judicial review. There is no basis to claim that the state's interest in discouraging transgender status should be subjected to a lower standard, because there is no lower standard to which it could be subjected.

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521 663 F.3d 1312, 1320 (11th Cir. 2011).

522 *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (holding that "employers who discriminate against men because they . . . wear dresses and makeup, or otherwise act femininely, are . . . engaging in sex discrimination, because the discrimination would not occur but for the victim's sex"); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Discrimination because one fails to act in the way expected of a man or woman is forbidden until Title VII."); Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (holding that "because gender identity is a component of sex, discrimination on the basis of gender identity is sex discrimination"); Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *4 (Apr. 20, 2012) (ruling that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII"). *But see* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII").

523 For example, in *Cleburne*, discussed *supra* Part I.C.2, the Court implied that it had applied the same principle in *Zobel v. Williams*, a successful challenge to Alaska's distribution of annual dividends to citizens based on how long they had resided in the state. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446–47 (1985) (citing Zobel v. Williams, 457 U.S. 55, 63 (1982)).

E. *Due Process: Gender-Variant Conduct*

Because *Lawrence*'s bar against moral justifications is based on a similar logic, it applies with no less force to the moral disapproval of children's gender-variant behavior. As Professors Julie Greenberg and Marybeth Herald have explained: "If the choice of one's sexual partner is considered one of the most intimate and personal choices a person can make, then a person's choice to live in the sex role that matches her self-identity must also be included."[524] Following this lead, several scholars have argued that, at the very least, *Lawrence* prohibits the state from invoking "moral disapproval" as a justification for restricting a person's right to engage in gender-variant conduct.[525]

While these arguments seem compelling, they have not yet been adopted by courts in reported decisions.[526] As a matter of law, if not logic, lawyers and judges have been more inclined to consider an individual's gender variance under the First Amendment and the Equal Protection Clause, rather than articulating an individual's liberty interest in gender-variant conduct under the Due Process Clause. In her essay *What* Lawrence *Can Mean for Intersex and Transgender People*, Professor Chai Feldblum hints that this trend may have more to do with the checkered history of the Court's substantive due process jurisprudence than with anything about gender variance.[527] Rather than

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524 Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 881 (2005).

525 *See, e.g.*, Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What* Lawrence *Can Mean For Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115 (2006); Taylor Flynn, *Sex and (Sexed By) the State*, 25 WOMEN'S RTS. L. REP. 217 (2004); Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for* Lawrence v. Texas, 5 J. RACE GENDER & ETHNICITY 2, 2 (2010); Laura K. Langley, Note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L. & C.R. 101, 128 (2006).

526 In one reported opinion in 1975, a federal judge suggested that a transgender person's "interest in privacy" might be implicated, "at least tangentially," by the state's refusal to change her sex designation on a birth certificate. Darnell v. Lloyd, 395 F. Supp. 1210, 1214 (D. Conn. 1975). More recently, in an unreported ruling, an Alaska trial court held that the state's refusal to allow a transgender person to change the sex designation on her driver's license violated a transgender person's "interest in protecting sensitive personal information from public disclosure"—a right analogous to a constitutional privacy interest in avoiding disclosure of personal matters that has been recognized by the U.S. Supreme Court. K.L. v. State, No. 3AN–11–05431 CI, 2012 WL 2685183, at *4 (Alaska Super. Ct. Mar. 12, 2012); *see also* Whalen v. Roe, 429 U.S. 589 (1977). Applying this information privacy framework, the Alaska court reasoned that "one's transgendered status is private, sensitive personal information," and the state's policy "can lead to the forced disclosure of the person's transgendered status." *K.L.*, 2012 WL 2685183, at *6. Because the court found that this infringement was not justified by the state's asserted interests in "having accurate documentation and identification and preventing fraud or falsification of identity documents," the court declined to decide whether the policy also violated the plaintiff's interest in "personal autonomy and independence in decision-making." *Id.* at *4, *6.

527 Feldblum, *supra* note 525.

exposing judges to charges of "activism" for "inventing" new rights, advocates may be strategically inclined to invoke the more popular and familiar terms of free speech and equal protection. But the liberty to engage in gender-variant conduct will not be recognized unless and until it has been asserted. As Currah puts it, "we will arrive at that moment, in part, by working to change the commonsense truths about gender and by making those claims in as many ways and in as many venues as possible."[528]

VI. THEORIZING CHILDREN'S QUEERNESS

This Part explores the metes and bounds of No Promo Hetero—the principle that the state may not promote heteronormativity in childhood, for the same reasons that it may not pursue this goal at any age. It argues that this principle enjoys two advantages over other arguments on behalf of children's queerness: universality and liberalism. First, the principle makes a claim for the liberation of all children's queerness, rather than limiting itself to a claim for the equal treatment of children who are, or identify as, lesbian, gay, bisexual, or transgender.[529] Second, the principle entertains the liberal premise of a neutral and limited state, rather than insisting upon the celebration of children's queerness in public and private spheres.[530] By charting a course that is both liberal and queer, No Promo Hetero avoids the essentialism of identity politics while speaking in a language that judges, lawyers, and lobbyists find familiar.

A. *Queering the State: No Promo Hetero*

Almost twenty years ago, in her pioneering essay *Queering the State*,[531] Lisa Duggan proposed a novel way for the LGBT movement to answer the opposition's "No Promo Homo" campaigns. Rather than insisting that homosexuality was innate or immutable, she suggested a "No Promo Hetero" campaign—a comprehensive attack against the

528 Currah, *supra* note 25, at 20.

529 *See* KATHRYN BOND STOCKTON, THE QUEER CHILD: OR GROWING SIDEWAYS IN THE TWENTIETH CENTURY 9 (2008). *But see* Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 273 (1996) (arguing that "[t]he first step in the protection of gay kids must be to *see* them as gay kids; unless the law is able to name the child, it will be unable to safeguard him or her" (emphasis added)).

530 *See* Rachmilovitz, *supra* note 2, at 7 (arguing that parents who pressure children into "mainstream sexuality" violate children's identity rights).

531 Duggan, *supra* note 26.

state's promotion of heteronormativity through public institutions, policies, and practices.[532]

Duggan developed No Promo Hetero by analogy to the liberal doctrine of the separation of church and state.[533] Rather than borrowing the rhetoric of minority rights, she urged advocates to "borrow from and transform another liberal discourse, that surrounding the effort to disestablish state religion, to separate church and state."[534] "We might become the new disestablishmentarians," she explained, "the state religion we wish to disestablish being the religion of heteronormativity."[535] Just as the state may not act for the purpose of promoting Christianity, it may not act for the purpose of promoting heterosexuality or gender conformity.[536]

B. *Universalism: Beyond Status*

As Duggan observed, No Promo Hetero is more universal than conventional claims for LGBT rights. By attacking the state's promotion of heteronormativity, it allows advocates to fend off the familiar charge that they are seeking "special rights" for a protected class of LGBT people.[537] Rather than coming off as "narrow and parochial," the argument "makes a case for freedom of association (to form relationships) and freedom of speech (acknowledgement or assertion) for everyone."[538]

It is not only universal; it is universalizing.[539] Unlike the LGBT movement's traditional response to No Promo Homo campaigns, No Promo Hetero does not depend upon the notion that an individual's sexual orientation and gender identity are fixed early in life, and cannot be influenced by parents, teachers, or the government itself.[540] As Duggan writes, "[i]f sexual desire is compared to religion, we can see it as not natural, fixed, or ahistorical, yet not trivial or shallow."[541] In principle, this paradigm could provide an argument on behalf of

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532 *Id.* at 8–9.

533 *Id.* at 9.

534 *Id.*

535 *Id.*

536 *Id.* For similar analogies to the Establishment Clause, see David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010); Rosky, *supra* note 160, at 956–75.

537 Duggan, *supra* note 26, at 9.

538 *Id.* at 10.

539 *See* SEDGWICK, *supra* note 159, at 1 (distinguishing between "minoritizing" and "universalizing" definitions of homosexuality).

540 *See* Duggan, *supra* note 26, at 9–10.

541 *Id.*at 9.

anyone's potential for queerness, while still insisting on the protection of individuals who identify as LGBT.[542]

The benefits of universalism seem especially significant in debates over children's queerness, because the question of any particular child's identity is often sharply contested. Rather than confessing a fear that children will "become" lesbian, gay, bisexual, or transgender, opponents of LGBT rights more often claim that children might be "confused,"[543] while they are going through a "phase"[544]—experiences that they claim are typical throughout childhood, adolescence, and early adulthood.[545] By insisting that the state has no legitimate interest in promoting heteronormativity in childhood, advocates obviate the need to show that any particular child is "really" LGBT.

In translating No Promo Hetero into the discourse of constitutional law, this Article has sought to preserve the principle's universality in several ways. First, as the Article's title suggests, the argument has been framed principally as an attack against the state's interest—the promotion of heteronormativity in children—and only secondarily as the vindication of children's right to be queer. By challenging the legitimacy of the state's interest, this argument largely avoids the need to carefully delimit the scope of children's constitutional rights. First and foremost, No Promo Hetero is framed as a limitation on the government's role rather than an authorization of children's speech, status, or conduct.

Second, this Article insists upon the independent merit and value of advancing claims based on speech and conduct, rather than collapsing them into claims based on status, or ignoring them altogether.[546] Although speech and conduct claims surely raise "vexing" questions in the context of childhood,[547] they speak to vital interests and groups that may not be accurately represented by the labels lesbian, gay, bisexual, or transgender.[548]

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542 In a related context, Kenji Yoshino has observed that rights-based arguments have a similar advantage over group-based arguments: They embody the principle of equal treatment, rather than drawing distinctions among groups. *See* Yoshino, *supra* note 340.

543 Ruskola, *supra* note 529, at 270.

544 *Id.* at 280.

545 *See, e.g.*, Ratchford v. Gay Lib, 434 U.S. 1080, 1083 (1978) (Rehnquist, J., dissenting) (arguing that "this danger may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood").

546 *Cf.* Cain, *supra* note 27, at 1619–40 (arguing that lesbian and gay litigators should not "bifurcate" constitutional claims based on status and conduct).

547 *See* Carey v. Population Servs., Int'l, 431 U.S. 678, 692 (1977) (plurality opinion).

548 *Cf.* Halley, *supra* note 13, at 567 ("When pro-gay advocates use the argument from immutability before a court on behalf of gay men, lesbians, and bisexuals, they misrepresent us.").

Finally, this Article challenges the promotion of heteronormativity under rational basis review, rather than depending upon the application of heightened scrutiny under the Supreme Court's equal protection jurisprudence. In doing so, the argument avoids relying on the claim that homosexuality or gender variance is an "obvious, immutable, or distinguishing characteristic[]."[549] Apart from the strategic advantages of avoiding the nature/nurture debates, this approach has the benefit of challenging the belief that queerness is inferior and should be contained.[550]

C. *Liberalism: Beyond the State*

Even as No Promo Hetero avoids the pitfalls of essentialism, it remains liberal enough to be rendered in constitutional terms. As Duggan notes, the argument appeals to the liberal ideal of a neutral and limited state, much like the No Promo Homo campaign to which it responds.[551] By invoking the ideal of the state's neutrality, it offers lobbyists, lawyers, and activists a way to sidestep protracted debates over the etiology and morality of children's queerness. Duggan explains: "As in the case of religious differences, we do not need to persuade or convert others to our view. We simply argue for 'disestablishment' of state endorsement for one view over another."[552] In advancing this argument, advocates would not need to ask anyone to accept the claim that children are "born" lesbian, gay, bisexual, or transgender, let alone to "celebrate" children's homosexuality or gender variance. Whatever one thinks of such matters, advocates may insist that the state should not be permitted to take sides.

Duggan warns, however, that this commitment to liberalism may be both virtue and vice: "Because this case is formulated within the terms of liberalism, it may trap us in as many ways as it releases us."[553] In particular, she worries that the argument "seems to construct a zone of liberty in negative relation to the state," insofar as "it argues about what the state canNOT do."[554]

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549 *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (quoting Lyng v. Castillo, 477 U.S. 635 (1986)) (internal quotation marks omitted); Halley, *supra* note 13, at 567; Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485 (1998).

550 For criticisms of the immutability requirement, see Halley, *supra* note 13, and Yoshino, *supra* note 549.

551 *See* Duggan, *supra* note 26, at 8.

552 *Id.* at 10.

553 *Id.* at 10–11.

554 *Id.* at 11. To guard against this risk, Duggan recommends "carefully fram[ing]" the argument in two ways: first, "to emphasize that state institutions must be evenhanded in the arena of sexuality, not that sexuality should be removed from state action completely," and

Duggan's qualms about the limits of liberalism are especially relevant in the context of childhood, because children do not enjoy the same degree of autonomy as adults, especially with regard to sexuality and gender. In most cases, the regulation of children's sexual and gender development is privatized: It is governed by family, friends, and social norms more than teachers, judges, and legal rules. Within the domain of the family, the Constitution generally permits parents to rule the roost. Ninety years ago, the Supreme Court held that parents have the fundamental right to direct the care, custody, and control of their children,[555] and the Court reaffirmed this principle as recently as thirteen years ago.[556] Under this doctrine, the state must presume that parents act in their children's best interests, unless a court determines that a parent is no longer fit to care for a child, or that a child has been abused or neglected.[557]

Whatever one thinks of this balance of power, No Promo Hetero does not seek to change it. Within broad boundaries, it permits parents to do precisely what it prohibits the state from doing—attempting to influence children's sexual and gender development toward a particular result. Some parents will encourage children to be straight, others will encourage them to be queer, and still others will take a neutral stance, granting children the freedom to explore such questions for themselves.

Within what boundaries? For present purposes, the existing body of abuse and neglect laws provides a plausible starting point. At a minimum, federal law effectively establishes that parents may not act in a manner that causes a child's "death, serious physical or emotional harm, sexual abuse, or exploitation, or . . . presents an imminent risk of serious harm."[558] So even if parents may attempt to encourage a child to be straight or discourage them from being queer, they may not do so in any manner that poses an imminent risk of serious harm to the child.

To explain how this principle is likely to play out in actual cases, it may be useful to consider a pair of opposing examples. On the one hand, imagine a typical scenario in which a mother encourages her son to ask a girl on a date, or "find a nice girl and settle down," without having any particular reason to believe that the boy is straight, gay, or bisexual. Strictly speaking, the mother has encouraged her child to be

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second, to "make the crucial distinction between state institutions (which must, in some sense, be neutral) and 'the public' arena, where explicit advocacy is not only allowable but desirable." *Id.*

555 Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

556 Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion); *id.* at 76 (Souter, J., concurring in judgment); *id.* at 80 (Thomas, J., concurring in judgment); *id.* at 95 (Kennedy, J., dissenting).

557 *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972).

558 Child Abuse Prevention and Treatment Act Reauthorization Act of 2010, Pub. L. No. 111-320, § 142, 124 Stat. 3459, 3482.

heterosexual—or at least, to pursue heterosexual relationships. But whatever the merits of the mother's behavior, this single act of encouragement would fall far short of abuse or neglect under any plausible standard.

On the other hand, imagine parents subjecting a girl to "reparative" or "conversion" therapy against her will, in an effort to "change" the girl's sexual orientation from lesbian to heterosexual.[559] Although this case is surely rarer than the last one, it is no more hypothetical: In a recent Utah case, when a sixteen-year-old girl came out to her parents, they responded by placing her with another family that "specialized in reforming gay teenagers."[560] Serving as the girl's legal guardians, the new family forced her to stand against a wall for long periods of time and wear a backpack filled with rocks "to bear the burden of homosexuality,"[561] and they told her that "your parents don't want you" and "you are going to hell."[562] On at least one occasion, one of the guardians hit the girl when she tried to escape.[563]

After the girl was removed by the Department of Child and Family Services, the State of Utah took the position that the parents had a constitutional right to determine the girl's sexual orientation as one dimension of a parent's right to direct the care, custody, and control of a child.[564] The juvenile court disagreed. The court issued a temporary order ordering the parents to attend a local meeting of Parents, Family, & Friends of Lesbians and Gays and prohibiting them from making any further attempts to change the girl's sexual orientation.[565]

Following a series of sharply contested hearings, the parties entered a stipulated court order that authorized the girl to live with her grandparents.[566] The order allowed the girl's parents to maintain legal custody over the girl's upbringing, subject to a series of No Promo

559 *See* AM. PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 3 (2012), *available at* http://www.apa.org/topics/sexuality/sorientation.pdf.

560 Petition for Permission to Appeal Interlocutory Order in Child Welfare Proceeding at 2–3 State of Utah *in re* Jane Doe, a Child Under the Age of 18, (on file with author). This account is based upon a series of interviews conducted with Ms. Doe's lawyer and my independent review of transcripts, pleadings, and court orders from the relevant proceedings. Because Ms. Doe was a minor throughout the proceedings, the record of this case is classified as a "private record," which may be reviewed only with Ms. Doe's consent. Both my interview and my review of the record were conducted with Ms. Doe's consent, pursuant to an ongoing confidentiality agreement with Ms. Doe's lawyer.

561 *Id.* at 2.

562 Stipulated Amended Pretrial, Adjudication and Disposition, Findings of Fact, Conclusions of Law, and Order at 4, State of Utah *in re* Jane Doe (on file with author).

563 *Id.*

564 Audio Recording of Hearing on Motion to Disqualify Guardian Ad Litem, State of Utah *in re* Jane Doe (on file with author).

565 *Id.*

566 Stipulated Amended Pretrial, Adjudication and Disposition, Findings of Fact, Conclusions of Law, and Order at 3, *State of Utah in re Jane Doe* (on file with author).

Hetero conditions. Under the court's order, the parents were prohibited from discussing the girl's sexual orientation with her without her consent, except during court-ordered family counseling sessions, and prohibited them from restricting the girl's dating and associations based on a person's sexual orientation or gender.[567] In addition, the parents were required to allow the girl to engage in "normal teenager activities," including dating other girls and attending dances, and to allow her to join her school's Gay-Straight Alliance and the local chapter of Parents, Families and Friends of Lesbians and Gays (PFLAG).[568]

Needless to say, these cases represent two endpoints along a broad spectrum of potential scenarios; it is easy to imagine any number of cases between these extremes. But the existence of hard cases does not cast doubt on the principle's merit: The state may not encourage children to be straight or discourage them from being queer; parents may try to do so, but only so long as they do not cross the line into abuse or neglect.

Like many child welfare determinations, such cases would turn on the prevailing consensus of physicians, psychiatrists, and psychologists who study child development. During the past several decades, a broad consensus has developed among medical professionals that homosexuality is not a mental illness and that therapies aimed at changing a minor's sexual orientation are harmful and dangerous.[569] By contrast, the American Psychiatric Association has only recently taken steps to de-stigmatize the diagnosis of "Gender Identity Disorder," which is now known as "Gender Dysphoria."[570] Even now, some licensed physicians continue to support "corrective therapy" for children who receive this diagnosis.[571] In light of these ongoing disagreements, courts may be less willing to conclude that forcing children into corrective therapy for Gender Identity Disorder of Childhood is a form of abuse or neglect.[572]

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567 *Id.* at 8–9.

568 *Id.*

569 *See, e.g.*, AM. ACAD. OF PEDIATRICS ET AL., JUST THE FACTS ABOUT SEXUAL ORIENTATION AND YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS, AND SCHOOL PERSONNEL 5–9 (2008), *available at* http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf (public statement on behalf of twelve major public and mental health organizations).

570 *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 521 (5th ed. 2013); J. Bryan Lowder, *Being Transgender Is No Longer a Disorder*, SLATE (Dec. 3, 2012), http://www.slate.com/articles/health_and_science/medical_examiner/2012/12/dsm_revision_and_sexual_identity_gender_identity_disorder_replaced_by_gender.html.

571 *See* Erika D. Skougard, Note, *The Best Interests of Transgender Children*, 2011 UTAH L. REV. 1161, 1162–63 (observing that "[c]hildhood gender experts are sharply divided about the best treatment for . . . children" who are diagnosed with "Gender Identity Disorder of Childhood").

572 *See id.* In September 2012, the California Legislature attempted to resolve this issue on a statewide level by adopting a law that prohibits the practice of "conversion therapy" on minors,

But if we focus only on traditional settings in which the state stands in the background—paradigmatically, two married parents raising a child together—we miss No Promo Hetero's most powerful thrust. Libertarian mythology aside, the state acts *parens patriae* or *in loco parentis* in innumerable ways, meddling both directly and indirectly in children's development. Adoption and foster care are only the most obvious examples; when parents divorce, they are subject to a judge's determination of children's best interests in custody and visitation proceedings.[573] In public schools, the modern state is ubiquitous—in the hiring and firing of teachers,[574] the setting of curriculums,[575] even the acquisition of library books.[576] In public hospitals, physicians routinely designate newborns as "male" or "female," and prescribe cosmetic genital surgeries and hormone treatments for children who fall outside the binary model of gender and sex.[577] Even when judges review the constitutionality of marriage and sodomy laws, they have articulated abstract visions of children's best interests. Under a regime of No Promo Hetero, the promotion of heterosexuality and gender conformity would be banished from all of these settings.

Admittedly, some readers of this Article will have more sweeping ambitions—ambitions that cannot be satisfied by a liberal principle like No Promo Hetero. To such readers, I can only confess that I share many of these ambitions myself, at least on a personal level—and indeed, that

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effectively establishing that this practice is a form of child abuse. Erik Eckholm, *Gay 'Cure' For Minors Is Banned In California*, N.Y. TIMES, Oct. 1, 2012, at A16. Although the law prohibits "sexual orientation change efforts," it defines this term to include "efforts to change behaviors or *gender expressions*," as well as efforts "to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." CAL. BUS. & PROF. CODE § 865(b)(1) (West 2013) (emphasis added).

Shortly after the law was passed, it was challenged by a group of families and licensed therapists under the First Amendment and the Due Process Clause. AnneClaire Stapleton, *California Law Banning Gay "Conversion Therapy" Put on Hold*, CNN (Dec. 22, 2012), http://www.cnn.com/2012/12/04/us/california-gay-therapy-ban. In a recent ruling, the Ninth Circuit denied a preliminary injunction that would have prevented the law from going into effect. Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013).

573 *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 294–98 (2009) (observing that in custody and visitation cases, litigants, experts, and judges often express concerns that lesbian and gay parents will serve as "role models," influencing children's sexual and gender development).

574 *See, e.g.*, Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1347 (Wash. 1977) (upholding the firing of gay teacher based on "danger of encouraging expression of approval and of imitation" because "[s]uch students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality").

575 *See, e.g.*, Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008) (affirming dismissal of claims by parents seeking to exempt children from "indoctrination" through elementary school lessons featuring children's books about same-sex couples).

576 *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (invalidating school board's decision to remove "filthy" books from libraries at high schools and junior high schools).

577 *See* JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 11–26 (2012).

this Article's embrace of liberalism is strategic, more than anything else. Rather than conceding that the government is actually neutral and limited, this Article deploys the ideal of the liberal state against governments that actually exist, in order to demonstrate one of the many ways in which they have failed to live up to this ideal. For if the state is neutral and limited, then it may no longer seek to pursue an objective that it has long asserted in strenuous terms—the promotion of heteronormativity in childhood.

CONCLUSION

In *United States v. Windsor*, the defenders of "traditional" marriage trotted out a familiar argument in support of the Defense of Marriage Act. Among other things, they claimed that the law was justified by the government's interest in "[p]romoting [c]hildrearing by [b]oth a [m]other and a [f]ather."[578] Because of "the different challenges faced by boys and girls as they grow to adulthood," they reasoned, it was "at least rational to think that children benefit from having parental role models of both sexes."[579] As the term "role model" suggests, they claimed that children would "benefit" from having both a mother and a father by learning the appropriate ways to be male or female, masculine or feminine, mother or father. "Men and women are different," they explained, "[s]o are mothers and fathers."[580]

In the congressional debates over DOMA, the law's sponsors were less cryptic about the lessons that they sought to impart to "the children of America."[581] By posing a series of rhetorical questions, Representative Charles Canady signaled that the law was designed to channel children into heterosexual relationships:

> Should this Congress tell *the children of America* that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex?
>
> Should this Congress tell *the children of America* that we as a society believe there is no moral difference between homosexual relationships and heterosexual relationships?
>
> Should this Congress tell *the children of America* that in the eyes of the law the parties to a homosexual union are entitled to all the rights

578 BLAG Brief, *supra* note 393, at 48.
579 *Id.*
580 *Id.*
581 142 CONG. REC. H7491 (daily ed. July 12, 1996) (statement of Rep. Charles Canady).

> and privileges that have always been reserved for a man and a woman united in marriage?[582]

In a legislative report supporting the bill, Representative Canady cautioned his colleagues "against doing anything which might mislead *wavering children* into perceiving society as indifferent to the sexual orientation they develop," in order to protect society's interest "in reproducing itself."[583]

In striking down DOMA, the Supreme Court found that the law actually harmed children, rather than benefitting them. In addition to finding that the law "injure[s]," "disparage[s]," and "demean[s]" same-sex couples,[584] the Court declared that DOMA "humiliates tens of thousands of children now being raised by same-sex couples."[585] As if that were not enough, the Court added that "DOMA also brings financial harm to children of same-sex couples" by raising "the cost of health care for families" and denying "benefits allowed to families upon the loss of a spouse and parent."[586] Because the Court found that these injuries were not justified by any "legitimate purpose,"[587] it held that the law violated the "basic due process and equal protection principles" of the Fifth Amendment.[588]

It is impossible to overstate the significance of this legal victory to the LGBT movement. For far too long, our legal system has presumed that the state has a legitimate interest in promoting heteronormativity in childhood. In the name of protecting children from the influences of indoctrination, role modeling, and public approval, opponents of LGBT rights have successfully defended a broad range of policies that discriminate against LGBT people.

Until recently, advocates of LGBT rights have responded by challenging these policies on strictly empirical grounds. They have attacked the factual premise that queerness *can* be contained, rather than challenging the legal premise that queerness *may* be contained. If only for the purpose of argument, they have entertained the troubling assumption that queerness is immoral, harmful, or inferior, and thus, that the state may legitimately discourage children from becoming queer.

Relying on some of the most basic principles of constitutional jurisprudence, this Article exploits an existing gap between fact and law.

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582 *Id.* (emphasis added).

583 H.R. REP. NO. 104-664, at 15 n.53 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919 n.53 (emphasis added) (quoting E.L. Pattullo, *Straight Talk About Gays*, COMMENT. 22–23 (1992)) (internal quotation marks omitted).

584 United States v. Windsor, 133 S. Ct. 2675, 2692, 2695–96 (2013).

585 *Id.* at 2694.

586 *Id.* at 2695.

587 *Id.* at 2696.

588 *Id.* at 2693.

It argues that even if the fear's empirical predictions were correct—even if exposing children to queerness makes them more likely to be queer—this fact would not be legally relevant. Dissenting from the Eleventh Circuit's refusal to reconsider the constitutionality of Florida's adoption law, Judge Rosemary Barkett conveyed this Article's argument perfectly well: "In our democracy, . . . it is not the province of the State, even if it were *able* to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities."[589] She explained: "This approach views homosexuality in and of itself as a social harm that must be discouraged"[590]—a premise foreclosed by the First Amendment, the Equal Protection Clause, and the Due Process Clause.

Forty years after the rise of the modern LGBT movement, the time has come to defend children's queerness, rather than assuring the world that homosexuality and gender variance can be quarantined. The state does not have any legitimate interest in promoting heteronormativity in childhood because it does not have any interest in promoting heteronormativity at any age. The Constitution protects every child's right to an open future in sexual and gender development—an equal liberty to be straight or queer.

589 Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc).

590 *Id.*