LGBTQ YOUTH AND THE PROMISE OF THE KENNEDY QUARTET

Michael J. Higdon†

The Supreme Court has only issued four opinions endorsing the constitutional rights of sexual minorities, each of them authored by Justice Anthony Kennedy. These four cases, which this Article refers to collectively as "the Kennedy Quartet," have done much to advance the equality of LGBTQ adults in the United States. The question remains, however, as to what extent those cases likewise protect LGBTQ children. Far from simply being an academic question, this issue has taken on increased urgency as legislators in a number of states—thwarted by the Kennedy Quartet in their ability to target LGBTQ adults—have turned their attentions to those sexual minorities who are still children. In so doing, they have passed laws that, among other things, punish adolescent sexual activity more harshly when it involves two people of the same sex, prohibit discussions in public schools that portray homosexuality in anything other than a negative light, and deny transgender youth the ability to compete in school athletics or use restrooms that correspond to their gender identity. These laws are harmful enough in their own right but are particularly pernicious in light of the harms those children already face simply by virtue of being a sexual minority in a homophobic society. Looking at the Kennedy Quartet in conjunction with the Supreme Court's jurisprudence regarding the constitutional rights of children, this Article argues that such laws are unconstitutional. It does so by, first, challenging the argument that the Kennedy Quartet pertains only to adults. Second, and more importantly, this Article then distills from those cases three key protections applicable to the entire LGBTQ community—children included—that these current laws violate. The hope is that this analysis will assist judges, legislators, and policy makers alike as they look for ways to put an end to this wave of discriminatory laws and, in their place, lobby for more inclusive legislation.

† Associate Dean for Faculty Development and Professor of Law, University of Tennessee College of Law. I am grateful to the University of Tennessee College of Law, particularly Dean Doug Blaze, for providing generous financial support for this project.

TABLE OF CONTENTS

> *If the image of the homosexual as sick was the silver bullet for gay rights opponents in the early years of the movement, the threat of the homosexual as a* child *proved to be their atom bomb in recent years.*
>
> —Craig Konnoth, *The Protection of LGBT Youth*

INTRODUCTION

In late 2020, people across the country took to social media to oppose a proposed bill in the State of California. Using the hashtag #SaveOurChildren, these critics argued that the proposal, known as Senate Bill 145, "legalizes pedophilia."[1] The legislator who introduced SB 145, State Senator Scott Weiner, even reported receiving death threats.[2] So what did SB 145 say and what was so bad about this proposed state law that it would provoke such national outrage? The bill corrected a form of discrimination regarding sexual offender registration in California that had been allowed to persist for some time. Specifically, California law gives judges the discretion to decide whether certain persons convicted of statutory rape with someone close in age must register as a sexual offender.[3] Judges are given this flexibility out of concern for overly punishing adolescents engaged in a nonforcible sexual relationship.[4] Previously, however, such discretion only existed if the defendant was guilty of having had vaginal intercourse; those convicted of sodomy were automatically required to register as a sex offender regardless of how close in age they were to the victim.[5] SB 145

1 *Fact Check: No Evidence of Any Attempt to Lower the Age of Consent to 4*, REUTERS (Sept. 10, 2020), https://www.reuters.com/article/uk-factcheck-age-of-consent/fact-check-no-evidence-of-any-attempt-to-lower-the-age-of-consent-to-4-idUSKBN26134A [https://perma.cc/QA53-NUJQ].

2 Trisha Thadani, *S.F. Supes Delay Resolution to Condemn Homophobic, Antisemitic QAnon Attacks on Sen. Scott Wiener*, S.F. CHRON. (Sept. 25, 2020, 5:39 PM), https://www.sfchronicle.com/local-politics/article/S-F-Supes-punt-resolution-to-condemn-homophobic-15598150.php [https://perma.cc/T8HR-JYJ8].

3 CAL. PENAL CODE § 290(c)(2) (West 2022). Note, however, that this discretion only applies if the victim was fourteen or older. *See id.* (listing crimes for which registration is within the judge's discretion but excluding those statutory rape crimes involving children under the age of fourteen).

4 Such provisions are known as "Romeo and Juliet" exceptions, which "afford[] protection to minors who willingly, voluntarily, and intentionally engage in sexual intercourse." Angela D. Minor, *Sexting Prosecutions: Teenagers and Child Pornography Laws*, 60 HOW. L.J. 309, 321 (2016).

5 *See* Jacob Ogles, *Why Is Gay Underage Sex Criminalized When Straight Sex Is Not?*, ADVOCATE (Jan. 23, 2019, 1:19 PM), https://www.advocate.com/crime/2019/1/23/why-gay-

(which was eventually signed into law) corrected this disparity by treating anyone who runs afoul of the state's statutory rape laws equally when it came to sex offender registration.

The reason this change fueled public outrage was because those most likely to benefit were LGBTQ youth in sexual relationships with those close in age.[6] Critics of the bill preferred to see those children treated more severely than their heterosexual peers, even if the sexual activity was otherwise identical.[7] Thus, the outrage accompanying SB 145 is highly instructive in two key regards. First, it reaffirms the continued existence of societal homophobia, or "the irrational fear and hatred of homosexuality,"[8] which has throughout history given rise to various forms of discrimination against the LGBTQ community. More importantly, however, it illuminates a powerful legal shift currently taking place—one in which legislation targeting sexual minorities has found a new, primary target: LGBTQ children. After all, in the last twenty-five years, the Supreme Court has issued a handful of opinions that make it more difficult for states to use legislation as a vehicle for marginalizing and demeaning the lives of LGBTQ adults.[9] In response, many states have now redirected those intentions toward sexual minorities who are still children.[10] Against that backdrop, the national outrage accompanying something as benign as California's attempt to punish youth in same-sex sexual relationships equally with those in opposite-sex couplings becomes more understandable.

Indeed, that same outrage is fueling attempts in other states to pass laws that affirmatively increase the disparities faced by LGBTQ youth.

---

underage-sex-criminalized-when-straight-sex-not [https://perma.cc/AAC6-M7DQ] ("A 'Romeo & Juliet' law in California keeps many young adults out of the state's sex offender registry, but not in the case of two Romeos or two Juliets.").

6 *See* Camille Caldera, *Fact Check: California's SB-145 Eliminates an Inequality in Sex Offender Registration*, USA TODAY (Sept. 3, 2020, 7:23 PM), https://www.usatoday.com/story/news/factcheck/2020/09/03/fact-check-california-law-does-not-decriminalize-sex-minors/3456171001/ [https://perma.cc/92TG-RWY7] ("Before SB-145, an 18-year-old male convicted of having oral or anal sex with a 17-year-old male would be required to register as a sex offender, while a 24-year-old male convicted of having penile-vaginal sex with a 15-year-old female would not be automatically required to register . . . .").

7 *See, e.g.*, Phil Willon, *Newsom Signs Bill Intended to End Discrimination Against LGBTQ People in Sex Crime Convictions*, L.A. TIMES (Sept. 11, 2020, 9:00 PM), https://www.latimes.com/california/story/2020-09-11/sb145-sex-crimes-law-gavin-newsom-lgbtq-rights [https:/perma.cc/G5SN-LNM] ("Wiener . . . noted that the 10-year age difference provision in California's sexual offender registry law has been on the books for decades and [yet] none of the lawmakers criticizing the bill have attempted to change the law to address judicial discretion in cases involving heterosexual sex with a minor.").

8 I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991).

9 *See infra* Section II.B.2.

10 *See infra* Section I.A.

For instance, in contrast to what California has done, some states have passed discriminatory statutory rape laws that punish sexual acts between adolescents of the same sex much more harshly than identical acts committed by those of the opposite sex.[11] But these efforts extend far beyond statutory rape. For example, despite the fact that LGBTQ children encounter bullying much more frequently than their heterosexual peers, a number of states have enacted (or attempted to enact) laws forbidding educators from even talking about sexual orientation, especially in ways that present LGBTQ persons in a positive light.[12] Additionally, a growing number of states have specifically targeted transgender youth with laws that deny them equal accommodations in schools, primarily in the context of athletics and access to bathrooms corresponding to their gender identity.[13] These are but three examples of the various ways states are currently using legislation to further stigmatize and harm LGBTQ youth, raising the questions of how else legislators might target these children going forward and what is to be done about it.

As an initial matter, the fact that a state would take such steps is troubling because, under the doctrine of *parens patriae*—which the Supreme Court has described as "a most beneficent function . . . often necessary to be exercised in the interests of humanity"[14]—legislators have a duty to protect those who cannot protect themselves.[15] Given then that LGBTQ youth are "among the most vulnerable individuals in our society,"[16] the question arises as to how legislators can justify piling on to the significant legal disabilities and ensuing harms already facing these children. A more serious concern that also forms the basis of this Article is the extent to which such legislation runs afoul of the constitutional protections afforded to LGBTQ children.

Those protections flow from the confluence of two broader bodies of Supreme Court jurisprudence: a collection of cases identifying the

11 *See infra* Section I.A.2.

12 *See infra* Section I.A.1.

13 *See infra* Section I.A.3.

14 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) (quoting Mormon Church v. United States, 136 U.S. 1, 57 (1890)).

15 *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890) (stating that "*parens patriae* is inherent in the supreme power of every state . . . . for the prevention of injury to those who cannot protect themselves").

16 Craig Konnoth, *The Protection of LGBT Youth*, 81 UNIV. PITT. L. REV. 263, 285 (2019); *see also* Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2348 (2019) (describing LGBTQ youth as "an especially vulnerable segment of the LGBTQ population").

constitutional protections afforded to children[17] and another dealing with those afforded to sexual minorities.[18] This latter category is comprised of four Supreme Court cases—*Romer v. Evans*,[19] *Lawrence v. Texas*,[20] *United States v. Windsor*,[21] and *Obergefell v. Hodges*[22]—which this Article refers to collectively as "the Kennedy Quartet," given that Justice Kennedy was the author of all four opinions. Although the four cases did indeed recognize greater protections for sexual minorities, looking at the specific facts of each could suggest that whatever rights were recognized therein only extend to LGBTQ adults. As Justice Kennedy himself (in)famously included in the penultimate paragraph of his opinion in *Lawrence v. Texas*, "[t]he present case does not involve minors."[23] Accordingly, as other commentators have noted, "it appears that most of the progress of the LGBT[Q] rights movement to date has primarily been for the benefit of LGBT[Q] adults, with far fewer protections for LGBT[Q] youth."[24] And it is within that perceived vacuum that attacks on LGBTQ youth have proliferated. It is the position of this Article, however, that both the existence and the breadth of this legal lacuna have been greatly exaggerated. Although a few scholars have looked at how the individual cases within the Kennedy Quartet could impact certain rights affecting LGBTQ children,[25] none have looked at the broader, collective impact of those four opinions on this class of children. This Article endeavors to do just that.

17 *See infra* Section II.A.

18 *See infra* Section II.B.

19 Romer v. Evans, 517 U.S. 620 (1996); *see infra* Section II.B.2.a.

20 Lawrence v. Texas, 539 U.S. 558 (2003); *see infra* Section II.B.2.b.

21 United States v. Windsor, 570 U.S. 744 (2013); *see infra* Section II.B.2.c.

22 Obergefell v. Hodges, 576 U.S. 644 (2015); *see infra* Section II.B.2.d.

23 539 U.S. at 578. Some scholars have referred to this passage as the "minor exception." *See* Joseph J. Wardenski, Comment, *A Minor Exception?: The Impact of* Lawrence v. Texas *on LGBT Youth*, 95 J. CRIM. L. & CRIMINOLOGY 1363, 1368 (2005).

24 Julie A. Nice, *The Responsibility of Victory: Confronting the Systemic Subordination of LGBT Youth and Considering a Positive Role for the State*, 23 TEMP. POL. & C.R. L. REV. 373, 375 (2014).

25 *See, e.g.*, Wardenski, *supra* note 23, at 1368–69 ("Lawrence decriminalized not just consensual sodomy between homosexual adults, but also the very status of being gay or lesbian, and as such, should also be interpreted to include gay youth in its protections."); Clifford J. Rosky, *No Promo Hetero: Children's Right to Be Queer*, 35 CARDOZO L. REV. 425, 425 (2013) (using cases from the Kennedy Quartet to argue "that the state has no legitimate interest in promoting heterosexuality or gender conformity during childhood"); Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195 (2008) (arguing that discriminatory statutory rape laws impacting LGBTQ children are unconstitutional under *Lawrence*).

As an initial matter, the Supreme Court has already established that children enjoy constitutional protections.[26] Although those protections are not always coextensive with those of adults, the reasons for that disparity do not apply to this current assortment of laws directed at LGBTQ youth.[27] Further, nowhere in the Kennedy Quartet did the Court ever suggest that those opinions were limited to disputes involving LGBTQ adults.[28] Although Kennedy did clarify that the facts of *Lawrence* did not concern children, as others have remarked, even a cursory reading of that opinion makes clear that the Court merely intended "to distinguish the Texas sodomy law from laws that govern *sexual* relations with minors,"[29] not any and all LGBTQ issues that might somehow involve a child.[30] As another commentator put it: "Read in context with the entire decision, the most likely intent of [this language] was to deny adults who sexually molest children a new 'privacy' defense to their criminal behavior, a limitation that bears no relation to sexual orientation."[31]

On the contrary, this Article argues that there is much in the Kennedy Quartet that applies to laws that discriminate against LGBTQ youth. To understand why, consider that Justice Kennedy invalidated same-sex marriage bans in *Obergefell* by (1) recognizing as irrelevant the fact that the Court's precedents regarding the fundamental right to marry all involved opposite-sex couples and (2) by extrapolating "four principles and traditions" justifying the recognition of marriage as a fundamental right under the Constitution.[32] Similarly, it is the position of this Article that, first, the fact that the Kennedy Quartet all involved LGBTQ adults is irrelevant to the question of what constitutional protections apply to LGBTQ youth. Second, one can likewise discern a number of implicit rights in the Kennedy Quartet that flow to the entire

26 *See infra* Section II.A.

27 *See infra* notes 265–67 and accompanying text.

28 *See* Romer v. Evans, 517 U.S. 620 (1996); *Lawrence*, 539 U.S. 558; United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

29 Rosky, *supra* note 25, at 461 (emphasis added); *see also* Nancy D. Polikoff, *Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles*, 60 UCLA L. REV. DISCOURSE 226, 228–29 (2013) (describing the "obvious" meaning of that language as "excluding sex with children from constitutional protection").

30 For instance, as Rosky points out, "[i]n light of the benevolent attitude toward homosexuality betrayed in [other parts of the opinion], it beggars belief to suppose that when the Court observed that '[t]he present case does not involve minors,' it meant to juxtapose gay parents with statutory rapists and child molesters." Rosky, *supra* note 25, at 461 (alteration in original) (quoting *Lawrence*, 539 U.S. at 578).

31 Wardenski, *supra* note 23, at 1395.

32 *Obergefell*, 576 U.S. at 665.

LGBTQ community, children included. In this current legal and social climate, where children who identify as sexual minorities are facing growing hostilities, it is essential that courts, legislators, and policy makers alike understand the full reach of these four opinions which are highly instructive when it comes to the limits to which the law can punish or refuse to protect LGBTQ children.

Specifically, this Article argues that the Kennedy Quartet collectively establishes at least three principles that apply with equal force to discrimination targeting children. Those principles are (1) LGBTQ identity is not a harm from which children need protection;[33] (2) neither popular notions of morality nor a bare desire to harm can justify discriminatory legislation against LGBTQ youth;[34] and (3) whatever other justifications legislators might advance in support of this discrimination must withstand heightened scrutiny.[35] While it is beyond the scope of this Article to fashion specific constitutional arguments to each of the various discriminations currently facing LGBTQ youth, this Article puts forth these three principles as a means of, first, debunking the argument that the Kennedy Quartet is entirely inapplicable to laws targeting children and, second, offering guidance as to the kinds of arguments that can be used to either prevent or strike down these discriminatory laws.

Accordingly, this Article proceeds in four Parts. Part I looks at the increasingly hostile legal landscape within which LGBTQ youth must now navigate. It focuses primarily on the legal contexts in which laws have targeted those youth but also reviews the pernicious harms (both physical and psychological) with which such youth must *already* contend as a result of existing homophobia. Part II then looks to the Supreme Court jurisprudence relating to the constitutional rights of children as well as the Court's decisions dealing with the rights of the LGBTQ community, focusing on the four cases comprising the Kennedy Quartet. Finally, Part III provides an analysis of the Kennedy Quartet, distilling from that collection of cases the three implicit rights mentioned above—rights that extend to all LGBTQ Americans, children included—and how the current laws targeting those children run afoul of these protections.

33 *See infra* Section III.A.

34 *See infra* Section III.B.

35 *See infra* Section III.C.

I. THE PRECARIOUS LIVES OF LGBTQ YOUTH

Despite the fact that society has, at least in some respects, become more accepting of sexual minorities,[36] the reality is that members of the LGBTQ community continue to face discrimination in a number of contexts.[37] For LGBTQ children, however, life can be particularly difficult given the extent to which they routinely "endure discrimination, harassment, and abuse due to their actual or perceived identities."[38] As detailed later in this Part, the disparate treatment regularly endured by these children has produced a number of harms, both physical and psychological.[39] However, the bigger purpose of this Part is to highlight how, even in the face of such existing harms, legislators in a number of states have actively campaigned (and, in many cases, succeeded) in only further marginalizing LGBTQ youth through discriminatory, stigmatizing legislation.

A. *Mounting Legislative Hostilities*

Sadly, cataloging the various ways in which the law has failed LGBTQ youth would require more space than the length of this Article would permit.[40] However, what follows are the three primary areas in which legislators are currently focusing their efforts at targeting LGBTQ youth. In each case, lawmakers are doing so primarily through enactment of overtly discriminatory laws and, to a lesser extent, through the refusal to pass legislation that would help correct existing disparities.

---

36 Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 272 (2015) ("[M]ost people would probably agree that the legal mobilization around marriage has invigorated the LGBT[Q] movement and has improved the situation of many sexual minorities in a predominantly heterosexual society.").

37 Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 283 (noting that "LGBTQ individuals . . . have not only faced historic discrimination, but continue to face discrimination on the basis of sexual orientation in a number of arenas").

38 Roy Abernathy, Note, *Seeking Remedies for LGBTQ Children from Destructive Parental Authority in the Era of Religious Freedom*, 26 WASH. & LEE J. C.R. & SOC. JUST. 625, 658 (2020).

39 *See infra* Section I.B.

40 For a fuller discussion of those various legal challenges, however, see Mudasar Khan, Kelly McLaughlin, Peter Mezey & Daniel Robertson, *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 477 (2017) (discussing "the myriad of challenges faced by lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth in the United States" (footnote omitted)).

1. Bullying and the Refusal to Protect

In 2020, the Center for Disease Control and Prevention released the Youth Risk Behavior Surveillance report, which "is the largest public health surveillance system in the United States, monitoring a broad range of health-related behaviors among high school students."[41] The report contains a number of statistics, but those relating to LGBTQ children and bullying are particularly striking. Specifically, whereas 17% of heterosexual youth reported being bullied on school property, the percentages jump to 29 and 43% for homosexual and transgender youth, respectively.[42] This data echoes the results of similar studies conducted in previous years,[43] leading many commentators to conclude that bullying has become "a ubiquitous phenomenon in schools today"[44] and that "[t]hose young people whose gender expression challenges society's sex role expectations are particularly targeted for violence."[45]

The states, however, are not powerless. Indeed, as more and more stories have emerged concerning students who have died as a result of suicide after enduring years of bullying, all fifty states have enacted antibullying legislation.[46] Several of those states have even gone so far

41 J. Michael Underwood et al., *Overview and Methods for the Youth Risk Behavior Surveillance System—United States, 2019*, 69 CTRS. FOR DISEASE CONTROL & PREVENTION MMWR 1 (2020), https://www.cdc.gov/mmwr/volumes/69/su/pdfs/su6901-H.pdf [https://perma.cc/S2L5-VK29].

42 *See* Madeleine Roberts, *New CDC Data Shows LGBTQ Youth Are More Likely to Be Bullied than Straight Cisgender Youth*, HUM. RTS. CAMPAIGN (Aug. 26, 2020), https://www.hrc.org/news/new-cdc-data-shows-lgbtq-youth-are-more-likely-to-be-bullied-than-straight-cisgender-youth [https://perma.cc/M5BP-8RDX] (summarizing the CDC's findings).

43 *See, e.g.*, Andrea Daley, Steven Solomon, Peter A. Newman & Faye Mishna, *Traversing the Margins: Intersectionalities in the Bullying of Lesbian, Gay, Bisexual and Transgender Youth*, 19 J. GAY & LESBIAN SOC. SERVS. 9, 11 (2007) (finding that LGBTQ students experienced bullying at twice the rate of non-LGBTQ students); Anthony R. D'Augelli, *Developmental and Contextual Factors and Mental Health Among Lesbian, Gay, and Bisexual Youths*, *in* SEXUAL ORIENTATION AND MENTAL HEALTH: EXAMINING IDENTITY AND DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE 37, 45 (Allen M. Omoto & Howard S. Kurtzman eds., 2006) (finding that, among LGBTQ youth, 81% experienced verbal harassment, 38% had been physically threatened, 22% had objects thrown at them, 15% suffered physical assaults, 6% suffered assaults with a weapon, and 16% had been sexually assaulted).

44 Sandra Graham & Jaana Juvonen, *An Attributional Approach to Peer Victimization*, *in* PEER HARASSMENT IN SCHOOL: THE PLIGHT OF THE VULNERABLE AND VICTIMIZED 49, 49 (Jaana Juvonen & Sandra Graham eds., 2001).

45 Joyce Hunter, *Introduction: Safe Passage*, J. GAY & LESBIAN SOC. SERVICES, 2007, at 2.

46 *See, e.g.*, Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 847 ("[A]s of January 2016, all fifty states, along with the District of Columbia, have enacted anti-bullying laws.").

as to explicitly include sexual orientation and gender identity as protected categories.[47] A recent study concluded that doing so has greatly improved the health and happiness of LGBTQ students living in those states, finding that "having an antibullying state law that enumerates sexual orientation was associated with reduced odds of bullying, stressors, and suicidal ideation and suicide attempts."[48] Despite these benefits, however, fewer than half the states currently include sexual orientation and gender identity as protected grounds.[49]

At the same time, some states have actively moved in the opposite direction, exacerbating the impacts of bullying on LGBTQ youth by passing what has come to be known as "no promo homo" laws—laws "which prohibit public education likely to promote homosexuality."[50] Alabama, for instance, has a state statute mandating certain content for sex education courses in public schools.[51] Up until April of 2021,[52] one such requirement was that the course had to emphasize "in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state."[53] Although Alabama recently removed this requirement, other states have retained such

47 *See Policy Maps, Enumerated Anti-Bullying and Harassment Laws by State*, GLSEN, https://www.glsen.org/policy-maps [https://perma.cc/MGY9-GDWB] ("There are 21 states and the District of Columbia that have passed legislation that specifically prohibits bullying and harassment of students by their peers in K-12 schools based on actual or perceived sexual orientation and gender identity.").

48 Ilan H. Meyer, Feijun Luo, Bianca D.M. Wilson & Deborah M. Stone, *Sexual Orientation Enumeration in State Antibullying Statutes in the United States: Associations with Bullying, Suicidal Ideation, and Suicide Attempts Among Youth*, 6 LGBT HEALTH 9, 11 (2019), https://pubmed.ncbi.nlm.nih.gov/30638436 [https://perma.cc/T592-8GU7]; *see also* Ari Ezra Waldman, *Are Anti-Bullying Laws Effective?*, 103 CORNELL L. REV. ONLINE 135 (2018) (finding that anti-bullying laws alone are "not sufficient to have a significant effect on rates of bullying, cyberbullying, and suicidal thoughts among LGB teenagers. Rather, states with more pro-equality laws, in general, reflecting a long-standing commitment to LGBTQ inclusion, are more likely to have lower rates of LGB bullying in schools").

49 *See* Benjamin Long, *Detailed Anti-Bullying Laws Can Help Protect LGBT+ Teens, Research Says*, REUTERS (Jan. 17, 2019, 5:37 PM), https://www.reuters.com/article/us-usa-lgbt-suicide/detailed-anti-bullying-laws-can-help-protect-lgbt-teens-research-says-idUSKCN1PB2V6 [https://perma.cc/YK87-MCAC]; *see also supra* note 47 and accompanying text.

50 Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 366 (2000).

51 ALA. CODE § 16-40A-2 (1975).

52 Olafimihan Oshin, *Alabama Governor Signs Bill to Remove Anti-LGBTQ Language from Sex Education Curriculum*, THE HILL (Apr. 29, 2021, 5:00 PM), https://thehill.com/homenews/state-watch/551046-alabama-gov-signs-bill-to-remove-anti-lgtbq-language-from-sex-education [https://perma.cc/6KTK-BNRU].

53 ALA. CODE § 16-40A-2(c)(8) (2012).

restrictions,[54] while others like Tennessee and Missouri have proposed adding them. For example, the Tennessee bill—entitled the "Classroom Protection Act"—has been repeatedly introduced and, if passed, would classify as inappropriate and thereby "prohibit[]" any such "classroom instruction, course materials or other informational resources that are inconsistent with natural human reproduction" in grade levels pre-K through eight.[55] The Missouri bill required that "no instruction, material, or extracurricular activity sponsored by a public school that discusses sexual orientation other than in scientific instruction concerning human reproduction shall be provided in any public school."[56] The purpose behind these laws is "ostensibly to prevent impressionable youths from being converted into homosexuals."[57] In attempting to justify such legislation in that way, Professor Kenji Yoshino argues that lawmakers "cast[] the laws as defending against an act of aggression on the part of homosexuals themselves."[58]

Although laws of this sort are damaging on a number of levels, it is particularly pernicious when it comes to school bullying. After all, at the heart of no promo homo laws is the idea that schools cannot address issues relating to sexual minorities in a positive light, with the result that teachers "may not address bullying of LGBT[Q] students in the same way that they would for non-LGBT[Q] students for fear of professional discipline or even termination."[59] Additionally, by prohibiting any conversations that might cast a sympathetic light on the lives and struggles of sexual minorities, such laws are likely to only further

54 See, for example, MISS. CODE. ANN. § 37-13-171(2)(e) (2021), which requires "abstinence-only education" that includes instruction on "the current state law related to sexual conduct," including "homosexual activity" along with "forcible rape" and "statutory rape." Importantly, this "current state law" refers to sodomy as "the detestable and abominable crime against nature." MISS. CODE. ANN. § 97-29-59 (2021); *see also* OKLA. STAT. ANN. tit. 70, § 11-103.3(D)(1) (West 2021) (mandating that AIDS prevention education shall teach students that "engaging in homosexual activity, promiscuous sexual activity, intravenous drug use or contact with contaminated blood products is now known to be primarily responsible for contact with the AIDS virus"); LA. STAT. ANN. § 17:281(A)(3) (1993) ("No sex education course offered in the public schools of the state shall utilize any sexually explicit materials depicting male or female homosexual activity.").

55 *See* Amanda Harmon Cooley, *Constitutional Representations of the Family in Public Schools: Ensuring Equal Protection for All Students Regardless of Parental Sexual Orientation or Gender Identity*, 76 OHIO ST. L.J. 1007, 1012–13 (2015) (first quoting H.R. 1332, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); and then quoting S.B. 234, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013)).

56 *Id.* at 1013 (quoting H.R. 2051, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012)).

57 Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 810–11 (2002).

58 *Id.*

59 Jillian Lenson, *Litigation Primer Attacking State "No Promo Homo" Laws: Why "Don't Say Gay" Is Not O.K.*, 24 TUL. J.L. & SEXUALITY 145, 158 (2015).

entrench the prejudices and stereotypes that foster such bullying in the first place. As William Eskridge has persuasively written: "Stereotypes weaken as people observe nonstereotypical behavior in minorities they come to know, and prejudices weaken as people cooperate with minorities in win-win projects. . . . Most no promo homo policies undermine this process by signaling state support for the traditional status denigration of [LGBTQ] people,"[60] which would of course include those children who identify as sexual minorities.

2. Criminalizing Sexual Activity

Age of consent laws, which vary by state, lay out the minimum age at which a person can legally consent to engage in a sexual act with another person.[61] In turn, statutory rape laws then criminalize sexual activity with children who are below the age of consent even if the child was a willing participant: "The law conceives of the younger partner as categorically incompetent to say either yes or no to sex. Because she is by definition powerless both personally and legally to resist or to voluntarily relinquish her 'virtue,' the state, which sees its interest in guarding that virtue, resists for her."[62] In most states, statutory rape is a felony regardless of the age of the "perpetrator."[63] However, presumably recognizing that sexual experimentation with peers is relatively common during adolescence, many states today have enacted "Romeo and Juliet" exceptions, which provide for a reduced penalty when both actors are close in age.[64] Within those states, such exceptions typically apply to both heterosexual and homosexual couplings,[65] meaning that a

60 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, 1410 (2000).

61 *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 334 (2003) ("At its most basic, statutory rape is the carnal knowledge of a person who is deemed underage as proscribed by statute and who is therefore presumed to be incapable of consenting to sexual activity." (footnote omitted)).

62 JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 71 (2002).

63 CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 29 (2004) ("[I]f the male were the same age as the female, or even younger than the female, he would still be prosecuted for the crime.").

64 *See* Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1217 n.82 (2015) (noting the existence of these exceptions and how they "permit sex between minors or between minors and adults who are close in age").

65 *See* Nancy Bourke, Comment, *Heeding the Equal Protection Clause in the Case of* State v. Limon *and in Other Instances of Discriminatory Romeo and Juliet Statutes*, 12 WIDENER L. REV.

defendant who engages in a sexual act with someone close in age (yet below the age of consent) will qualify for the reduced penalty regardless of whether the two actors are the same or opposite gender.

Other states, however, condition any such mitigation on the two parties being of the opposite sex. For instance, the relevant Texas statute provides that a person is guilty of statutory rape if that person "engages in sexual contact" with "a child younger than 17 years of age, whether the child is of the same or opposite sex."[66] Anyone who violates this provision is guilty of "a felony of the second degree," subject to a minimum of two years imprisonment, a fine of up to $10,000, and is mandated to register as a convicted sex offender.[67] However, under the Texas Romeo and Juliet exception, "[i]t is an affirmative defense to prosecution under this section that the actor . . . was not more than three years older than the victim *and of the opposite sex*."[68] Thus, when it comes to adolescent statutory rape offenders in Texas, the difference between receiving a fairly heavy penalty and no penalty at all turns on whether the sexual activity involved two people of the same or opposite gender. As a result, LGBTQ youth are likely to be punished much more severely than their heterosexual peers for the same conduct.[69]

A bigger issue with statutory rape laws as they relate to LGBTQ youth, however, is that, even when written as gender neutral, they are more likely to be enforced against youth engaged in same-sex pairings.[70] Consider, for instance, a 2016 study that looked at more than 25,000 reported incidents of statutory rape within a seven-year period to determine the role gender pairings played in whether an arrest took

613, 633 (2006) (noting that, as of 2006, only four states had discriminatory "Romeo and Juliet" provisions).

66 TEX. PENAL CODE ANN. § 21.11(a) (West 2017).

67 *See id.* § 12.33(a)–(b) (West 2017); TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A) (West 2005).

68 TEX. PENAL CODE ANN. § 21.11(b)(1) (West 2019) (emphasis added).

69 And Texas is not alone. Despite the change California made regarding sex offender registration that was discussed earlier, it still maintains different standards regarding its Romeo and Juliet exceptions when it comes to vaginal intercourse vis-à-vis sodomy with the result that there is "more prosecutorial discretion in terms of what amounts to a felony for those convicted of unlawful intercourse with a minor than for non-vaginal sex with a minor." *See* Kendra Clark, Note, *Specters of California's Homophobic Past: A Look at California's Sex Offender Registration Requirements for Perpetrators of Statutory Rape*, 52 U.C. DAVIS L. REV. 1747, 1755 (2019).

70 *See, e.g.*, Kasey S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 612 (2004) (noting that, when it comes to "the selective application or enforcement of sodomy laws against LGBT[Q] individuals[, it] also occurs in the context of statutory rape laws, which authorities persist in using to regulate same-sex activities among LGBT[Q] youth").

place.[71] As an initial matter, the study noted that, because sexual experimentation is quite common among adolescents, the "majority of adolescent sexual experiences criminalized by statutory rape laws are never brought to the attention of law enforcement, and most that are . . . do not result in arrest."[72] Further, the study found that reported incidents of same-sex statutory rape were quite rare, "accounting for only 1% of all statutory rape incidents."[73] Nonetheless, when turning to the incidents of statutory rape that ultimately did result in an arrest, the study found that "both male-on-male and (especially) female-on-female incidents had significantly higher arrest odds."[74] Finally, although the study did not analyze case outcomes postarrest, other studies have found that LGBTQ youth are more likely than heterosexual youth to be ordered to register as sex offenders for the exact same conduct.[75] Despite these troubling statistics, no state has taken any action to try and ameliorate these disproportionate penalties.

3. Denying Transgender Students Equal Accommodations

Recently, transgender youth have become particular targets of legislation that effectively denies them certain accommodations in educational settings, primarily in the form of access to bathrooms and school athletics. As to the latter, in the first five months of 2021 alone, governors in five states signed bills into law that limited transgender students' abilities to participate in school sports.[76] Florida, for example,

71 *See generally* Mark Chaffin, Stephanie Chenoweth & Elizabeth J. Letourneau, *Same-Sex and Race-Based Disparities in Statutory Rape Arrests*, 31 J. INTERPERSONAL VIOLENCE 26 (2016).

72 *Id.* at 27.

73 *Id.* at 41.

74 *Id.* at 36. For instance, "female-on-female pairings had double the arrest odds outside a romantic relationship and about *16 times* the arrest odds inside a romantic relationship." *Id.* at 41 (emphasis added).

75 *See* Tom Wahl & Nicole Pittman, *Injustice: How the Sex Offender Registry Destroys LGBT Rights*, ADVOCATE (Aug. 5, 2016, 5:48 AM), https://www.advocate.com/commentary/2016/8/05/injustice-how-sex-offender-registry-destroys-lgbtq-rights [https://perma.cc/H43Y-CMCY] (noting that "initial investigations [of children required to register as sex offenders] show a disproportionate number of these youth are queer").

76 *See* Sydney Kalich, *Here Are the States Banning Transgender Athletes in Women's Sports and the States Considering It*, NEWSNATION (June 1, 2021, 11:27 AM), https://www.newsnationnow.com/us-news/here-are-the-states-banning-transgender-athletes-in-womens-sports-and-the-states-considering-it [https://perma.cc/J4FW-YAKC] (listing those states where such laws had passed in January through May of 2021 as Alabama, Arkansas, Mississippi, Tennessee, and West Virginia, and noting that Florida would join the list in June of 2021, the governor of South Dakota achieved a similar result via executive order in March, and Idaho had passed similar legislation the previous year).

passed the "Fairness in Women's Sports Act," which states that "[a]thletic teams or sports designated for females, women, or girls may not be open to students of the male sex."[77] The Florida law then states that, when it comes to determining one's sex, "a statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex at birth *if the statement was filed at or near the time of the student's birth*."[78] Thus, the statute excludes gender identity as a basis for determining sex, and likewise suggests that amended birth certificates can be ignored unless the amendment took place during the child's infancy.[79] Although legislators have attempted to justify these laws as being necessary to protect cisgender female students from unfair competition by those assigned male at birth,[80] currently there is no evidence to support that argument.[81] Indeed, "most studies and policy papers discussing transgender athletics consider whether an athlete was born male or female to be irrelevant to athletic ability."[82] Further, there exists only an incredibly small number of transgender athletes for whom these concerns are even relevant, making the speed with which a number of states are proposing and adopting such legislation somewhat dubious.[83]

77 FLA. STAT. § 1006.205(3)(c) (2021). The statute does, however, state that "[a]thletic teams or sports designated for males, men, or boys may be open to students of the female sex." *Id.* at (3)(b).

78 *Id.* at (3)(d) (emphasis added).

79 Thus, an amended birth certificate obtained later in life would be of no consequence. *See, e.g.*, Rachel Duffy Lorenz, Comment, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. REV. 523, 530 (2005) ("The majority of states allow transgender persons to amend their birth certificates to reflect changes *after sex-reassignment surgery*." (emphasis added)).

80 *See* FLA. STAT. § 1006.205(2)(b) (2021) ("The Legislature finds that requiring the designation of separate sex-specific athletic teams or sports is necessary to maintain fairness for women's athletic opportunities."); *see also* Kayla L. Acklin, *"Hurdling" Gender Identity Discrimination: The Implications of State Participation Policies on Transgender Youth Athletes' Ability to Thrive*, 37 B.C. J.L. & SOC. JUST. 107, 110 (2017) ("One of society's most frequently expressed concerns is that transgender girls will have a competitive advantage over cisgender girls in athletics because of their biological make-up.").

81 *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 274 (2013) ("Concerns that permitting transgender students to participate in K-12 athletics will lead to injuries for transgender males competing with cisgender males, or cisgender females competing with transgender females, or competitive advantages or disadvantages, lack merit."); *see also infra* notes 312–13 and accompanying text.

82 Emily Grubman, *Sex Is Not a Three-Letter Word: The Effect of Manipulating the Definition of "Sex" on the Future of Transgender Athletes*, 40 LOY. L.A. ENT. L. REV. 161, 190 (2020).

83 *See, e.g.*, Chelsea Shrader, Comment, *Uniform Rules: Addressing the Disparate Rules That Deny Student-Athletes the Opportunity to Participate in Sports According to Gender Identity*, 51

Of course, the same can be said about laws denying bathroom access—policies intended to make schools less inclusive and just generally more uncomfortable for transgender students. As an initial matter, a few states have proposed or passed legislation requiring those who are transgender to use restrooms that correspond to their gender at birth, regardless of age.[84] Called "bathroom bills," these laws purport to protect women from having to share restrooms with male sexual predators "masquerading" as women.[85] As one critic put it, allowing those who are transgender to use the restroom associated with their gender "would endanger the privacy and safety of women and children in public bathrooms, locker rooms, dressing rooms, and other intimate places (such as common showers), opening them to whomever wants to be there at any given time, and also to sexual predators who claim 'confusion' about their gender."[86] Such arguments have persisted despite the fact that there is no statistical evidence to suggest that inclusive bathroom policies have resulted in women being sexually assaulted in bathrooms by men pretending to be women.[87] The absence

UNIV. RICH. L. REV. 637, 648 (2017) ("The National Center for Transgender Equality estimates that 1.4 million Americans are transgender. This relatively small ratio of the population—which includes both transgender males and transgender females—does not pose a substantial risk to Title IX's goal of providing opportunities for female students to participate in sports." (footnote omitted)); *see also infra* notes 318–19 and accompanying text.

84 *See, e.g.*, William Peter Maurides, *The Use of Preemption to Limit Social Progress in South Carolina: The Road to the Bathroom Bill*, 69 S.C. L. REV. 977, 978 (2018) ("In March 2016, following a one-day specially convened session, the North Carolina legislature passed the Public Facilities Privacy and Security Act."); Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 24, 2019), https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/G5LC-S8AU] ("Sixteen states . . . have considered legislation that would restrict access to multiuser restrooms, locker rooms, and other sex-segregated facilities on the basis of a definition of sex or gender consistent with sex assigned at birth or 'biological sex.'").

85 *See, e.g.*, Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 637 (2020) (mentioning "the heated rhetoric around the state-level bathroom bills, which often raises the specter of a male sexual predator who claims that he is a woman to gain access to the ladies restroom").

86 Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, NBC NEWS (Sept. 19, 2018, 12:33 PM) (quoting statement of Chanel Pruner, Chairman, Keep MA Safe), https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106 [https://perma.cc/3VQ5-6BQA].

87 *See, e.g.*, Charles Adside, III, *The Caitlyn Dilemma: Transgender Bathroom Access and Unavoidable Constitutional Difficulties*, 37 QUINNIPIAC L. REV. 457, 489 (2019) ("Security justifications for bathroom bills are almost completely lacking in concrete evidence, thus revealing such animosity."); Shayna Medley, *Not in the Name of Women's Safety:* Whole Woman's Health *as a Model for Transgender Rights*, 40 HARV. J.L. & GENDER 441, 457 (2017) (noting that, when it comes to bathroom bills, there is a "legislative interest in remedying a harm that, upon examination of the facts, is virtually non-existent").

of such data is quite telling given the fact that, for many years now, several large municipalities have, without incident, affirmatively protected the transgender community's right to use the restrooms of their choice.[88]

In other states, these bathroom bills are specifically directed at transgender students.[89] In 2021, for example, Tennessee passed a law that requires schools to offer an accommodation to students who object (in writing) to using "a multi-occupancy restroom."[90] However, such accommodation cannot include "[a]ccess to a restroom or changing facility that is designated for use by members of the opposite sex while members of the opposite sex are present or could be present."[91] Most importantly, the act defines "sex" as "a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth."[92] Thus, a transgender student who objects to using the bathroom associated with that person's sex at birth is entitled to an accommodation but is precluded from ever using the bathroom that corresponds to the person's gender identity. Should the student do so anyway, other students who object to the presence of the transgender student can sue the school for monetary damages.[93]

As others have commented, these laws denying transgender students the ability to participate in sports and to use the bathrooms

88 *See, e.g.*, Amira Hasenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL'Y 70 (2019). After studying crime data in cities that had gender identity nondiscrimination policies, the authors found that such protections are "not related to the number or frequency of criminal incidents in such public spaces. Additionally, the results show that reports of privacy and safety violations in public restrooms, locker rooms, and changing rooms were exceedingly rare and much lower than statewide rates of reporting violent crimes more generally." *Id.*

89 *See, e.g.*, Stephen Gruber-Miller, *Iowa Senate "Bathroom Bill" Would Ban Transgender People from Using School Restrooms Matching Gender Identity*, DES MOINES REG. (Feb. 10, 2021, 5:44 PM), https://www.desmoinesregister.com/story/news/politics/2021/02/10/iowa-senate-bathroom-bill-targeting-transgender-people-advances-legislature/4460035001 [https://perma.cc/ZS8Y-YLYD] ("The measure . . . would apply to people using bathrooms in elementary and secondary public and nonpublic schools.").

90 *See* The Associated Press, *Tennessee Gov Signs Transgender "Bathroom Bill" for Schools*, NBC NEWS (May 18, 2021, 11:53 AM), https://www.nbcnews.com/nbc-out/out-news/tennessee-gov-signs-transgender-bathroom-bill-schools-rcna953 [https://perma.cc/G3QG-ALB6]; *see* H.R. 1233, 112th Gen. Assemb., 1st Reg. Sess. § 4(a)(1) (Tenn. 2021).

91 *Id.* § 3(2)(A).

92 *Id.* § 3(4).

93 *Id.* § 6(c) ("A student, teacher, or employee, or a student's parent or legal guardian, as applicable, aggrieved under this section who prevails in court may recover monetary damages, including, but not limited to, monetary damages for all psychological, emotional, and physical harm suffered.").

associated with their gender are but two examples of how in recent years the law has actively contributed to "the stigmatization and vilification of trans youth."[94] After all, to deny transgender students these protections because cisgender students might feel uncomfortable sharing their spaces only "serves to reify and reinforce the ignorance (and, at times, the intolerance) that spawned this discomfort in the first place."[95]

B. *The Resulting Harms*

These legislative initiatives targeting LGBTQ youth, outlined above, are damaging in their own right but are particularly pernicious in light of the harms those children already face simply by virtue of being a sexual minority in a homophobic society. Indeed, as one commentator aptly notes, "Gay and lesbian youth are constantly exposed to environmental and internal stressors that stem from homophobia."[96] This homophobia and the resulting stigma it causes frequently begin at an early age when children who do not conform to gender norms quickly find themselves shunned by peers.[97] However, that stigma becomes particularly acute, and thus most likely to inflict the greatest amount of physical and psychological damage, during adolescence.[98] Although the ensuing consequences of these stressors have been documented and discussed elsewhere,[99] a brief review is warranted here in order to fully understand the true impact of the discriminatory legislation that is the focus of this Article.

Of greatest concern is the fact that "[g]ay youth attempt suicide at higher rates than their heterosexual counterparts."[100] In fact, studies

94 *Chapter One: Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2176 (2021).

95 *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1737 (2014).

96 Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 REVISTA JURIDICIA U. INTERAMERICANA P.R. 151, 163 (1999).

97 *See* Ritch C. Savin-Williams & Richard G. Rodriguez, *A Developmental, Clinical Perspective on Lesbian, Gay Male, and Bisexual Youths*, *in* ADOLESCENT SEXUALITY 77, 85 (Thomas P. Gullotta, Gerald R. Adams & Raymond Montemayor eds., 1993) (noting that children who challenge gender roles often feel like "outsiders, wanting but fearing to be let in").

98 *See* Lynne Hillier & Doreen Rosenthal, *Special Issue on Gay, Lesbian and Bisexual Youth*, 24 J. ADOLESCENCE 1, 3 (2001) ("The quality of life of many same sex attracted young people is compromised by hostility, invisibility and alienation in their daily lives.").

99 *See, e.g.*, Higdon, *supra* note 25, at 213–24.

100 Aisha Schafer, Comment, *Quiet Sabotage of the Queer Child: Why the Law Must Be Reframed to Appreciate the Dangers of Outing Gay Youth*, 58 HOW. L.J. 597, 604 (2015).

reveal that LGBTQ youth attempt suicide at rates nearly five times that of heterosexual youth.[101] Sadly, those attempts often succeed as "[a]pproximately thirty percent of annual completed suicides among youth are committed by members of the LGBTQ community."[102] It is important to note that although there appears to be fewer statistics regarding suicide within that subset of LGBTQ youth,[103] the rate of suicide within the greater transgender community in the United States is nine times greater than the general population.[104] Further, "[n]inety percent of transgender individuals who attempt suicide do so before the age of twenty-five."[105] Thus, when it comes to children, simply being a sexual minority greatly increases the risk of dying by suicide.[106]

There are, of course, numerous reasons why statistics relating to suicide are so much higher for LGBTQ youth, but bullying certainly plays a large role. As Professor Ken Rigby explains, "[s]everal cases of suicide by schoolchildren have been attributed to the experience of repeated victimization."[107] To fully understand the connection between the two, it is important to note that bullying often produces feelings of hopelessness within the bullied child, with research showing a strong correlation between such feelings and suicidal thoughts.[108] In fact, as a result of their youth and inexperience, children are perhaps at even greater risk of experiencing such feelings. According to Professor and Psychologist Dr. Betsy Kennard, "youths typically don't have the long-term view of the world that adults do. They may think their despair won't go away, so there's more hopelessness."[109]

101 *See* Abernathy, *supra* note 38, at 659.

102 Khan, McLaughlin, Mezey & Robertson, *supra* note 40, at 508.

103 *But see* Maureen Carroll, Comment, *Transgender Youth, Adolescent Decisionmaking, and* Roper v. Simmons, 56 UCLA L. REV. 725, 734 (2009) ("According to some studies, more than half of all transgender youth attempt to kill themselves.").

104 Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2286 n.456 (2020).

105 Abernathy, *supra* note 38, at 660.

106 *See* Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R. L. REV. 307, 322 (2014) ("Disturbingly, suicide is now the leading cause of death among gay and lesbian youth nationally.").

107 Ken Rigby, *Health Consequences of Bullying and Its Prevention in Schools*, *in* PEER HARASSMENT IN SCHOOL, *supra* note 44, at 310–11.

108 *See* Susan M. Swearer, Amie E. Grills, Kisa M. Haye & Paulette Tam Cary, *Internalizing Problems in Students Involved in Bullying and Victimization: Implications for Intervention*, *in* BULLYING IN AMERICAN SCHOOLS: A SOCIAL-ECOLOGICAL PERSPECTIVE ON PREVENTION AND INTERVENTION 63, 66 (Dorothy L. Espelage & Susan M. Swearer eds., 2004).

109 Matthew Haag & Jessica Meyers, Questions, *Grief Follow Suicide*, DALL. MORNING NEWS, Jan. 23, 2010, at B1, http:// www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-studentdeath_ 23met.ART0.State.Edition1.4c0f05b.html.

Even for those LGBTQ youth who do not experience suicidal thoughts, there are a number of other psychological harms that are quite prevalent within that community. As Craig Konnoth has noted, children who are sexual minorities can suffer "stress reactions including severe anxiety and eating or sleep disturbances as well as . . . depression, loneliness, and alienation."[110] Further, for children who are transgender, "[a]s puberty approaches, the psychological burden of facing bodily changes out of sync with one's gender identity can cause depression and anxiety."[111] Once again, bullying plays a particularly powerful role in intensifying these psychological harms, which also include "low self-esteem, social problems (e.g., peer rejection, friendlessness), and school maladjustment."[112] These psychological harms are not fleeting consequences but often follow these children well into adulthood.[113]

Finally, these health consequences endured by LGBTQ youth often force them to make unhealthy life decisions that only result in further injury. For instance, LGBTQ youth are more likely to experience parental rejection, which frequently results in homelessness.[114] In fact, a number of studies have estimated that approximately forty percent of all homeless youth are LGBTQ.[115] Homelessness is particularly traumatic for children who are sexual minorities given that they are more likely to engage in substance abuse[116] and be forced into prostitution.[117] An additional consequence that frequently befalls

110 Konnoth, *supra* note 16, at 278.

111 *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 95, at 1725.

112 Becky Kochenderfer Ladd & Gary W. Ladd, *Variations in Peer Victimization: Relations to Children's Maladjustment*, *in* PEER HARASSMENT IN SCHOOL, *supra* note 44, at 25, 27.

113 *See, e.g.*, Stephen Allison, Leigh Roeger & Nova Reinfeld-Kirkman, *Does School Bullying Affect Adult Health? Population Survey of Health-Related Quality of Life and Past Victimization*, 43 AUSTL. & N.Z. J. PSYCHIATRY 1163, 1163 (2009) (summarizing studies).

114 *See* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 671 (2017) ("[R]ecent studies report that as many as 20 to 40 percent of homeless youth identify as LGBT[Q]. Many of these youth wind up on the streets after suffering family rejection and abuse for being LGBT[Q]." (footnote omitted)).

115 *Id.*; *see also* Nice, *supra* note 24, at 391 (citing studies that "estimate that approximately 40% of homeless youth" are LGBTQ).

116 *See* Khan, McLaughlin, Mezey & Robertson, *supra* note 40, at 519. ("Thirty-five percent of homeless LGB youth reported abusing alcohol or other substances; forty percent of their transgender counterparts reported substance abuse.").

117 *See* Deborah Lolai, *"You're Going to Be Straight or You're Not Going to Live Here": Child Support for LGBT Homeless Youth*, 24 TUL. J.L. & SEXUALITY 35, 55 (2015) ("In order to get by from day to day, many homeless youth engage in sex work. Prostitution is disproportionately a survival crime of LGBT[Q] youth due to the generally harsher conditions LGBT[Q] homeless youth face compared with their non-LGBT[Q] homeless peers.").

LGBTQ youth is low educational attainment. Given that school can often be a hostile environment for these children, it is not surprising to learn that studies have consistently revealed high rates of absenteeism and poor academic performance within that category of students.[118] And the long-term consequences of these academic "choices" can be devastating to these children's futures. As one commentator put it, "[t]his research seems to posit a kind of heteronormative educational Darwinism that results in young LGBs, who are aware of and act on their identities relatively early in life, [and] self-select out of education because of overt hostility and discrimination that they encounter."[119]

In laying out these harms, this Article does not mean to suggest that states bear direct responsibility for coming up with solutions to the various societal forces that inflict these dangers on so many LGBTQ youth. Instead, the point is simply that these harms represent the current landscape of severe difficulties *already* faced by those children who are sexual minorities. Thus, as states continue to create laws that either target these children or refuse to pass legislation that is needed to protect them, those legislators are actively exacerbating the serious harms that already befall one of the state's most vulnerable populations.

II. CHILDREN, SEXUAL MINORITIES, AND THE CONSTITUTION

At the heart of this Article lies the argument that states are violating the constitutional rights of LGBTQ youth to their physical and psychological detriment. Turning then to the Fourteenth Amendment, from which "[t]he delineation of permissible and impermissible state conduct flows,"[120] it is first important to note that the Due Process and Equal Protection Clauses are both drawn extremely broadly in terms of all "persons." Clearly, then, children as well as those who are members of the LGBTQ community are entitled to those protections; however, the salient inquiry that forms the basis of this Part is the *extent* to which those two groups are protected by the Constitution. Only by answering

118 *See, e.g.*, Huwiler & Remafedi, *supra* note 96, at 164 ("[A]cademic underachievement, truancy, and dropout are prevalent among homosexual youth . . . ."); *see also* ELIZABETH J. MEYER, GENDER, BULLYING, AND HARASSMENT: STRATEGIES TO END SEXISM AND HOMOPHOBIA IN SCHOOLS 1 (2009) ("Lower academic performance, absenteeism, drug and alcohol abuse, and suicidal behaviors have all been linked to victims of schoolyard bullies.").

119 Mark Henrickson, *"You Have to Be Strong to Be Gay": Bullying and Educational Attainment in LGB New Zealanders*, J. GAY & LESBIAN SOC. SERVS., Sept. 2008, at 67, 70, https://ur.booksc.me/book/29582009/116420 [https://perma.cc/H4SF-R2JL].

120 J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 449 n.208 (2003).

that question can this Article then turn to a discussion of what constitutional protections flow to those who simultaneously fall within both groups.

A. *The Constitutional Rights of Children*

The Supreme Court has made clear that children enjoy constitutional rights. More than fifty years ago the Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[121] More specifically, the Court has made clear that "[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."[122] Two popular examples of this principle are *Tinker v. Des Moines Independent Community School District*[123] and *Roper v. Simmons*,[124] recognizing children's First and Eighth Amendment rights, respectively. Beyond those cases, however, there are a number of Supreme Court opinions that illuminate the various contexts in which the Fourteenth Amendment has been interpreted to protect children.

Education offers perhaps the most fertile source of cases recognizing and protecting the liberty interests of children. Although some earlier cases had established the rights of parents to direct the education of their children,[125] it was the Supreme Court's 1954 unanimous decision in *Brown v. Board of Education* that struck down segregation in schools, making clear that children themselves enjoy constitutional protections when it comes to their education.[126] There,

121 *In re* Gault, 387 U.S. 1, 13 (1967).

122 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976); *see also* Haley v. Ohio, 332 U.S. 596, 601 (1948) ("Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.").

123 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that school prohibition against students wearing armbands in protest of the Vietnam War violated the students' First Amendment rights). In his concurrence, Justice Stewart described the majority as proceeding on the "uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults." *Id.* at 515 (Stewart, J., concurring).

124 Roper v. Simmons, 543 U.S. 551 (2005) (holding that imposing capital punishment on those who were under eighteen years of age at the time of the crime violates the Eighth Amendment).

125 *See* Meyer v. Nebraska, 262 U.S. 390, 397 (1923) (declaring unconstitutional a Nebraska statute that prohibited teaching "any subject to any person in any language [other] than the English language"); Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925) (declaring unconstitutional an Oregon statute that required all children to attend public school).

126 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

the Court held that "plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[127] In so ruling, the Court took pains to note the harms that such segregation inflicted on those children: "To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[128]

Nearly thirty years later, in *Plyler v. Doe*, the Court would focus on similar harms when striking down a Texas law that prevented children of undocumented immigrants from enrolling in public school.[129] Despite finding that an immigrant's undocumented status is not an immutable characteristic, the Court nonetheless found that the law was not so much directed at that subset of immigrants, but at their children.[130] In that regard, the Court noted that the Texas law was "directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control."[131] Regarding the constitutionality of such legislation, the Court engaged in a balancing test: "In determining the rationality of [the subject legislation], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims."[132] In so doing, the Court struck down the law given the enduring harms it imposed on the children at issue, noting that "[t]he stigma of illiteracy will mark them for the rest of their lives."[133]

Another class of Supreme Court cases dealing with the constitutional rights of children have centered around state laws that discriminated against nonmarital children. Historically, nonmarital children were viewed as having no legal parents.[134] Considered "filius nullius," or "the child of no one," illegitimate children had no legal

127 *Id.* at 495 (holding that "in the field of public education the doctrine of 'separate but equal' has no place").

128 *Id.* at 494.

129 Plyler v. Doe, 457 U.S. 202 (1982).

130 *Id.* at 220.

131 *Id.* ("It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.").

132 *Id.* at 223–24.

133 *Id.* at 223 ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

134 *See* Dorothy E. Roberts, *The Genetic Tie*, 62 UNIV. CHI. L. REV. 209, 253 & n.183 (1995).

relationship to either parent.[135] Starting in 1968, however, the Supreme Court began to change that with *Levy v. Louisiana*, where the Court struck down a Louisiana statute that prevented nonmarital children from bringing an action for the wrongful death of their biological mother.[136] Using the Equal Protection Clause, the Court concluded that "it is invidious to discriminate against [nonmarital children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."[137] In so ruling, the Court made clear that "illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[138]

The Supreme Court's evolving jurisprudence on the issue of abortion has likewise underscored the point that children enjoy more than just token constitutional protections under the Fourteenth Amendment. In the 1976 case of *Planned Parenthood of Central Missouri v. Danforth*, the Court acknowledged that "the State has somewhat broader authority to regulate the activities of children than of adults."[139] Nonetheless, the Court made clear that children enjoy constitutional rights that are not conditioned on the child reaching the age of majority.[140] Accordingly, the Court struck down a state law that conditioned a minor's abortion on parental consent, stating that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[141] Subsequently, the Court has made clear that the right of privacy, which of course emanates from the Fourteenth Amendment,[142] does permit states to require parental notification and consent but only

135 *Id.*; *see also* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926) ("[I]t was not understood to deny the fact of physiological begetting; it was asserting that such a one did not possess the specific rights which belong to one who was *filius*, implying wedlock as a legal institution.").

136 Levy v. Louisiana, 391 U.S. 68, 72 (1968).

137 *Id.* (footnote omitted). According to the Court, "[w]hile a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination against a particular class." *Id.* at 71 (citation omitted).

138 *Id.* at 70 (footnote omitted).

139 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

140 *See id.*

141 *Id.* at 75.

142 *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (describing the right as "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action").

so long as there exists some form of judicial bypass procedure.[143] In other words, no state has "the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy," regardless of patient's age.[144]

Finally, in the Court's evolving jurisprudence involving parental rights, there has been suggestion that children may possess some constitutional protections regarding the relationships they form with third parties who play a parental role in the child's life. However, questions of whether such a right truly exists and, if so, what the scope of that right is are far from certain at this point. In 1989, a plurality of the Court in *Michael H. v. Gerald D.* noted that "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."[145] Eleven years later, however, Justice Stevens penned a dissent in *Troxel v. Granville* in which he posited that "it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."[146] Even the majority in that case passed on the question of whether parents have an unlimited right to cut off visitation between their children and a third-party nonparent.[147] With the increasing complexity of the American family,[148] it seems that the Court will have to revisit these issues in coming years, perhaps recognizing yet another discrete area of law in which children have a specific constitutional right.

143 *See* Wendy-Adele Humphrey, *Two-Stepping Around a Minor's Constitutional Right to Abortion*, 38 CARDOZO L. REV. 1769, 1773 (2017) ("In essence, a judicial bypass is the substitution of a court's permission for the requisite parental or guardian involvement.").

144 *Danforth*, 428 U.S. at 74.

145 Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

146 Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

147 *Id.* at 73 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context.").

148 *See* Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1483 (2018) ("With advances in assisted reproduction, the legalization of same-sex marriage, and the increased frequency of divorce, remarriage and cohabitation, states now regularly encounter claims of parental identity that 30 years ago would have been unimaginable.").

B. *The Constitutional Rights of LGBTQ Individuals*

Although questions remain regarding the full reach of the constitutional protections to which members of the LGBTQ community are entitled,[149] the Supreme Court's current jurisprudence on that topic can be broken down into two broad categories: (1) the pre-Kennedy cases, none of which were particularly illuminating or helpful—and one that was quite damaging—and (2) the Kennedy Quartet, consisting of four cases written by Justice Anthony Kennedy between 1996 and 2015 and which all—to one degree or another—identified and broadened those protections. This Section discusses both categories of cases in turn.

1. Early Cases

The first case in which the Supreme Court was confronted with the existence of the LGBTQ community came in the late 1950s with *One, Inc. v. Olesen*,[150] a case that is noteworthy for its brevity, containing just one sentence: "The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed."[151] When one considers the underlying facts, however, that single sentence becomes a much more powerful statement. Specifically, the plaintiff was a California-based magazine named *One*, which described itself as "The Homosexual Magazine."[152] The magazine brought suit after the postmaster of Los Angeles refused to accept the magazine's latest issue for mailing, claiming that the issue was "obscene, lewd, lascivious and filthy" and thus unable to be transmitted via mail under federal law.[153] The lower courts agreed with the Postmaster,[154] but the Supreme Court disagreed, giving the LGBTQ community its first Supreme Court victory.[155]

149 *See infra* notes 254–55 and accompanying text.

150 One, Inc. v. Olesen, 355 U.S. 371 (1958).

151 *Id.*

152 *See* One, Inc. v. Olesen, 241 F.2d 772, 773 (9th Cir. 1957), *rev'd*, 355 U.S. 371 (1958).

153 *Id.*

154 *Id.* at 777 ("[I]t is apparent that the magazine is obscene and filthy and is therefore non-mailable matter.").

155 *See* Jason M. Shepard, *The First Amendment and the Roots of LGBT Rights Law: Censorship in the Early Homophile Era, 1958–1962*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 599, 670 (2020) (describing the case as "establish[ing] the precedent that homosexual communication was to be treated by the same standards as other forms of communication, under the First Amendment").

The next case came in 1972 when Richard Baker and James McConnell, relying on *Loving v. Virginia*,[156] became the first same-sex couple to challenge discriminatory marriage laws.[157] The two men had sought a marriage license under Minnesota law, which did not explicitly condition marriage on the two parties being the opposite sex.[158] Nonetheless, their application was denied, and the two men subsequently brought suit in state court, arguing that, under *Loving*, "the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."[159] The Minnesota Supreme Court rejected the plaintiffs' arguments, holding that, "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[160] In *Baker v. Nelson,* the U.S. Supreme Court agreed with the Minnesota high court, issuing yet another one-sentence summary disposition: "The appeal is dismissed for want of a substantial federal question."[161] Although it would not be the Court's final word on same-sex marriage, LGBTQ Americans would have to wait another forty years for the Court to revisit the issue.[162]

Given the brevity of the opinions in both *Baker* and *Oleson*, the Court had thus far given no indication of what substantive protections the Constitution might afford sexual minorities. That would all change in 1986 when the Court issued *Bowers v. Hardwick*,[163] but the guidance provided there was far from positive and, instead, would prove to be a tremendous setback to the burgeoning movement for LGBTQ equality.[164] The case presented a challenge to Georgia's sodomy law,

156 Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down state statutes that prohibited interracial marriage as "invidious racial discriminations").

157 *See* Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 UNIV. PA. J. CONST. L. 871, 881 (2018) ("Baker and McConnell alleged Minnesota's marriage law ran afoul of the First, Eighth, Ninth, and Fourteenth Amendments.").

158 *See* Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971) ("Petitioners contend, first, that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages.").

159 *Id.* at 186.

160 *Id.* at 187.

161 Baker v. Nelson, 409 U.S. 810 (1972).

162 *See infra* Sections II.B.2.c–II.B.2.d.

163 Bowers v. Hardwick, 478 U.S. 186 (1986).

164 As one LGBTQ scholar explained:

which made it a felony for any adult to engage in consensual oral or anal sex.[165] Police arrested Michael Hardwick in his apartment after discovering him having consensual oral sex there with another male.[166] Hardwick brought suit, arguing that the Georgia statute violated his right to privacy under the U.S. Constitution.[167] In a 5–4 opinion, the Court disagreed.

Framing the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," the majority ruled that Hardwick's case bore no "resemblance" to the earlier precedents upon which the right to privacy had been built.[168] Specifically, the Court found that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[169] The Court then refused to extend the right of privacy to encompass consensual sodomy, noting that laws prohibiting sodomy had enjoyed a long existence in the United States and were quite prevalent even when the Fourteenth Amendment was ratified.[170] On that basis, the Court upheld the validity of the Georgia statute.[171] However, in what was likely the most damning blow to the gay rights' movement, the Court suggested that such laws were constitutional even if the only justification for them was a sense of morality shared by the majority of voters in that state: "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[172]

> *Bowers v. Hardwick* quickly evolved from a case about the Due Process Clause of the federal Constitution to a case that answered almost every constitutional question that came up about gay people. Equal protection for LGBT[Q] people? "No, see *Bowers v. Hardwick*." First Amendment, "No, see *Bowers v. Hardwick*." We were just waiting for the contract case involving lesbians in which the courts would say "unenforceable, *Bowers v. Hardwick*."

Matthew Coles, *The Profound Political but Elusive Legal Legacy of Justice Anthony Kennedy's LGBT Decisions*, 70 HASTINGS L.J. 1199, 1200 (2019) (footnotes omitted).

165 *See Hardwick*, 478 U.S. at 200 (Blackmun, J., dissenting) (quoting GA. CODE ANN. § 16-6-2(a) (1984)).

166 *Id.* at 187–88.

167 *Id.* at 188.

168 *Id.* at 190–91.

169 *Id.* at 191.

170 *Id.* at 192–93 ("In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.").

171 *Id.* at 194–96.

172 *Id.* at 196.

As such, *Bowers* represented an inauspicious beginning to the efforts at establishing some meaningful constitutional protections for sexual minorities in the United States. To make matters worse, *Bowers* would remain the Supreme Court's final word on that issue for several years, during which time "backlash politicians increasingly sought to target sexual minorities for discrimination in all the vital venues of the 'private' and 'public' spheres: employment, housing, family, public service and educational opportunities."[173] Indeed, it would take ten years before the Court would even agree to hear another case concerning discrimination targeting sexual minorities—a case that would become the first of four landmark opinions, each of which would begin to undo the harms of *Bowers* and, collectively, chart a path toward more meaningful LGBTQ equality.

2. The Kennedy Quartet

To date, the Supreme Court has issued four decisions concerning the constitutional rights of sexual minorities. All were authored by Justice Anthony Kennedy,[174] who, during his time on the Court, was described as "the Court's median Justice[or] the Justice who sits in the ideological center of the Court."[175] As is discussed more fully below, each of those opinions were themselves a victory for the LGBTQ community but, when combined, they have had a profound impact on the lives of LGBTQ people throughout the United States. Although some have criticized the four cases for not going far enough in protecting members of the LGBTQ community,[176] few have questioned the motives of Justice Kennedy in writing these opinions. As one commentator put it: "I think these four opinions reflect the profound emotional commitment of a very decent human being to right a great historical wrong."[177]

---

173 Francisco Valdes, *Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135, 1158 n.79 (2005).

174 Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 474 (2016) ("[N]o other Justice has written any opinion endorsing claims regarding sexual orientation.").

175 David S. Cohen, *Justice Kennedy's Gendered World*, 59 S.C. L. REV. 673, 674 (2008).

176 *See infra* notes 254–55 and accompanying text.

177 Coles, *supra* note 164, at 1205.

a. *Romer v. Evans*

Writing shortly after the Court issued its decision in *Romer v. Evans*,[178] Louis Michael Seidman observed that the case "marks the first occasion on which the Court has recognized a claim of discrimination brought by gay people."[179] At the heart of the case was "Amendment 2," which voters in Colorado had adopted after a statewide referendum.[180] In response to several municipalities in the state having passed ordinances that protected people from discrimination on the basis of sexual orientation, Amendment 2 repealed those protections and, in addition, prohibited any future antidiscrimination legislation on the basis of sexual orientation[181]:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[182]

The amendment, which was seen by many as the opening salvo in "a national effort by the right wing to essentially derail the political LGBT movement,"[183] ultimately passed with fifty-three percent of the vote.[184] After being challenged in court, both the trial court and the Supreme Court of Colorado ruled that Amendment 2 was unconstitutional.[185] The Supreme Court granted certiorari, and it agreed with the lower courts, rejecting as "implausible" the State's

178 Romer v. Evans, 517 U.S. 620 (1996).

179 Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 68 n.3.

180 *Romer*, 517 U.S. at 620.

181 *Id.* As the Court observed, the law in question excludes those who are LGBTQ "from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. [It also] nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.* at 629.

182 *Id.* at 624 (quoting COLO. CONST. art. II, § 30b, *invalidated by* Romer v. Evans, 517 U.S. 620 (1996)).

183 Coles, *supra* note 164, at 1199.

184 *See* John F. Niblock, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 154 n.5 (1993).

185 *Romer*, 517 U.S. at 625 ("[T]he State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process.").

argument that Amendment 2 was merely intended to "deny homosexuals special rights."[186] Instead, Justice Kennedy wrote that the law in question "imposes a special disability upon those persons alone."[187] As such, the Court (in a 6–3 decision) held that Amendment 2 violated the Fourteenth Amendment because, even assuming that rational basis was the appropriate level of scrutiny, the law failed for two distinct reasons.[188]

First, the Court noted that Amendment 2 "has the peculiar property of imposing a broad and undifferentiated disability on a single named group."[189] Stated more specifically, Kennedy observed that the amendment "identifies persons by a single trait and then denies them protection across the board," thus rendering the law in question "at once too narrow and too broad."[190] The Court was particularly troubled by the discrete protections that Amendment 2 effectively stripped from LGBTQ individuals—namely the ability to use the political process to achieve antidiscrimination protections:

> Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury.[191]

In the words of Justice Kennedy, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[192]

The second basis upon which the Court relied was the degree to which Amendment 2 was motivated by animus toward a discrete group of people. As the majority pointed out, "Amendment 2 . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate

186 *Id.* at 626.

187 *Id.* at 631 ("Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.").

188 *Id.* at 631–32, 636 (referencing the test for rational basis and then stating that "Amendment 2 fails, indeed defies, even this conventional inquiry").

189 *Id.* at 632.

190 *Id.* at 623, 633.

191 *Id.* at 631.

192 *Id.* at 633.

justifications that may be claimed for it."[193] Indeed, citing past precedent, the Kennedy opinion made clear 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."[194]

Thus, the Court affirmed the lower court's decisions that Amendment 2 was unconstitutional. Scalia dissented, making much of the fact that Kennedy's opinion curiously made no reference whatsoever to *Bowers*.[195]

b. *Lawrence v. Texas*

Perhaps Kennedy's refusal in *Romer* to reference *Bowers* signaled some question on the part of the Court regarding the legitimacy of that earlier opinion.[196] That theory would gain some traction seven years later when Kennedy issued his next opinion regarding the constitutional rights of LGBTQ individuals. This decision—*Lawrence v. Texas*[197]—not only mentioned *Bowers* but explicitly overruled the 1986 case in terms that would leave no doubt as to the Court's dim view of that earlier case and the reasoning upon which it had been decided.

The facts of *Lawrence* involved two men, John Geddes Lawrence and Tyron Garner, who were arrested in Texas after officers allegedly observed the two having consensual sex in Lawrence's apartment.[198] The officers had entered the apartment after receiving a false report that someone there was armed and dangerous.[199] The two men were charged

193 *Id.* at 635.

194 *Id.* at 634–35 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

195 *Id.* at 640 (Scalia, J., dissenting) ("The case most relevant to the issue before us today is not even mentioned in the Court's opinion . . . ."). Scalia's argument was that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct." *Id.* at 641.

196 As Cass Sunstein points out, "the Court's silence about *Hardwick* stemmed from the fact that a majority could not be gotten to (a) distinguish *Hardwick*, (b) approve *Hardwick*, or (c) overrule *Hardwick*. If each of these options was unavailable, silence was the only alternative." Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 65 (1996); *see also* Mark E. Papadopoulos, Note, *Inkblot Jurisprudence:* Romer v. Evans *as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL'Y 165, 168 (1997) ("Justice Kennedy, writing for the majority in *Romer*, found *Bowers* entirely unworthy of mention.").

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

198 *Id.* at 562–63.

199 *See* Chan T. McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 352 n.83 (2019) (describing the report as having communicated that there was a "Black man going crazy with a gun").

with having violated Texas's anti-sodomy law, which provided that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[200] Thus, unlike Georgia's sodomy law at issue in *Bowers*, which applied to any act of sodomy, the Texas law only criminalized sodomy between those of the same sex. The two men challenged the law as violating their rights under the Fourteenth Amendment. At the state level, however, they were unsuccessful given that lower courts felt constrained by *Bowers* to reject their constitutional claims.[201]

The Supreme Court granted certiorari and, in another 6–3 decision, reversed. However, in order to fully understand the scope and reach of the majority opinion, it is helpful to first contrast it with Justice O'Connor's concurrence where she wrote separately to propose a more narrow justification for striking down the Texas law. Specifically, she would have invalidated the Texas law under the Equal Protection Clause of the Fourteenth Amendment given that the law criminalized same-sex but not opposite-sex sodomy.[202] O'Connor, citing *Romer*, reiterated the point that "[m]oral 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."[203] Thus, O'Connor would not have overturned *Bowers*[204]—arguing that the issue need not be decided given the differences between the two cases—but instead favored a ruling whereby states could continue to criminalize sodomy, but not in such a way as to "single out one identifiable class of citizens for punishment that does not apply to everyone else."[205] Justice Kennedy, however, and the four other Justices who joined in the majority, were not content to rule on such narrow grounds.

Instead, Kennedy's majority decision ruled that the Texas law was unconstitutional, not simply because of the way in which it discriminated against those who engaged in same-sex sodomy, but due to the degree to which it ran afoul of substantive due process. Kennedy reasoned that "[t]he petitioners are entitled to respect for their private lives" and that "[t]heir right to liberty under the Due Process Clause

200 *Lawrence*, 539 U.S. at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)).

201 *Id.* ("The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick* to be controlling on the federal due process aspect of the case." (citation omitted)).

202 *Id.* at 579, 581 (O'Connor, J., concurring).

203 *Id.* at 582 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

204 *Id.* at 579 (O'Connor, J., concurring) ("I joined *Bowers*, and do not join the Court in overruling it.").

205 *Id.* at 584.

gives them the full right to engage in their conduct without intervention of the government."[206] In *Lawrence* that intervention took the form of a criminal conviction, which Kennedy described as "a criminal offense with all that imports for the dignity of the persons charged."[207] The practical impact of the majority's focus on due process was that Texas was now foreclosed from simply rewriting its law to make it applicable to all sodomy as Georgia had previously done in *Bowers*.[208] In fact, Kennedy's opinion took pains to leave no doubt as to the majority's disdain for that earlier opinion.

Kennedy began by observing that the earlier opinion failed to fully comprehend the liberty interest at stake: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[209] Instead, the laws at issue in both *Bowers* and *Lawrence* "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[210] More specifically, Kennedy wrote that "[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. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[211] Kennedy then took issue with the historical justifications the Court had relied upon in *Bowers*, noting the degree to which "[t]he foundations of *Bowers* have sustained serious erosion" by subsequent Court decisions, including *Romer*.[212] As a result, Kennedy concluded that "*Bowers* was not correct when it was decided, and it is not correct today."[213]

206 *Id.* at 578. Kennedy went on to observe that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

207 *Id.* at 560.

208 *See, e.g.*, Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221, 237–38 (2005) ("[I]t is quite possible that Justice Kennedy himself would have used the Equal Protection Clause to attack Texas' sodomy law were it not for the need to squarely and unambiguously overrule *Bowers*.").

209 *Lawrence*, 539 U.S. at 567.

210 *Id.*

211 *Id.*

212 *Id.* at 576.

213 *Id.* at 578.

When it came to what exactly *Lawrence* stood for, however, Kennedy muddied the waters somewhat by inserting the following near the end of the opinion:

> 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. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.[214]

This language was clearly intended to communicate that, whatever the Court was deciding in *Lawrence*, issues concerning the continued ability of state and federal government to legislate against sex crimes and to discriminate against those who identified as LGBTQ in other contexts would have to wait for another day. Scalia, however, was not convinced that Kennedy's opinion was so limited. In his dissent, he specifically referenced this paragraph, most pointedly Kennedy's reference to "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[215] Interpreting this language as a not-so-veiled reference to same-sex marriage, Scalia's response to Kennedy's suggestion that *Lawrence* had no bearing on that issue was quite blunt: "Do not believe it."[216] And, indeed, as the remainder of this Part explores, the two remaining opinions in the Kennedy Quartet would suggest that, when it came to same-sex marriage, the skepticism Scalia expressed in *Lawrence* was not entirely misplaced.

c. *United States v. Windsor*

When it came to bans on same-sex marriage, the first nail in the coffin would come ten years after *Lawrence* when Kennedy issued his majority opinion in *United States v. Windsor*,[217] striking down a federal law that limited recognition of same-sex marriages. The law in question was the Defense of Marriage Act (DOMA), which Congress had passed in 1996 largely in response to a Hawaiian state court decision indicating

214 *Id.*

215 *Id.* at 578; *id.* at 604 (Scalia, J., dissenting).

216 *Id.* at 604 (Scalia, J., dissenting).

217 United States v. Windsor, 570 U.S. 744 (2013).

that the state's constitution may require same-sex marriage.[218] The fact that Hawaii would even consider taking this (at the time, completely unprecedented) step caused great consternation among many of the other states, and the response was swift.[219] With the assumption that same-sex marriages performed in one state would potentially be entitled to full faith and credit in all others, a large number of states took preemptive action and amended their constitutions to define marriage as a legal union that could only exist between one man and one woman.[220] The hope was that, in so doing, the state could refuse to recognize out-of-state "marriages" that did not comply. All in all, thirty-one states would eventually pass such amendments.[221]

As political pressure mounted, Congress likewise became involved and passed DOMA,[222] which had two main purposes.[223] Section II of DOMA declared that no state would be required to recognize same-sex marriages performed in other states.[224] Next, section III provided that, when it came to federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the

218 *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding that the state's discriminatory definition of marriage was presumptively unconstitutional, and the state could only rebut that presumption by showing that "(a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights").

219 *See* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1157 (2009) (noting how events in Hawaii "ignited the national backlash against same-sex marriage").

220 *See* William Buss & Emily Buss, *Escaping the American Blot? A Comparative Look at Federalism in Australia and the United States Through the Lens of Family Law*, 48 CORNELL INT'L L.J. 105, 133 n.151 (2015) ("Within twelve years of the Hawaii Supreme Court's ruling, many states, including Hawaii, had added an express ban on same-sex marriage to their laws, and a majority of these prohibitions were ultimately adopted as constitutional amendments."); Julie L. Davies, *State Regulation of Same-Sex Marriage*, 7 GEO. J. GENDER & L. 1079, 1080 (2006) ("Following the first failure of a statute banning marriage for same-sex couples in Hawaii, states began turning to state constitutional amendments to restrict marriage.").

221 *See* Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2087–88 (2013) ("Over time, voters in thirty-one states have approved constitutional amendments expressly limiting the definition of marriage to a union between a man and a woman or, in Hawaii's case, authorizing the legislature to do so.").

222 Mark A. Tumeo, *Civil Rights for Gays and Lesbians and Domestic Partner Benefits: How Far Could an Ohio Municipality Go?*, 50 CLEV. ST. L. REV. 165, 169 (2003) ("In 1996, the United States Congress capitulated to political pressure from the conservative religious right and passed the Defense of Marriage Act . . . .").

223 *See* United States v. Windsor, 570 U.S. 744, 752 (2013) ("DOMA contains two operative sections . . . .").

224 28 U.S.C. § 1738C ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . .").

word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[225] In other words, to the extent federal law conditioned marital benefits on whether the couple was married in their state of residence, the federal government would exclude same-sex marriages even if the state in question recognized such unions. Notably, Congress took this step at a time when not a single state had legalized same-sex marriage.

The legal challenge in *Windsor* was limited to section III of DOMA, and it involved a lesbian couple, Edith Windsor and Thea Spyer, who had been involved with one another since 1963.[226] The two women had registered as domestic partners in 1993 and, in 2007, had married in Canada.[227] In 2009, however, Spyer died, leaving her estate to Windsor.[228] Despite the fact that New York recognized the Canadian marriage, DOMA precluded Windsor from taking advantage of the marital exemption for federal estate tax purposes. As a result, she was forced to pay over $300,000 in estate taxes that she would not have had to pay had her spouse been male.[229] Windsor challenged DOMA, and the Court agreed that the law was unconstitutional, characterizing it as violative of "basic due process and equal protection principles applicable to the Federal Government."[230]

At the outset, Kennedy noted the extraordinary nature of DOMA. Indeed, despite recognizing that the federal government retained some authority to legislate on the meaning of "marriage," the statute went too far in that it "enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[231] More importantly, DOMA singled out a discrete population, "a class of persons that the laws of New York, and of 11 other States, have sought to protect."[232] As such, "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State."[233] It was on that basis that the Court declared section II of DOMA unconstitutional:

225 1 U.S.C. § 7.

226 570 U.S. at 752–53.

227 *Id.* at 753.

228 *Id.*

229 *Id.* ("Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax . . . .").

230 *Id.* at 769.

231 *Id.* at 765.

232 *Id.*

233 *Id.* at 768. The Court clarified, however, that even though some variations might exist across the states, any such differences are still "subject to constitutional guarantees." *Id.*

> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.[234]

In short, the Court held 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 in personhood and dignity."[235] Stated somewhat differently, Kennedy ruled that "[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. . . . [and] withdraws from Government the power to degrade or demean in the way this law does."[236] Accordingly, the Court concluded that, "[b]y seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."[237]

d. *Obergefell v. Hodges*

Two years later, in *Obergefell v. Hodges*,[238] the Court took up the remaining question of whether a state may constitutionally prohibit same-sex marriage. Although the Court had previously held that "the right to marry is protected by the Constitution," Kennedy conceded that those precedents all involved laws that had clearly "presumed a relationship involving opposite-sex partners."[239] Nonetheless, according to Justice Kennedy's opinion, an analysis of those opinions "compels the conclusion that same-sex couples may exercise the right to marry."[240] Specifically, the Court identified four essential "principles and traditions"[241] related to marriage that justify its classification as a

234 *Id.* at 775.

235 *Id.*

236 *Id.* at 774.

237 *Id.* at 775.

238 Obergefell v. Hodges, 576 U.S. 644 (2015).

239 *Id.* at 664–65.

240 *Id.* at 665 ("Still, there are other, more instructive precedents. . . . [that] have expressed constitutional principles of broader reach.").

241 *Id.* ("[T]he Court must respect the basic reasons why the right to marry has been long protected.").

fundamental right—principles and traditions that, according to the Court, apply with equal force to same-sex couples.[242]

First, citing *Loving*, the Court noted that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy," recognizing that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[243] In light of that language, it is important to pause at this point and note Kennedy's use of the word "dignity"—a word he employed three times in *Lawrence*, but ten times each in both *Windsor* and *Obergefell.*[244] Kennedy's use of that word, which he has used in a variety of opinions to encompass "both decisional autonomy and social standing,"[245] has led some scholars to argue that the underlying message of these opinions is that "LGBT[Q] people have innate dignity that should be recognized and protected by force of law."[246]

Moving to the second principle and tradition that Kennedy identified, he asserted that marriage is a fundamental right because the institution "supports a two-person union unlike any other in its importance to the committed individuals."[247] As the Court explained: "Marriage . . . . offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[248] Third, the Court held that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[249] Citing *Windsor*, where the Court noted how laws prohibiting same-sex marriage "harm and humiliate the children of same-sex couples," the Court explained that, "[b]y giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their

242 *Id.* ("The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

243 *Id.* at 665–66.

244 *See* Steve Sanders, *Dignity and Social Meaning:* Obergefell*,* Windsor*, and* Lawrence *as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2071 (2019).

245 Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1739 (2008).

246 Kyle C. Velte, Obergefell*'s Expressive Promise*, 6 HOUS. L. REV. 157, 164 (2015).

247 *Obergefell*, 576 U.S. at 666.

248 *Id.* at 667.

249 *Id.* at 667–68 ("[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." (alteration in original) (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978))).

community and in their daily lives.'"[250] Finally, in recognition of the fact that "marriage is a keystone of our social order," the Court justified the fundamental nature of the right to marry because of "the foundation of the family and of society, without which there would be neither civilization nor progress."[251]

Having distilled the fundamental right to marry down into those four components, each of which justify its recognition as a fundamental right, the Court found no basis for excluding same-sex couples from that right:

> Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning. [Although the] limitation of marriage to opposite-sex couples may long have seemed natural and just, . . . its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[252]

Accordingly, the Court held that both the Due Process and the Equal Protection Clauses prohibit states from denying same-sex couples the ability to marry on terms equal to those of opposite-sex couples.

Obergefell not only represented the final opinion in the Kennedy Quartet, but some have referred to it as "one of the most important decisions of the last twenty years."[253] To be sure, a number of crucial questions remain, and many scholars have criticized the Kennedy opinions for not providing broader protections. As one scholar wrote, the opinions in the Kennedy Quartet "are part of one of the great social movements for change of modern times[and] [b]ecause they're part of that movement, they represent a powerful political and social legacy. But a jurisprudential legacy . . . not so much."[254] One of the particular criticisms levied against Kennedy's opinion in *Obergefell*, for instance, is "the Court's failure to tell us how courts should look at laws that single LGBT[Q] people out for different treatment."[255]

---

250 *Id.* at 668 (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)).

251 *Id.* at 669 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

252 *Id.* at 670–71.

253 Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of* Obergefell v. Hodges, 70 HASTINGS L.J. 1263, 1263 (2019).

254 Coles, *supra* note 164, at 1199.

255 *Id.* at 1202; *see also* Brooke Lowell, Note, *You Must Present a Valid Form of (Gender) Identification: The Due Process and First Amendment Implications of Tennessee's Birth Certificate Law*, 28 WM. & MARY BILL RTS. J. 1133, 1149 (2020) ("While always sympathetic to gay rights,

Nonetheless, the four opinions "cemented [Kennedy's] status as the Court's dominant author of LGBT[Q] rights,"[256] and, despite the criticisms one might have concerning how much more substance those opinions might have delivered regarding the constitutional rights of sexual minorities, "Justice Kennedy has done much to advance our understanding of equality and equal citizenship."[257]

III. EXTENDING CONSTITUTIONAL EQUALITY TO LGBTQ YOUTH

As detailed above, there is no question that children enjoy constitutional protections,[258] nor is there any question that the Constitution prohibits at least some forms of discrimination against adult sexual minorities.[259] What is not clear, however, is the extent to which constitutional protections attach to children *on the basis* of their membership in the LGBTQ community. Although there is currently no way to resolve that question as it relates to all issues involving LGBTQ youth, the longer such uncertainty is allowed to persist, the greater the legal harms likely to befall these children. As discussed earlier, with cases like *Romer*, *Lawrence*, *Windsor*, and *Obergefell* explicitly limiting the degree to which states can discriminate against LGBTQ adults,[260] it is now the children within that community who have become the new target of homophobic legislation.[261]

As this Section details, however, the Kennedy Quartet cannot be read so narrowly as to only protect adults. Just as the Court in *Obergefell* deemed it irrelevant that previous opinions dealing with the fundamental right to marry all involved opposite-sex couples,[262] so too is it largely irrelevant here that the cases comprising the Kennedy Quartet all involved actions aimed at LGBTQ adults. As outlined earlier, the Court has already established that—like adults—children enjoy a

Justice Kennedy never identifies a level of scrutiny for them in *Obergefell*."); Peggy Rowe, Note, *States' Rights or States' Wrongs? The Constitutional Argument for Medically Accurate and Comprehensive Sex Education*, 62 ARIZ. L. REV. 539, 551 n.77 (2020) ("Justice Kennedy's opinion in *Obergefell* has been criticized for not adhering to any recognized level of scrutiny . . . .").

256 Green, *supra* note 174, at 474; *see also* Ruthann Robson, *Justice Ginsburg's* Obergefell v. Hodges, 84 UMKC L. REV. 837, 837–38 (2016) ("Justice Kennedy's opinion for the Court in *Obergefell* seemingly cements his reputation as a champion of LGBTQ rights.").

257 Murray, *supra* note 253, at 1271.

258 *See supra* Section II.A.

259 *See supra* Section II.B.

260 *See supra* Section II.B.2.

261 *See supra* Section I.A.

262 *See supra* notes 239–40 and accompanying text.

number of specific Fourteenth Amendment protections,[263] and there is nothing in the Supreme Court's jurisprudence to suggest that, when it comes to sexual minorities, children are somehow entitled to fewer protections. It is true, of course, that the constitutional rights of children are not always consistent with those afforded adults.[264] However, even to the extent the Court has implied that states may have more legislative authority vis-à-vis children, those principles are inapplicable to the discriminatory laws at issue here.

In 1979, the Supreme Court in *Bellotti v. Baird* identified three reasons that children may be entitled to less robust constitutional protections than adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[265] At the heart of each of those reasons lies the concern with protecting children from harms to which they may be more susceptible due to their young age as well as safeguarding the rights of parents to make decisions for their children. Regarding the latter, as one commentator has noted, there may indeed be situations where "a child's [constitutional] right to be queer is not absolute[but] must be balanced against a parent's right to direct the care, custody, and control of her child."[266] However, the current assortment of laws—discussed earlier—that discriminate against LGBTQ children do not implicate parental decision-making. Thus, under the *Bellotti* framework, there exists no reason here for treating LGBTQ youth as being entitled to fewer constitutional protections than LGBTQ adults. Instead, these laws must be analyzed vis-à-vis "the state's interest in protecting all children's welfare,"[267] and as discussed in the remainder of this Part, these laws almost certainly fail under the principles outlined in the Kennedy Quartet.

To understand why exactly, consider again Justice Kennedy's opinion in *Obergefell*, specifically the way in which he invalidated same-sex marriage bans by extrapolating "four principles and traditions" that justify the recognition of marriage as a fundamental right under the Constitution.[268] Similarly, it is the position of this Article that one can

263 *See supra* Section II.A.

264 *See, e.g.*, Martin Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 480 (2016) ("[T]he Court has often recognized that for some legal purposes children, even adolescents, are sufficiently different from adults so as to justify denials of autonomy and personhood rights.").

265 Bellotti v. Baird, 443 U.S. 622, 634 (1979).

266 Rosky, *supra* note 25, at 428.

267 *Id.*

268 *See supra* notes 241–51 and accompanying text.

likewise discern at least three underlying principles in the Kennedy Quartet applicable to the entire LGBTQ community, including children. Those principles are (1) LGBTQ identity is not a harm from which children need protection; (2) neither popular notions of morality nor a bare desire to harm or stigmatize can justify discriminatory legislation targeting LGBTQ youth; and (3) that whatever other justifications legislators might put forth in support of such laws, those claims must survive heightened scrutiny. Understanding those principles is not only instructive to fully understanding the reach of the Kennedy Quartet, but has become increasingly imperative as courts, legislators, and policy makers alike turn their attentions to the growing legal discriminations being imposed on LGBTQ youth.

A. *LGBTQ Status Is Not Something from Which People Need Protection*

Within the context of children and sexuality, it is important to acknowledge that states are free to pass laws aimed at protecting children from some of the harms that might flow from underage sexual activity, including "the prohibition of statutory rape, child molestation, and child pornography offenses."[269] For instance, as one commentator put it, "[s]tate[s] . . . treat child victims of sexual offenses differently than adult victims' because of the state's interest in protecting a child's vulnerability and immaturity."[270] When it comes to *sexual identity*, however, the Kennedy Quartet compels a different analysis.

As an initial matter, the difference between sexual identity and sexual activity is even more significant for LGBTQ youth than it is for adults given that, when it comes to children, "sexual identity usually precedes—and is often completely independent of—any actual sexual conduct."[271] More importantly, however, under the Kennedy Quartet,

269 Rosky, *supra* note 25, at 453; *see also* Louis P. Nappen, *School Safety v. Free Speech: The Seesawing Tolerance Standards for Students' Sexual and Violent Expressions*, 9 TEX. J. C.L. & C.R. 93, 93 (2003) ("Minors often receive added legal protections or leniencies; for instance, the legislature and the judiciary have enacted and upheld laws that specifically protect children from sexually-based crimes, such as child pornography and statutory rape." (footnote omitted)).

270 Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 210 (2003) (quoting Bridgette M. Palmer, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. UNIV. L. REV. 843, 859 (1999)).

271 Wardenski, *supra* note 23, at 1385; *see also* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 175 (2000) ("In

legislators cannot discriminate against LGBTQ youth based simply on their identity as a sexual minority on the basis that such identity is harmful to children. After all, one of the key distillations from those four cases is the rejection of the argument that identifying as LGBTQ is somehow inherently bad, thus requiring laws that discourage such self-identification. As Judge Rosemary Barkett of the Eleventh Circuit once wrote:

> In our democracy, however, 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, and so demeans the dignity of homosexuals, something that *Lawrence* specifically proscribes.[272]

Or, as another commentator more succinctly put it, *Lawrence* "effectively legitimized the status of being gay."[273]

That principle, however, gains even more strength when one looks at how it played out, not simply in *Lawrence*, but in the Kennedy Quartet as a whole. For instance, in *Romer*, the Court rejected Colorado's Amendment 2, which proponents had sought to justify by relying on arguments like "[t]he danger of childhood corruption, undermining innocence, and turning children gay."[274] In rejecting those rationales, the Court looked to the LGBTQ community as a class, implicitly recognizing that "being gay was something more than being a sodomite. . . . [such that] the status of homosexuality did transcend the mere sexual act associated with it."[275] Kennedy would then go so far in *Obergefell* to acknowledge that "in more recent years . . . psychiatrists and others recognized that sexual orientation is both *a normal expression of human sexuality and immutable*."[276] Thus, as one commentator has described when discussing *Lawrence*, *Windsor*, and *Obergefell*: these decisions "are united by the principle that gays and lesbians are entitled to dignity."[277]

---

the same way that heterosexual teenage boys are heterosexual even before they lose their virginity, gay youth are, by the same standard, gay even if they have never acted upon their same-sex attraction.").

272 Lofton v. Sec'y of the Dep't of Child. & Fam. Servs., 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting).

273 Wardenski, *supra* note 23, at 1366.

274 Konnoth, *supra* note 16, at 266.

275 Wardenski, *supra* note 23, at 1387.

276 Obergefell v. Hodges, 576 U.S. 644, 661 (2015) (emphasis added).

277 Sanders, *supra* note 244, at 2069; *see also supra* notes 244–46 and accompanying text.

Just like the adults who directly benefitted from the holdings in those four cases, LGBTQ children are likewise entitled to similar constitutional protections regarding their identities as sexual minorities. As such, a number of the laws currently targeting LGBTQ youth prove quite problematic. Chief among those are laws that purport to protect children from exposure to those who identify as LGBTQ, including "no promo homo" laws[278] and discriminatory bathroom bills.[279] By saying that children must be shielded from conversations about LGBTQ issues and exposure to transgender students in intimate spaces, respectively, legislators are essentially saying that LGBTQ status is, in and of itself, a harm that justifies discriminatory legislation. But, as explained above, the Kennedy Quartet rejected those arguments, deeming them entirely insufficient to justify discrimination of this sort.

And, indeed, some courts are already recognizing this principle vis-à-vis LGBTQ youth. Consider, for instance, a recent decision by a South Carolina federal court that invalidated a state law requiring that health education classes within public school districts "may not include . . . any 'discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.'"[280] The party challenging the law had argued that it violated the Equal Protection Clause "by subjecting students who are not heterosexual to negative treatment in the classroom"[281] and the court agreed, holding that the law in question employs "a classification based on sexual orientation that is not rationally related to any legitimate state interest, and thus cannot satisfy any level of judicial review."[282] Similarly, the Fourth Circuit recently declared unconstitutional a school's refusal to allow a transgender student to use the bathroom that matched his gender identity.[283] After comparing *Bowers* with *Obergefell*, the court observed: "How shallow a promise of equal protection that would not protect [the student] from the fantastical fears and unfounded prejudices of his adult community."[284]

Similarly, discriminatory statutory rape laws—ones that punish nonforcible sexual activity between adolescents more harshly when the

278 *See supra* notes 50–58 and accompanying text.

279 *See supra* Section I.A.3.

280 Gender & Sexuality All. v. Spearman, No. 20-cv-00847, 2020 WL 1227345, at *1 (D.S.C. Mar. 11, 2020) (quoting S.C. CODE ANN. § 59-32-30(A)(5)).

281 *Id.*

282 *Id.* at *2.

283 Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020).

284 *Id.* at 620.

two parties are of the same gender[285]—are likewise indefensible. Although such laws are triggered by sexual activity, these heightened penalties apply only to those engaged in same-sex relationships, thus essentially punishing LGBTQ status. In fact, relying on *Lawrence* and *Romer*, the Supreme Court of Kansas struck down its discriminatory statutory rape law on that very basis: "[T]he 'status-based enactment [is so] divorced from any factual context' we cannot 'discern a relationship' to the espoused State interest that the law preserves the sexual development of children consistent with traditional sexual mores."[286] Although the discriminatory enforcement of statutory rape laws against those adolescents in same-sex relationships, discussed earlier,[287] has thus far gone unchallenged, it is the position of this Article that such practices and the state's refusal thus far to intercede likewise raise constitutional concerns.[288]

In short, as one commentator put it when writing about *Lawrence*: "The Court granted gays and lesbians rights much broader than the right to have sex in private, but rather to define their existence in accordance with their sexual orientation . . . ."[289] Thus, as reaffirmed and developed by the full Kennedy Quartet, that self-definition alone cannot form the basis for discriminatory legislation against sexual minorities, even if those targeted happen to be children.

B. *Morality-Based Legislation Intended to Inflict Harm on LGBTQ People Is Unconstitutional*

Just as the Kennedy Quartet made clear that states cannot discriminate against sexual minorities simply by virtue of treating LGBTQ identities as harmful, those cases also made clear that states cannot use public morality as a basis for discriminating against LGBTQ adults. That idea was borne in *Romer* when Kennedy wrote 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

285 *See supra* Section I.A.2.

286 State v. Limon, 122 P.3d 22, 35 (Kan. 2005) (quoting Romer v. Evans, 517 U.S. 620, 635 (1996) (citation omitted)).

287 *See supra* notes 70–74 and accompanying text.

288 *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, . . . the denial of equal justice is still within the prohibition of the [C]onstitution."); Oyler v. Boles, 368 U.S. 448, 456 (1962) (holding that selective enforcement of state laws is unconstitutional where based on "arbitrary classification").

289 Wardenski, *supra* note 23, at 1396.

politically unpopular group cannot constitute a *legitimate* governmental interest."[290] By the time of *Lawrence*, Kennedy was even more explicit, adopting the language Justice Stevens had previously used in his *Bowers* dissent: "[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."[291] Ten years later in *Windsor*, Kennedy described the "moral and sexual choices" of same-sex couples as things "the Constitution protects"[292]—an idea he would expand upon in *Obergefell* when he wrote that "against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry . . . . serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry."[293]

Thus, another principle derived from the Kennedy Quartet is the idea that, when considering challenges to laws that discriminate against sexual minorities, "courts must consider more carefully whether anti-gay actions are rooted in animus and societal prejudice."[294] Further, there is no reason to believe that this idea applies only to adults. If anything, it would seem the principle is even more acute in the context of LGBTQ youth given that, under *parens patriae*, the court has both the power and the duty "to protect, care for, and control citizens who cannot take care of themselves."[295] Indeed, some of the Supreme Court cases dealing with children make clear that they are at times entitled to even greater constitutional protections due to their young age. For example, in *Roper v. Simmons*,[296] the Court held that the death penalty constituted cruel and unusual punishment when applied to people below the age of eighteen, effectively "grant[ing] juveniles additional constitutional protections under the Eighth Amendment."[297]

Beyond capital punishment, the language the Court has used when discussing the Fourteenth Amendment rights of children likewise

290 *Romer*, 517 U.S. at 634 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

291 Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

292 United States v. Windsor, 570 U.S. 744, 772 (2013).

293 Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

294 Wardenski, *supra* note 23, at 1408.

295 Natalie Loder Clark, Parens Patriae *and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000).

296 Roper v. Simmons, 543 U.S. 551 (2005).

297 Samantha L. Santola, Comment, United States v. Grant*: A Step in the Right Direction to Providing Non-Incorrigible Juvenile Offenders a Meaningful Opportunity for Release*, 50 SETON HALL L. REV. 589, 595 (2019).

makes clear that the degree to which they may be especially harmed is a relevant consideration. Consider, for instance, what the Court said in *Plyler* when striking down legislation that prevented the children of undocumented immigrants from attending public school[298]: "we may appropriately take into account its costs to the Nation and to the innocent children who are its victims" and how "[t]he stigma of illiteracy will mark them for the rest of their lives."[299] Perhaps even more powerful is the language the Court used in *Brown* when, in talking about the victims of segregation,[300] it referenced those students' "feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[301] As both cases underscore, such considerations are particularly acute when dealing with vulnerable populations. And, as others have described, LGBTQ youth are "the already-marginalized sub-class of the LGBT[Q] population."[302]

However, going back to the list of discriminatory laws being directed at LGBTQ children, it is quite clear that a number are clearly driven solely by the very animus that the Kennedy Quartet deemed constitutionally unacceptable. Consider, for instance, statutory rape laws that provide exceptions for adolescents who have sexual relationships with those close in age but only when the two are opposite sex.[303] Accordingly, LGBTQ youth—those most likely to engage in sexual encounters with someone of the same sex—are punished as felons while their heterosexual peers are most likely to receive little if any punishment. As the Supreme Court of Kansas persuasively argued in *State v. Limon* when striking down the state's discriminatory statutory rape law, whatever justifications the state might put forth that justify such disparate treatment, they essentially relate to popular notions of morality, which the Kennedy Quartet rejected.[304]

But discriminatory statutory rape laws are but one example of current legislation running afoul of this principle. Take, for example, laws that limit the way in which LGBTQ issues may be discussed in

298 *See supra* notes 129–33 and accompanying text.

299 Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

300 *See supra* notes 125–28 and accompanying text.

301 Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

302 Wardenski, *supra* note 23, at 1407–08.

303 *See supra* Section I.A.2.

304 *See* State v. Limon, 122 P.3d 22, 34 (Kan. 2005) ("The Court recognized that many people condemn homosexuality as immoral . . . . However, the Court continued by stating: 'These considerations do not answer the question before us.'" (quoting Lawrence v. Texas, 539 U.S. 558, 571 (2003))).

public schools. As noted earlier, Alabama's recent law required sex education courses to emphasize "that homosexuality isn't an acceptable lifestyle and that being a homosexual is a criminal offense in the state."[305] There, the statement of morality is found within the text of the statute itself. Further, the statute's reference to the criminal laws evokes one of the key rationales for Justice Kennedy's decision in *Lawrence*, where he described the law at issue as "a criminal offense with all that imports for the dignity of the persons charged."[306] Although Alabama recently removed these provisions, its statute is nonetheless emblematic of both laws[307] and proposed laws[308] that exist in other states. And it bears repeating that the damage imposed on LGBTQ youth by such legislation only adds to the considerable harms those children already face in their everyday lives.[309]

Of course, for some of the other categories of legislation discussed earlier, legislators have put forth rationales that purport to protect other children and, thus, justify the discriminatory measures. Specifically, legislators have attempted to explain the laws denying transgender students equal access to bathrooms and school sports as necessary to protect cisgender students from, respectively, having to share private spaces with transgender students[310] and having to compete against those who have an unfair advantage due to being born male.[311] As noted earlier, however, these justifications are dubious for two reasons. First, there is the lack of any support for either position. For example, regarding bathroom bills, the Fourth Circuit described the dangers that proponents used to justify such discriminatory measures as "sheer conjecture and abstraction," leading the court to conclude that the law was, instead, "marked by misconception and prejudice."[312] Finally, there is a similar dearth of evidence that transgender athletes have any

305 *See supra* notes 52–53 and accompanying text; ALA. CODE § 16-40A-2(c)(8) (2012).

306 *Lawrence*, 539 U.S. at 575.

307 *See supra* note 54 and accompanying text.

308 *See supra* notes 55–58 and accompanying text.

309 *See supra* Section I.B.

310 *See supra* notes 84–88 and accompanying text.

311 *See supra* notes 76–83 and accompanying text.

312 Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 614–15 (4th Cir. 2020) (first quoting Grimm v. Glouster Cnty. Sch. Bd., 400 F. Supp. 3d 444, 461 (E.D. Va. 2019); and then quoting Tuan Anh Nguyen v. Immigr. and Naturalization Serv., 533 U.S. 53, 73 (2001)) ("The Board's proposed policy was concocted amidst a flurry of emails from apparently concerned community members and adopted in the context of two heated Board meetings filled with vitriolic, off-the-cuff comments, such as referring to [the student] as a 'freak.'"); *see also supra* notes 87–88 and accompanying text.

meaningful advantage in school sports[313]—activities that, after all, "are supposed to be primarily about inclusivity, setting individual goals, collective goals and well-being."[314]

A second reason for skepticism concerning the purported intent behind these laws lies in the speed with which a number of states have passed such legislation despite the fact that the percentage of students nationwide who identify as transgender is quite small. For instance, as noted earlier, before 2021 was even halfway over, five states had already passed laws limiting the ability of transgender students to participate in school athletics.[315] Further, thirty-five similar bills have been introduced by legislators in other states.[316] In 2019, however, only two such bills were introduced,[317] thus raising the question of why the sudden onslaught. After all, among children aged thirteen to seventeen in the United States, only 0.7% are transgender.[318] And, of course, the number of transgender students who are likewise interested in participating in school athletic programs would be an even smaller percentage still. Not surprisingly, many who have advocated for laws limiting the ability of transgender children to compete "cannot cite a single instance in their own state or region where such participation has caused problems."[319]

Given the questionable nature of the justifications behind such discriminatory laws, especially when contrasted with the objective data that inclusive legislation—like anti-bullying laws discussed earlier[320]—actually benefits children, it would seem that if legislators were truly interested in protecting children, they would instead devote more energies to legislation of the latter variety. Regardless, even if remedial legislation is not mandated by the Constitution, it is the position of this Article that the Kennedy Quartet makes quite clear that legislators

313 *See supra* notes 81–82 and accompanying text.

314 Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NPR (Mar. 18, 2021, 5:17 PM), https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s [https://perma.cc/DHA8-N7GT].

315 *See* Kalich, *supra* note 76 and accompanying text.

316 *See* Kalich, *supra* note 76.

317 *See* Ermyas & Wakeam, *supra* note 314.

318 *See* JODY L. HERMAN, ANDREW R. FLORES, TAYLOR N.T. BROWN, BIANCA D.M. WILSON & KERITH J. CONRON, AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2 (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf [https://perma.cc/MF3D-RB9Q] (estimating that "0.7% of youth ages 13 to 17, about 150,000 youth, would identify as transgender").

319 David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP NEWS (Mar. 3, 2021), https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7 [https://perma.cc/AH52-J45S].

320 *See supra* note 48 and accompanying text.

cannot premise discriminatory legislation on moral disapproval of the LGBTQ community, and that principle extends to the current laws targeting the children of that community.

C. *Discrimination on the Basis of LGBTQ Status Is Subject to Heightened Scrutiny*

By pointing out these two rationales that states cannot use to justify laws that discriminate against LGBTQ children, the question arises as to what justifications *would* pass constitutional muster. Admittedly, due to the limitations of the Kennedy Quartet,[321] that question is much harder to answer. After all, "*Romer*, *Lawrence*, *Windsor*, and *Obergefell* have been criticized for their failure to specify a standard of review for laws that disadvantage sexual minorities."[322] Nonetheless, whatever that exact standard might be, what the Kennedy Quartet makes clear is that it is much higher than mere rational basis. Thus, to the extent that states attempt to justify laws that discriminate against youth who are sexual minorities on bases other than moral disapproval or claims that LGBTQ identities are harmful to children, courts will need to employ a more searching analysis of those purported justifications.

As an initial matter, a number of lower courts have already ruled that discrimination on the basis of transgender identity is subject to intermediate scrutiny.[323] Most recently, for instance, the Fourth Circuit held that not only are bathroom bills subject to heightened scrutiny given that they discriminate on the basis of gender, but that "transgender people constitute at least a quasi-suspect class."[324] Citing the famous footnote four from *United States v. Carolene Products*[325] and then applying the test for determining the appropriate level of scrutiny, the court had little difficulty in concluding that heightened scrutiny applied, stating: "[O]ne would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for

321 *See supra* notes 254–55 and accompanying text.

322 Mark Joseph Stern, Karen Oehme & Nat Stern, *A Test to Identify and Remedy Anti-Gay Bias in Child Custody Decisions After* Obergefell, 23 UCLA WOMEN'S L.J. 79, 92 (2016).

323 *See, e.g.*, Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (holding that, when it comes to laws that discriminate against those who are transgender, "something more than rational basis but less than strict scrutiny applies").

324 Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610 (4th Cir. 2020).

325 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

adverse treatment, than transgender people."[326] In so ruling, the court also noted the large number of district courts that had similarly ruled that the transgender community formed, at the very least, a quasi-suspect class.[327]

But what of LGBTQ communities in general? Despite the absence of any concrete answer from the Kennedy Quartet, those cases nonetheless established that the level of scrutiny that attaches to that class is much broader than mere rational basis. As one scholar noted when describing *Romer*, "[i]t is true that the Court did not explicitly extend the doctrine of heightened scrutiny to sexual orientation . . . , but by holding that discrimination against LGBT[Q] individuals is irrational and impermissible, the Court recognized that sexual orientation is morally and politically irrelevant."[328] As another scholar stated post-*Lawrence*, "courts must consider *more carefully* whether anti-gay actions are rooted in animus and societal prejudice."[329] Laurence Tribe went so far as to suggest that *Lawrence* invoked strict scrutiny despite the Court never saying so explicitly.[330] As Tribe explained, to view the decision as only mandating rational basis review, "requires overlooking passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process."[331]

In fact, relying on *Lawrence*, the Ninth Circuit has ruled that laws that discriminate on the basis of sexual orientation are subject to heightened scrutiny—a conclusion it found buttressed by Kennedy's decision in *Windsor*:

> In *Windsor*, instead of conceiving of hypothetical justifications for the law, the Court evaluated the "essence" of the law. *Windsor* looked to DOMA's "design, purpose, and effect." This inquiry included a review of the legislative history of DOMA. *Windsor* quoted extensively from the House Report and restated the House's conclusion that marriage should be protected from the immorality of homosexuality. Unlike in rational basis review, hypothetical reasons for DOMA's enactment were not a basis of the Court's inquiry. In its brief to the Supreme Court, the Bipartisan Legal

326 *Grimm*, 972 F.3d at 610–11 (quoting Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018)).

327 *Id.* at 610 (citing cases).

328 Ashutosh Bhagwat, *Liberty or Equality?*, 20 LEWIS & CLARK L. REV. 381, 396 (2016).

329 Wardenski, *supra* note 23, at 1408 (emphasis added).

330 Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916–17 (2004).

331 *Id.* at 1917.

> Advisory Group offered five distinct rational bases for the law. *Windsor*, however, looked behind these justifications to consider Congress's "avowed purpose:" "The principal purpose," it declared, "is to impose inequality, not for other reasons like governmental efficiency."[332]

Finally, as commentators have noted, although *Obergefell* failed to

> use the magic words of "heightened scrutiny," . . . . [the case nonetheless] applied heightened scrutiny review in practice by allocating the burden to the States seeking to uphold the marriage bans, identifying marriage as a fundamental right, and discussing the four elements of the Suspect Class Doctrine under equal protection analysis.[333]

In fact, at least one commentator has argued that the level of scrutiny arising out of the Kennedy Quartet is, in some ways, higher than that afforded other minority groups. Specifically, Russell K. Robinson points out that, from *Romer* to *Obergefell,* the Court advanced from opposing mere "rank hatred" to the much broader category of "antigay stereotyping and implicit and structural biases against LGBT[Q] sexuality and identity."[334] As such, Robinson argues that, when it comes to the appropriate level of scrutiny, "sexual orientation is presently in a more favorable position than race and sex" given that the latter two categories face increasing difficulties when it comes to relying on animus.[335]

Regardless of the precise level of scrutiny that attaches to discrimination on the basis of sexual orientation, it is clear from the Kennedy Quartet collectively that it is some form of heightened scrutiny. And there is nothing in those opinions or in the Supreme Court's jurisprudence relating to the constitutional rights of children generally[336] to indicate that the level is somehow reduced when dealing with laws affecting LGBTQ youth. Thus, to the extent legislators put forth rationales for the laws currently targeting this class of children, the burden will be on the states to prove more than a mere rational basis.

---

332 SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 481–82 (9th Cir. 2014) (citations omitted).

333 Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 11 (2016).

334 Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 171–72 (2016) (arguing that this continuum represents a "a 'thick' and 'thin' version of animus").

335 *Id.* at 171. Robinson refers to animus as "a standard that emerged from cases brought by people of color, poor people, and people with disabilities, but that the Court no longer recognizes in such cases." *Id.* at 173.

336 *See supra* Section III.A.

But, as detailed earlier,[337] the Kennedy Quartet has already invalidated justifications that involve labeling LGBTQ identities as harmful or are premised on a desire to harm that group through laws expressing political notions of morality. Thus, combined, these three principles render insupportable the argument that the constitutional protections of the Kennedy Quartet stops short of children, particularly a group of children as vulnerable as LGBTQ youth.

CONCLUSION

In 1972, the Supreme Court struck down legislation that targeted nonmarital (once referred to as "illegitimate") children, observing that "[c]ourts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise."[338] The exact same could be said of LGBTQ youth, although perhaps even more forcefully. After all, courts, legislators, and policymakers alike may have relatively little power when it comes to the social stigma that already attaches to these children—a stigma that is arguably much greater than that ever experienced by nonmarital children given the significant physical and psychological harms suffered by LGBTQ youth.[339] These lawmakers can, however, direct their efforts at protecting the constitutional rights of these children—rights that are not quite as uncertain as some have contended. Indeed, when it comes to the protections afforded LGBTQ youth, lawmakers are not dealing with a blank slate. In the four cases that comprise the Kennedy Quartet,[340] the Supreme Court has already made clear that a number of rationales used to support legislation that discriminated against LGBTQ adults failed to pass constitutional muster. And, as described herein,[341] those rationales apply with equal force to the laws—now proliferating across the country—that target LGBTQ youth. Thus, a proper understanding of the Kennedy Quartet reveals that, when it comes to these children, the Supreme Court has

337 *See supra* Section III.B.

338 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972) (footnote omitted).

339 *See supra* Section II.B.

340 *See supra* Section II.B.2.

341 *See supra* Part III.

already foreclosed the typical "adult and even political work that lawyers and policymakers perform on the backs of children."[342]

342 Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 725 (2009).