

HARVEY MILK AND JUDICIAL REVIEW: THE END OF RATIONAL BASIS WITH BITE, AND LGBT SCHOOLS, TOO?

KATHERINE ERICKSON[∞]

ABSTRACT

In the mid-1980s, lesbian, gay, bisexual, and transgender rights activists recognized the need for a safe haven for victimized LGBT youth and established the Harvey Milk High School in New York City. In 2002, the Board of Education approved public funding for Harvey Milk High School, and in 2005, Alliance, a public charter school in Milwaukee, Wisconsin was also established to serve LGBT students who had been victims of harassment in their schools. Advocates for civil rights generally take one of two major approaches to such efforts at segregation or separation, grounded alternately in anti-classification principles or in anti-subordination principles. According to anti-classification theory, the government should not make classifications of people based on socially-constructed identities such as race. Some civil rights advocates have criticized this approach to equal protection law as overly global, saying that it condemns all identity-based classifications, as opposed to only those which serve to oppress. These advocates instead espouse a theory of “anti-subordination,” which argues that the real problem is not separation per se but oppression.

Anti-subordination advocates claim LGBT schools and other voluntarily segregated schools may actually benefit marginalized groups. This article will explore the constitutionality of these schools’ open-admissions policies in light of recent legal developments in LGBT rights. It will examine these developments through the lens of the historical desegregation case law which dismantled the dual school system for Black and white students, and attempt to integrate both bodies of law into a sensible rule on LGBT schools.

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[∞] Staff Attorney, New York Legal Assistance Group, Tenants’ Rights Unit; J.D. 2015, New York University School of Law. This article began as a final paper for Professor Paulette M. Caldwell’s Education Law Seminar at NYU Law. It went through several drafts under her supervision and fulfilled my substantial writing requirement. I am indebted to Professor Matthew Coles for his seminar on Sexuality and the Law which gave me the background to make an attempt at synthesizing Equal Protection and desegregation jurisprudence. I would also like to thank Charles Mather, J.D. 2014, University of Michigan, for his comments on an earlier draft, as well as the staff of the *N.Y.U. Review of Law & Social Change* for all their assistance. Any errors or omissions are mine alone.

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I.

INTRODUCTION

“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently *unequal*.”

—*Brown v. Board of Education*¹

“While the racially segregated school systems in *Brown* communicated the government’s view of nonwhite students as inferior, the Harvey Milk High School has the opposite effect. It communicates to all children, whether straight or sexual minority and whether enrolled at Harvey Milk High School or not, that sexual minority students have value and are entitled to a violence-free education.”

—*Thomas A. Mayes*²

1. *Brown v. Board of Ed.*, 347 U.S. 483, 495 (1954) (emphasis added).

2. Thomas A. Mayes, *Separate Public High Schools for Sexual Minority Students and the*

In the mid-1980s, lesbian, gay, bisexual, and transgender (LGBT) rights activists recognized the need for a safe haven for victimized LGBT youth. In 1985, the Harvey Milk High School (HMHS), a nonprofit high school for children who had faced extreme harassment in their home schools, was established in New York City.³ In 2002, the Board of Education approved public funding for Harvey Milk High School.⁴ In 2005, Alliance, a public charter school in Milwaukee, Wisconsin, was established to serve LGBT students who had been victims of harassment in their schools.⁵ Educators have made efforts to establish a similar school in Chicago, though these have so far been unavailing.⁶ For the purposes of this article, I will refer to these separate or segregated schools whose mission is primarily to serve LGBT students as “LGBT schools.”

Advocates for civil rights generally take one of two major approaches to such efforts at segregation or separation, grounded alternately in anti-classification principles or in anti-subordination principles. The “anti-classification” perspective that currently dominates equal protection jurisprudence disfavors treating individuals differently on the basis of identity; this ostensibly echoes the “separate is never equal” argument so prevalent in desegregation case law.⁷ According to anti-classification theory, the government should not make classifications of people based on socially-constructed identities such as race.⁸ This perspective assumes that classifications themselves are the wrong to be cured, as opposed to historical or institutional barriers facing a particular group.⁹ Anti-classification theory thus refrains from examining the history or political context of a given government policy.¹⁰

Some civil rights advocates have criticized this approach to equal protection law as overly global, saying that it condemns all identity-based classifications, as

Limits of the Brown Analogy, 35 J.L. & EDUC. 339, 346 (2006).

3. Louis P. Nappen, *Why Segregated Schools for Gay Students May Pass a “Separate but Equal” Analysis But Fail Other Issues and Concerns*, 12 WM. & MARY J. WOMEN & L. 101, 102–04 (2005).

4. Bill Hutchinson, *Mike Hails Gay HS as a Shelter from Bullies*, N.Y. DAILY NEWS (July 29, 2003), <http://www.nydailynews.com/archives/news/mike-hails-gay-hs-shelter-bullies-article-1.518666>.

5. Jessica Calefati, *Gay High Schools Offer a Haven from Bullies*, U.S. NEWS & WORLD REPORT (Dec. 31, 2008), <http://www.usnews.com/education/articles/2008/12/31/gay-high-schools-offer-a-haven-from-bullies> [<https://perma.cc/7A9W-ST9U>].

6. Carlos Sadovi, *Gay-Oriented High School Plan Dropped*, CHI. BREAKING NEWS (May 13, 2014, 4:40 PM), http://articles.chicagobreakingnews.com/2008-11-18/news/28512128_1_social-justice-pride-campus-gay-youths-gay-issues [<https://perma.cc/FM8M-W3P7>].

7. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1014 (1986).

8. Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 295 (2014).

9. *Id.* at 298–99.

10. *Id.* at 298.

opposed to only those which serve to oppress.¹¹ These advocates instead espouse a theory of “anti-subordination,” which argues that the real problem is not separation *per se* but oppression.¹² From an anti-subordination perspective, “both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy.”¹³ In short, what matters to anti-subordination advocates in questions of segregation is results—if separation is empowering for a given historically-disadvantaged community, then it should be permitted.

Anti-subordination advocates claim LGBT schools and other voluntarily segregated schools may actually benefit marginalized groups.¹⁴ LGBT youth today still have a higher risk than non-LGBT¹⁵ children of severe depression and experience a higher incidence of suicidal ideation, attempts, and completion.¹⁶ Advocates assert that LGBT children may thus continue to benefit from transferring from their original or “home” schools into separate LGBT schools, which may provide a more empowering environment.¹⁷ This article will explore the constitutionality of these schools’ open-admissions policies in light of recent legal developments in LGBT rights. I will examine these developments through the lens of the historical desegregation case law which dismantled the dual school system for Black and white students, and attempt to integrate both bodies of law into a sensible rule on LGBT schools.

11. *See, e.g.*, Colker, *supra* note 7, at 1014 (“The courts may therefore have uttered global assertions of anti-differentiation such as ‘separate can never be equal’ when what they meant was ‘enforced segregation of blacks prevents their attainment of equality.’”).

12. *Id.* at 1007–08.

13. *Id.*

14. Kristina Brittenham, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough*, 45 B.C. L. REV. 869, 879–80 (2004).

15. In this article, I often use the term “LGBT” to refer to lesbian, gay, bisexual and transgender children, with a particular focus on those who are perceived to be LGBT or perceived to be queer by their peers. I recognize that not all LGBT children are bullied, or out, or visibly queer, and some children who are bullied because of their perceived queer identity do not self-identify as queer, or not in the perceived way. Take, for example, the case of a boy who is perceived as effeminate, who self-identifies as straight and cisgender (meaning that he identifies with the sex to which he was assigned at birth in the hospital). He may be bullied by his peers for, according to them, “being gay,” while not identifying as LGBT at all. Another child may exhibit gender non-conforming behavior and identify as transgender, gender fluid, androgynous, or female but not femme, but be bullied “for being gay,” even though she identifies as straight. I have tried to be as specific as possible with language throughout, recognizing both that being straight does not necessarily exempt one from being “queer” (as in the case of transgender children), nor does being bullied for being perceived as LGBT necessarily mean one is LGBT.

16. Dorothy Espelage, *Bullying & The Lesbian, Gay, Bisexual, Transgender, Questioning (LGBTQ) Community*, STOP BULLYING 1, 66 (2012), http://www.stopbullying.gov/at-risk/groups/lgbt/white_house_conference_materials.pdf [<https://perma.cc/DPG8-Q5EV>] (compiling data on LGBT bullying from the White House Conference on Bullying, as part of an interagency effort led by the Department of Education that works to coordinate policy, research and communications on bullying).

17. Calefati, *supra* note 5.

In general, when a state law makes a classification of people, it triggers the equal protection clause of the Fourteenth Amendment.¹⁸ If the classification is deemed “suspect,” such as those based on race, courts will apply strict scrutiny—the most stringent form of review and the one most likely to result in the court striking down the law in question.¹⁹ Strict scrutiny requires that a law be “narrowly tailored” to further a “compelling governmental interest.”²⁰ Intermediate scrutiny, which applies to gender-based classifications, requires that a law further an “important governmental interest” to which the law is “substantially related.”²¹ Rational basis review, the lowest level of judicial scrutiny, is the default level of review for government classifications.²² Rational basis review requires only that a challenged law be rationally related to a legitimate governmental interest.²³ The practical implications of differential levels of review are that nearly all laws subject to rational basis are upheld, while nearly all that are subject to strict scrutiny are struck down.²⁴

Some opponents of LGBT schools have challenged the constitutionality of separate schools for LGBT children as employing impermissible categorization based on sexual orientation. For example, New York Conservative Party Chairman Mike Long and New York State Senator Ruben Diaz have claimed that federal funding of HMHS as an LGBT school violates the rights of “heterosexual students.”²⁵ Diaz used anti-segregation language in referring to LGBT schools, implicitly comparing HMHS to the racially segregated schools prevalent before *Brown v. Board of Education* and targeted in the ensuing desegregation case law.²⁶ There is, of course, one obvious difference between

18. *Equal Protection Definition*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/equal-protection> [<https://perma.cc/8H6M-4HH8>].

19. *Id.*

20. *Strict Scrutiny Definition*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/strict-scrutiny> [<https://perma.cc/ZN5A-9AS8>].

21. *Intermediate Scrutiny Definition*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/intermediate-scrutiny> [<https://perma.cc/92WE-3QWG>].

22. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”); *Rational Basis Definition*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis [<https://perma.cc/G28G-HNNL>].

23. See *Cleburne*, 473 U.S. at 442; *Rational Basis Definition*, *supra* note 22.

24. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 806–07 (2006) (citing *Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984); *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

25. David Herszenhorn, *Lawsuit Opposes Expansion of School for Gay Students*, N. Y. TIMES (Aug. 16, 2003), <http://www.nytimes.com/2003/08/16/nyregion/lawsuit-opposes-expansion-of-school-for-gay-students.html>.

26. See Herszenhorn, *supra* note 25 (“Mr. Diaz, a Democrat, said he believed that the school discriminated against heterosexual students, particularly black and Hispanic youngsters who attend low-performing public schools. ‘I am opposing segregation in any shape, type or form,’ Mr. Diaz said.”); Rebecca Bethard, *New York’s Harvey Milk School: A Viable Alternative*, 33 J.L. & EDUC. 417, 420 (2004) (“Senator Diaz has stated he is opposed to segregation and that the funds used for the Harvey Milk School would be better spent on programs to protect all students.”).

pre-*Brown* white schools and modern separate LGBT schools: HMHS and Alliance both have open-admissions policies.²⁷ Unlike pre-*Brown* all-white schools, these LGBT schools technically allow any child to enroll—including straight, cisgender children.²⁸

In *Brown v. Board of Education of Topeka*, the Supreme Court ruled that *de jure* racial segregation violates the Equal Protection Clause.²⁹ In 1955 the Supreme Court delegated the work of desegregation to the district courts, in a case that became known as *Brown II*.³⁰ The closest analogy in desegregation law for the open-enrollment policies used by HMHS and Alliance, I argue, are the so-called “freedom of choice plans” created to comply with the desegregation mandate of *Brown II*.³¹ New Kent County’s freedom of choice plan was ruled inadequate compliance with *Brown II* in the landmark case, *Green v. County School Board of New Kent County*.³² While the *Brown* analogy is imperfect, especially as the term “LGBT” groups together both sexual orientation and gender identity, it has already been applied to the question of LGBT schools.³³ In his 2004 article, *Segregation by Any Other Name*, law student Randy Hedlund argues that the Supreme Court implicitly ruled in *Green* that an open-enrollment policy does not cure the constitutional violation of segregation, and thus HMHS and similar schools remain unconstitutional.³⁴ In the past, defenders of LGBT schools have argued such schools are clearly constitutional, at least in part

27. See Harvey Milk High School, NYC Dep’t of Educ., Admissions Application, at 1 [hereinafter HMHS Admissions Application] (“Many of our students take advantage of the after-school program and services provided by HMI, an organization with over a 25 year history of working with lesbian, gay, bisexual, transgender, questioning, at-risk, and straight youth.”), <http://schools.nyc.gov/NR/rdonlyres/CBA9234C-FD34-4CAE-9176-1F1347C2EC93/166581/APP LICATION.pdf> [https://perma.cc/VZW3-KQD6]; ALLIANCE SCHOOL OF MILWAUKEE, <http://www5.milwaukee.k12.wi.us/school/alliance/> [https://perma.cc/57LN-VS9D] (“The Alliance School is a place where it’s okay to be black, white, gay, straight, gothic, Buddhist, Christian, or just plain unique!”).

28. *Id.* “Cisgender” describes a person whose sense of personal identity and gender corresponds with their birth sex—the sex assigned by doctors, and therefore their family and community, at birth. Katy Steinmetz, *This Is What ‘Cisgender’ Means*, TIME (Dec. 23, 2014), <http://time.com/3636430/cisgender-definition/> [https://perma.cc/Z27P-LW4P].

29. 347 U.S. 483, 495 (1954).

30. *Brown v Board of Ed. (Brown II)*, 349 U.S. 294 (1955).

31. By “freedom of choice plan,” I refer to the so-called desegregation plans which merely allowed students to cross-enroll in formerly racially-segregated schools. See *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 441, 433–34, 441–42 (1968) (describing the freedom of choice plans adopted by New Kent County, which permitted Black students to “choose” to attend their previous all-Black school or to attend the county’s all-white school, and vice versa; the court found that 85% of the Black children remained in their original school and not a single white student enrolled in the previously all-Black school).

32. *Id.* at 441–42.

33. The constitutionality of single-sex schools is somewhat ambiguous under current Supreme Court jurisprudence. For a discussion of the intersection between the LGBT schools debate and the single-sex school debate, along with the intermediate scrutiny standard for gender classification, see discussion *infra* Part III.D.

34. Randy Hedlund, *Segregation by Any Other Name: Harvey Milk High School*, 33 J.L. & EDUC. 425, 427 (2004).

because the schools withstand rational basis review.³⁵ Hedlund does not advocate any particular standard of review for sexual orientation.³⁶

There has been an increasing trend in the federal judiciary towards treating sexual orientation as a suspect class and thus subjecting classifications based on sexual orientation to a level of scrutiny higher than rational basis.³⁷ In the landmark civil rights case *United States v. Windsor*, the Supreme Court arguably progressed towards treating sexual orientation as a protected classification when it struck down part of the Defense of Marriage Act restricting the federal interpretation of “marriage” and “spouse” to only heterosexual unions.³⁸ The Court refrained from explicitly codifying this reading of its jurisprudence when striking down gay marriage bans upon review of *Obergefell*, which was a consolidation of four cases challenging state laws that prohibited same-sex marriage.³⁹ Neither of these cases benefits from a straightforward conclusion concerning where the Supreme Court stands on the standard of scrutiny for sexual orientation. The Sixth Circuit’s interpretation of *Windsor*, however, which the Supreme Court did not contradict in *Obergefell*, appears to strengthen Hedlund’s claim that funding LGBT schools reflects an unconstitutional differential treatment of children based on sexual orientation.⁴⁰ This is especially

35. See, e.g., Mayes, *supra* note 2, at 343 (“[T]he decision to establish a separate public high school for sexual minority students would certainly pass rational basis review.”).

36. Hedlund, *supra* note 34, at 427.

37. See, e.g., SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471, 481 (9th Cir. 2014) (“In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.”); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013), *rev’d sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (“Sexual orientation discrimination accordingly fulfills all the criteria the Supreme Court has identified, and thus Defendants must justify Ohio’s failure to recognize same-sex marriages in accordance with a heightened scrutiny analysis.”).

38. “Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, *Windsor* and the United States couch their arguments in equal protection terms. They argue that § 3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of ‘heightened’ scrutiny, and that § 3 cannot survive such scrutiny. They further maintain that the governmental interests that § 3 purports to serve are not sufficiently important and that it has not been adequately shown that § 3 serves those interests very well. The Court’s holding, too, seems to rest on ‘the equal protection guarantee of the Fourteenth Amendment,’—although the Court is careful not to adopt most of *Windsor*’s and the United States’ argument.” *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (Scalia, J., dissenting) (construing the majority as disingenuous in its supposed reliance on the Fifth Amendment) (citations omitted).

39. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (relying, in theory, on a “synergy” between the Fourteenth Amendment Equal Protection Clause and the Fifth Amendment Due Process Clause, reaching the same result that would almost certainly have been reached if they had examined the ban under heightened scrutiny for sexual orientation).

40. *Obergefell v. Wymyslo*, 962 F. Supp. 2d at 991 (construing various equal protection cases, including *Windsor* and *Lawrence*, and concluding that discrimination based on sexual orientation requires the government to justify its failure to recognize same-sex marriages under a heightened scrutiny standard). The later Supreme Court majority opinion on this case did not contradict the

true in light of his interpretation of *Green*. Opponents may take advantage of this heightened scrutiny to attack LGBT schools anew, potentially even including private schools.⁴¹

In this article, I argue that a close reading of LGBT rights law and desegregation law reveals that LGBT schools are constitutional even when examined under the rigorous strict scrutiny standard. In Part II, I will describe the establishment of LGBT schools, as well as the harassment which originally justified, and continues to justify, their existence. In Part III, I will explain how a close reading of desegregation case law shows that *Brown* does not threaten LGBT schools, even if sexual orientation is reviewed under strict scrutiny. The Court, as we will see, was concerned not with segregation *per se*, but with the dismantling of a dual system, which was an existing constitutional violation. Finally, in Part IV, I will explore how allowing communities to address hostility towards LGBT students by establishing separate schools problematically shifts the burden of addressing homophobia from school districts to students and fails to nurture tolerance. I will ultimately argue that we should maintain established LGBT schools as havens of last resort, because LGBT youth continue to live in precarious danger. Just because we allowed children to suffer violence for the sake of integration does not mean we should do so again.

II.

BACKGROUND: LGBT SCHOOLS AS A RESPONSE TO ONGOING HOSTILITY

Harvey Milk High School (HMHS) was founded in 1985 as a privately-funded alternative school for LGBT students who had been threatened, verbally harassed, or subjected to physical violence at their original neighborhood public schools, or “home schools.” HMHS’s admission application states that it is a “small, transfer high school” which:

provides all students with a safe, supportive, and engaging educational environment . . . Many of our students take advantage of the after-school program and services provided by HMI, an organization with over a 25 year history of working with lesbian, gay, bisexual, transgender, questioning, at-risk, and straight youth.⁴²

Ninth Circuit’s view. *Obergefell v. Hodges*, 135 S. Ct. at 2603.

41. The Supreme Court has previously said that private schools risk losing tax exemption status if they have admissions standards seriously contrary to public policy—for example, only admitting white students. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (“[U]nderlying all relevant parts of the [Internal Revenue] Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”).

42. HMHS Admissions Application, *supra* note 27, at 1.

In the late 1990s, supporters of LGBT schools described the establishment schools like HMHS as an “extraordinary, temporary measure to serve these teenagers who have literally been driven out of public schools,” a “last-ditch effort to make sure that they get the public education that is their right.”⁴³

The homophobic hostility that drove advocates to found HMHS continues, and LGBT students in traditional public schools remain in crisis. Our schools avoid LGBT issues in their curricula,⁴⁴ allow constant micro-aggressions⁴⁵ against LGBT-identified youth, discourage gender-nonconforming behavior on the part of all students,⁴⁶ and provide inadequate support services for LGBT children whose parents are not pro-LGBT.⁴⁷ In addition to this quiet assault against the hearts and minds of LGBT children, there is also outright physical violence and harassment. Rates of hate speech, harassment, and assault of LGBT students remain high;⁴⁸ a 2011 nationwide survey revealed that over 38% of LGBT students were physically assaulted because of their identity in the previous year alone.⁴⁹

This violence has a terrorizing effect on schools throughout the nation. Around two thirds of LGBT students surveyed actively felt unsafe at school because of their sexual orientation.⁵⁰ School employees are often complicit in the harassment, either passively watching or actively participating by

43. Kim Paula Kirkley, *Don't Forget the Safety Net That All-Gay Schools Provide in Considering the Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 127, 127–28 (1997).

44. JOSEPH G. KOSCIW, EMILY A. GREYAK, MARK J. BARTKIEWICZ, MADELYN J. BOESEN & NEAL A. PALMER, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, at xvi (2012) [hereinafter GLSEN, 2011 NAT'L SCH. CLIMATE SURVEY] (noting that “only a small percentage of students were taught positive representations about LGBT people, history, or events in their schools (16.8%)” and that “less than half (44.1%) of students reported that they could find information about LGBT-related issues in their school library”), <http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf> [https://perma.cc/323V-YC9M].

45. According to Sheree Marlowe, the new Chief Diversity Officer at Clark University, microaggressions are “comments, snubs or insults that communicate derogatory or negative messages that might not be intended to cause harm but are targeted at people based on their membership in a marginalized group.” Stephanie Saul, *Campuses Cautiously Train Freshman Against Subtle Insults*, N. Y. TIMES (Sept. 6, 2016), <http://www.nytimes.com/2016/09/07/us/campuses-cautiously-train-freshmen-against-subtle-insults.html> [https://perma.cc/AS6L-JTXM]. Saul gives the example of asking an Asian student you do not know personally for help on your math homework. *Id.*

46. GLSEN, 2011 NAT'L SCH. CLIMATE SURVEY, *supra* note 44, at 44.

47. *Id.* at 46 (noting that, for example, a policy requiring students to have parental permission to attend Gay-Straight Alliance meetings may hinder their access to that important school resource).

48. *Id.* at xiv.

49. *Id.* at xiv–xv (noting that 38.3% of LGBT children surveyed were pushed or shoved in the past year because of their sexual orientation, and 27.1% because of their gender expression; 18.3% were victims of more serious physical assaults, e.g. involving a weapon, due to their sexual orientation, and 12.4% because of their gender expression).

50. *Id.* at xiv.

committing verbal or physical abuse themselves.⁵¹ Bullying of LGBT children is so common that at least one judge has declared it to be the expected status quo.⁵² In 2011, over 60% of LGBT students surveyed who were harassed or assaulted in school did not report the incident, believing that nothing would be done.⁵³ Even among students who had enough faith in their school administration to bother reporting, over one third indeed found that the school did nothing in response.⁵⁴ Students often hear homophobic remarks such as “faggot,” “dyke,” or “queer” at school; a Department of Education-sponsored study found that 63% of students who heard these remarks heard them from faculty or school staff.⁵⁵ Heterosexist school environments—that is, status quo environments that are biased in favor of opposite-sex relationships and traditional gender roles—are hostile for both LGBT students and their heterosexual and cisgender peers.⁵⁶ The findings that LGB children are at greater risk for depression, bullying and violence than non-LGB children were reiterated by the 2015 Youth Risk Behavior Survey; this survey also showed that LGB students were three times more likely than non-LGB students to have been raped.⁵⁷

Another study, of transgender children, found that one third of transgender students heard school staff make negative comments about someone’s gender expression in the past year.⁵⁸ During these bias incidents, staff was even less likely to intervene after transphobic remarks than they were for homophobic remarks.⁵⁹ Two thirds of transgender students felt unsafe in school because of how they expressed their gender.⁶⁰ Among LGBT students, transgender students were the most likely to experience harassment and assault in their schools.⁶¹

51. Mayes, *supra* note 2, at 342.

52. *See, e.g., Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011) (“As one would expect in a high school of more than 4,000 students, there had been incidents of harassment of homosexual students.”) (emphasis added).

53. GLSEN, 2011 NAT’L SCH. CLIMATE SURVEY, *supra* note 44, at xv.

54. *Id.*

55. Espelage, *supra* note 16, at 65.

56. *Id.*

57. Jan Hoffman, *Gay and Lesbian High School Students Report ‘Heartbreaking’ Levels of Violence*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/12/health/gay-lesbian-teenagers-violence.html> [<https://perma.cc/9EVG-Z3RP>] (construing Laura Kann, Emily O’Malley Olsen, Tim McManus, William A. Harris, Shari L. Shanklin, Katherine H. Flint, Barbara Queen, Richard Lowry, David Chyen, Lisa Whittle, Jemekia Thornton, Connie Lim, Yoshimi Yamakawa, Nancy Brener & Stephanie Zaza, *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12 — United States and Selected Sites, 2015*, 65 MMWR SURVEILLANCE SUMMARIES 1–202 (Aug. 12, 2016), <http://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm> [<https://perma.cc/WWC7-BZP8>]).

58. EMILY A. GREYTAK, JOSEPH G. KOŚCIW & ELIZABETH M. DIAZ, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS, at x (2009) [hereinafter GLSEN, HARSH REALITIES], <http://www.glsen.org/sites/default/files/Harsh%20Realities.pdf> [<https://perma.cc/RE5J-JGW2>].

59. *Id.*

60. *Id.* at xi.

61. *Id.*

This transphobic climate had a serious negative impact on transgender student learning.⁶²

Toxic, anti-LGBT and heterosexist culture makes the typical American school a frightening place for sexual minority students—and a rigid, unpleasant environment for heterosexual children as well. This climate of fear and marginalization has real psychological effects on students, and real impacts on student achievement. LGBT students who have been victimized experience plummeting self-esteem and around 30% higher incidence of depression than the general student population.⁶³ Aside from school climate issues, sexual minority youth face frequent rejection from their parents and peers, as well as homophobia in society at large, leading to pre-existing psychological distress that can be compounded and magnified by hostility at school.⁶⁴

Recently, HMHS began receiving public funding. In 2002, New York City approved funding for a \$3.2 million capital expansion of HMHS, in addition to a smaller annual funding level, giving rise to doubled enrollment.⁶⁵ HMHS currently serves sixty-seven students, grades nine through twelve.⁶⁶ Far from remaining a mere temporary measure, as mentioned above, the HMHS model expanded to Milwaukee in 2005, with the founding of the Alliance School.⁶⁷ Similar to HMHS, Milwaukee’s Alliance School is a public charter school for high school-aged children.⁶⁸ Its mission is to reduce bullying in order to “provid[e] a safe and accepting environment for all students.”⁶⁹ There are seats

62. *Id.* at xi–xii (reporting that, among other things, a higher proportion of transgender students than cisgender students had missed class in the past month due to safety reasons).

63. GLSEN, 2011 NAT’L SCH. CLIMATE SURVEY, *supra* note 44, at 44.

64. Espelage, *supra* note 16, at 66.

65. Nappen, *supra* note 3, at 104. HMHS continues to receive public funding, with an annual budget of approximately \$1.28 million. *Harvey Milk School Fiscal Year 2017 Budget*, NYC DEP’T OF EDUC., https://www.nycenet.edu/offices/d_chanc_oper/budget/dbor/galaxy/galaxybudgetsummaryto/display2.asp?DDBSSS_INPUT=M586 [<https://perma.cc/73ZD-QRBS>].

66. Harvey Milk High School, *About Us: Statistics and Budget*, NYC DEP’T OF EDUC., <http://schools.nyc.gov/SchoolPortals/02/M586/AboutUs/Statistics/register.htm> [<https://perma.cc/CBZ7-ZS9Y>] (data as of March 1, 2017, refreshed mid-month, indicating 67 students currently enrolled). Enrollment has fluctuated slightly over the past few years. *See, e.g.*, NYC DEP’T OF EDUC., HARVEY MILK HIGH SCHOOL QUALITY REVIEW REPORT 2012-2013 (Mar. 5, 2013) (indicating enrollment of 68 students), http://schools.nyc.gov/OA/SchoolReports/2012-13/Quality_Review_2013_M586.pdf [<https://perma.cc/VQN5-9P8K>]; NYC DEP’T OF EDUC., HARVEY MILK HIGH SCHOOL QUALITY REVIEW REPORT 2014-2015 (Apr. 24, 2015) (indicating enrollment of 64 students), http://schools.nyc.gov/OA/SchoolReports/2014-15/Quality_Review_2015_M586.pdf [<https://perma.cc/8WZ7-6A96>]. Note that 67 students is a decrease from their 2003 enrollment of about 100 students. Nappen, *supra* note 3, at 104.

67. *See* ALLIANCE SCHOOL OF MILWAUKEE, <http://www5.milwaukee.k12.wi.us/school/alliance/> [<https://perma.cc/57LN-VS9D>]; Calefati, *supra* note 5 (discussing both Alliance and HMHS, as well as failed efforts to establish a LGBT-specific school in Chicago).

68. ALLIANCE SCHOOL OF MILWAUKEE, <http://www5.milwaukee.k12.wi.us/school/alliance/> [<https://perma.cc/57LN-VS9D>] (“The Alliance School is a small, charter school of the Milwaukee Public School system. . . . We currently serve students in grades 9-12 who live in the Milwaukee area.”).

69. *Id.*

for one hundred eighty five students.⁷⁰ HMHS and The Alliance School have inspired proposals for a similar school in Chicago,⁷¹ though the school has not yet been constructed due to political opposition, including concerns about segregating gay youth.⁷²

III.

DEBUNKING THE THREAT OF HEIGHTENED SCRUTINY

In addition to tepid political opposition, the future formalization of heightened scrutiny of sexual orientation may leave HMHS vulnerable to equal protection challenges. In *Windsor*, a 2013 landmark LGBT rights case that centered on estate tax exemption rights for same-sex couples, the Supreme Court struck down Section 3 of the Defense of Marriage Act.⁷³ In so doing, the Court arguably paved the way for sexual orientation as a protected classification.⁷⁴

A. Sexual Orientation May Soon Be Subject to Heightened Scrutiny

The Supreme Court has purported to use mere rational basis review when looking at classifications based on sexual orientation.⁷⁵ However, in practice, when looking at sexual orientation classification, the Court uses an unusual version of the otherwise highly deferential rational basis standard, which scholars have nicknamed “rational basis with bite.”⁷⁶ In *Romer v. Evans*⁷⁷ and

70. *Id.*

71. See Calefati, *supra* note 5.

72. *Id.* See Sadovi, *supra* note 6 (“Some gay rights activists said they were concerned the proposed high school would segregate gay youths while others saw such a campus as a safe haven from possible harassment and violence.”).

73. *United States v. Windsor*, 133 S. Ct. 2675, 2694, 2696 (2013).

74. “In accord with my previously expressed skepticism about the Court’s ‘tiers of scrutiny’ approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not apply anything that resembles that deferential framework.” *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (citations omitted) (arguing that the Court is applying heightened scrutiny under the guise of rational basis); see also *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014) (“In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.”); Stacey L. Sobel, *When Windsor Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL’Y 493, 523 (2015) (arguing that *Windsor* supported the use of heightened scrutiny for sexual orientation because the Court affirmed the Second Circuit’s analysis, which relied on heightened scrutiny).

75. *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1362 (2013).

76. See, e.g., *id.*; Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005); Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

77. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

Lawrence v. Texas,⁷⁸ for example, the Court applied “rational basis with bite” to classifications based on sexual orientation and still struck down the laws in question. In fact, some lower courts had interpreted the Constitution as requiring heightened scrutiny for classifications based on sexual orientation even before *Windsor*.⁷⁹

The *Windsor* case arose at the passing of Edith Windsor’s wife, Thea Spyer.⁸⁰ Section 3 of the Defense of Marriage Act (DOMA), which mandated that the federal definitions of “marriage” and “spouse” exclude same-sex unions, barred Windsor from claiming the federal estate tax exemption to her inheritance from Ms. Spyer.⁸¹ In the ensuing suit brought by Windsor, the Supreme Court struck down Section 3 of DOMA as an unconstitutional violation of due process and equal protection.⁸² Justice Scalia penned a memorable dissent in the case, in which he mocked the majority’s reticence regarding the level of scrutiny applied:

[I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.⁸³

Scalia went on to state that he would review this classification under rational basis scrutiny, and that while the Court purports to do the same, it “certainly does not *apply* anything that resembles that deferential framework.”⁸⁴

It now seems inevitable that heightened scrutiny will eventually be formally adopted as the standard of review for sexual orientation classifications; the district court in *Obergefell*⁸⁵ as well as the Ninth Circuit in *SmithKline Beecham*⁸⁶ have both interpreted *Windsor* to require heightened scrutiny of

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

79. *See, e.g.*, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012) (“Having considered all four factors, this Court finds that homosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny.”); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989–90 (N.D. Cal. 2012) (“In short, this Court holds that gay men and lesbians are a group deserving of heightened protection against the prejudices and power of an often-antagonistic majority.”).

80. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

81. *Id.* at 2682–83

82. *Id.* at 2695–96

83. *Id.* at 2706 (Scalia, J., dissenting).

84. *Id.* (citations omitted).

85. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013) (“Sexual orientation discrimination accordingly fulfills all the criteria [for heightened scrutiny] the Supreme Court has identified, and thus Defendants must justify Ohio’s failure to recognize same-sex marriages in accordance with a heightened scrutiny analysis.”).

86. *SmithKline*, 740 F.3d at 481 (construing *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

sexual orientation.⁸⁷ This suggests that LGBT schools may soon be subject not to rational basis review, but instead to some heightened form of scrutiny under the Equal Protection Clause. Public LGBT-segregated schools, among other pro-LGBT programs, seem much more likely to be struck down under heightened scrutiny because they explicitly classify students based on sexual orientation.⁸⁸

Even if the Supreme Court definitively holds that classifications based on sexual orientation are subject to heightened scrutiny, this still does not clarify the issue with respect to transgender individuals. Despite the fact that LGB and T identities are often grouped together, sexual orientation and gender identity are distinct bases of classification, and applying heightened scrutiny to the former does not necessarily mean the same standard applies to the latter. Indeed, if the Supreme Court decides to follow the nonbinding Equal Employment

87. Compare *Obergefell v. Wymyslo*, 962 F. Supp. 2d at 991, with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). The Court, while apparently applying heightened scrutiny in the recent landmark LGBT rights case *Obergefell*, nonetheless failed to codify it. *Obergefell*, 135 S. Ct. at 2603 (striking down the Michigan gay marriage ban while declining to rule on heightened scrutiny for sexual orientation). The dissent expresses the frustration of many towards the language used by the majority:

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a “synergy between” the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the “modern Supreme Court’s treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing.” The majority’s approach today is different: “Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.” The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ “legitimate state interest” in “preserving the traditional institution of marriage.”

Obergefell, 135 S. Ct. at 2623 (Scalia, J., dissenting) (citations omitted). By the logic of the dissent, by claiming that the synergy of the Fourteenth Amendment and the Fifth Amendment make gay marriage bans unconstitutional, the Court is effectively already applying heightened scrutiny to sexual orientation.

88. Nappen, *supra* note 3, at 121.

Opportunity Commission (EEOC) decision in *Macy v. Holder*,⁸⁹ and the Obama administration's equally nonbinding interpretation of Title IX in the context of the bathroom debate,⁹⁰ it could wind up applying intermediate scrutiny to discrimination against transgender people on the theory that classification based on gender identity is a form of sex discrimination.⁹¹

B. Heightened Scrutiny Appears On Its Face to Threaten LGBT Schools

Many LGBT rights advocates have campaigned for a heightened level of scrutiny to be applied to classifications based on sexual orientation, in the hopes of strengthening anti-discrimination claims. Rational basis review, however—the same deferential standard that has long stymied anti-homophobic discrimination litigation—may have actually protected certain LGBT-focused programs, such as LGBT schools.⁹² The “rational basis with bite” standard, like intermediate scrutiny, would theoretically allow for a type of benign asymmetry in the law, in that it would uphold affirmative action-type programs that could not survive strict scrutiny.⁹³ Because LGBT schools separate children on the basis of identity without bare animus⁹⁴ towards any group, rational basis with bite would likely allow LGBT schools to continue operating from an anti-subordination perspective, while simultaneously prohibiting laws motivated by homophobic

89. *Macy v. Holder*, EEOC Appeal No. 0120120821 (2012), <https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt> (holding that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition”).

90. Dear Colleague Letter on Transgender Students, U.S. DEPT. OF EDUC. (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (“The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”).

91. See *infra* Part III.D.

92. Nappen, *supra* note 3, at 121. See generally *The Benefits of Unequal Protection*, *supra* note 75.

93. *The Benefits of Unequal Protection*, *supra* note 75, at 1366. Proponents of heightened scrutiny, of course, will argue that asymmetrical pro-gay programs, such as pre-tax salary “gross-ups” by private companies meant to eliminate the tax disparity between same-sex and opposite-sex couples, are becoming moot in the wake of *Obergefell* and other victories for the LGBT rights movement. Certainly, now that gay marriage is legal nationwide, gross-ups should no longer be necessary. Similarly, perhaps bullying and homophobic hostility should be targeted at the source with mainstream educational programs at all levels of public schooling.

94. While rational basis is, in general, a permissive standard for assessing government classifications, such classifications must still have a rational relation to a legitimate governmental purpose. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Rational Basis Definition*, *supra* note 22. In *Moreno*, the Supreme Court struck down a provision of the Food Stamp Act which denied food stamps to households of “unrelated persons,” as a violation of the Due Process Clause of the Fifth Amendment. The Court ruled that bare animus—in this case, against hippies—cannot constitute a legitimate governmental interest.” *Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); see also *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (citing *Moreno* to strike down a state law prohibiting the passage of municipal or county laws protecting LGB people from discrimination).

animus such as the sodomy statutes challenged in *Lawrence*.⁹⁵ In short, the benign asymmetry permitted by rational basis with bite cannot be sustained in the higher tiers of scrutiny.⁹⁶

1. *The Purported Legal Threat to Separate LGBT Schools*

If and when the Court adopts some form of heightened scrutiny to review classifications based on sexual orientation, opponents of LGBT schools will likely claim that such schools violate the constitutional mandate against segregation, even if they have open-admission policies. They will argue that the mere existence of identifiably “gay schools” is unlawful under *Brown*, analogizing LGBT schools to the racially segregated schools at issue in *Green v. Cty. Sch. Board of New Kent Cty.*⁹⁷ Even privatization⁹⁸ would not necessarily resolve this issue because the tax-exempt status of private LGBT schools could

95. *The Benefits of Unequal Protection*, *supra* note 75, at 1366. The landmark *Lawrence* case, in striking down an anti-sodomy law in Texas as well as in thirteen other states, explicitly overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), and legalized same-sex sexual relations nationwide. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The *Lawrence* opinion cited Justice Stevens’ dissent in *Bowers*:

Our prior cases make two propositions abundantly clear. First, the 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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Bowers, 478 U.S. at 216 (Stevens, J., dissenting) (footnotes and citations omitted), *overruled by Lawrence*, 539 U.S. at 578.

96. This issue is a complex one, for while strict scrutiny certainly prohibits benign asymmetries such as *de jure* segregation, intermediate scrutiny may or may not allow it. For example, the Supreme Court struck down Virginia’s categorical exclusion of women from a military college, not because it deemed sex segregation to be *per se* unconstitutional under intermediate scrutiny, but because the “parallel” institution set up by the state for women was inadequate. *United States v. Virginia (VMI)*, 518 U.S. 515, 534 (1996). This fairly narrow decision found that the constitutional violation was not cured by the parallel women’s school because it did not “provide equal opportunity,” and not because a similarly sex-segregated institution could never provide equal opportunity. *Id.* Thus, *VMI* suggests that while under intermediate scrutiny, “[sex] classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women,” such classifications may be used to compensate for particular economic disabilities” women have suffered. *Id.* at 533–34. Under strict scrutiny, of course, even certain classification-based programs which benefit marginalized groups are unconstitutional. *See, e.g., Regents of Univ. of California v. Bakke*, 438 U.S. 271, 266 (1978) (upholding the lower court’s decision invalidating the Medical School of the University of California at Davis’s “special admissions program” which dictated a strict numerical quota for racial minorities).

97. 391 U.S. 430, 441–42 (1968) (holding freedom of choice admission plans inadequate to de-segregate schools in compliance with *Brown*). *See also id.* at 437–38 (stating that under *Brown II* school boards operating dual school systems were “clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch*”) (emphasis added).

98. Or, in the case of HMHS, re-privatization.

still come into question under *Bob Jones v. United States*.⁹⁹ In *Bob Jones*, the Supreme Court held that a private religious school's tax-exempt status can be revoked if its practices¹⁰⁰ are contrary to a compelling government interest.¹⁰¹

There has already been one lawsuit challenging the constitutionality of separate LGBT schools. New York Conservative Party Chairman Mike Long and New York State Senator Ruben Diaz brought suit against HMHS soon after the school began receiving federal funding in the summer of 2003.¹⁰² While the case, *Diaz v. Bloomberg*, was ultimately settled without a decision,¹⁰³ news coverage reveals some of the arguments that were made. Long and Diaz reportedly objected to HMHS on constitutional grounds, claiming that spending money on "the few" LGBT youth at HMHS rather than "the many" heterosexual students is preferential treatment that violates the rights of heterosexual students.¹⁰⁴ Their chosen plaintiffs, an anonymous Bronx Latina mother and her four children, demanded that HMHS return its funding to the state.¹⁰⁵

In *Brown*, the rationale against segregation was that it harmed the marginalized group—Black children. By contrast, the opponents of HMHS were concerned that the increased resources going to LGBT children violated the rights of the majority group—heterosexual children.¹⁰⁶ But while the lawsuit was certainly not in the *Brown* tradition of protecting minority students from the psychological aggressions inherent to segregation, it did invoke the language of anti-segregation: "Senator Diaz has stated he is opposed to segregation and that the funds used for the Harvey Milk School would be better spent on programs to protect all students."¹⁰⁷ This claim is unlikely to succeed if HMHS is subjected to the highly deferential rational basis review. Under heightened scrutiny, however, LGBT schools like HMHS would be more vulnerable to anti-segregation challenges such as this one.

99. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1982).

100. In the case of *Bob Jones University*, these practices were racially discriminatory admissions policies. *Id.* at 580–81.

101. *Id.* at 604.

102. Bethard, *supra* note 26, at 420.

103. Frankle Edozien, *Gay is 'Out' - City Settles Over Milk HS*, N.Y. POST (June 29, 2006), <http://nypost.com/2006/06/29/gay-is-out-city-settles-over-milk-hs/> [https://perma.cc/2S8M-M9L4]; see also *Diaz v. Bloomberg*, No. 114533 (N.Y. Sup. Ct. filed Apr. 4, 2006) (the only litigation document publicly available on the website of the State of New York).

104. Nappen, *supra* note 3, at 123–24; see also Bethard, *supra* note 26, at 420 ("This suit contends that the school violates the New York City Department of Education anti-discrimination policies as well as the Constitutional rights of heterosexual students.").

105. Nappen, *supra* note 3, at 123–24.

106. *Id.* at 131–32 ("Attorney Rena Lindevaldsen argues that HMHS gives one small group of students a better education at the expense of poor kids across the city.") (construing Duncan Osborne, *Diaz Bashes Milk School: Bronx State Senator Files Lawsuit, Charges Discrimination*, GAY CITY NEWS (Aug. 15–21, 2003), <http://web.archive.org/web/20051110055210/http://www.gaycitynews.com/gen233/diazbashes.html>).

107. Bethard, *supra* note 26, at 420.

In a similar vein to the Long and Diaz lawsuit, Randy Hedlund argues that HMHS's use of "federal and state tax dollars . . . to fund a segregated high school for homosexual students" is unconstitutional.¹⁰⁸ He further claims that the open-admissions policy of HMHS does not render it constitutional, citing the post-*Brown* "freedom of choice" plans that were ruled insufficient to cure the constitutional violation of racial segregation in *Green*.¹⁰⁹ If LGBT schools are examined under heightened scrutiny and the Court adopts Hedlund's interpretation of desegregation case law, HMHS and similar schools will be in danger of losing their public funding.

2. Various Legal Defense Strategies Evaluated

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."¹¹⁰ LGBT school administrators may attempt to defend their policies by arguing that their students are not, in fact, similarly situated to other public school students—indeed, LGBT schools exist precisely because LGBT students are more vulnerable to harassment and violence than non-LGBT students.¹¹¹ Unlike in *Brown*, the separation here is voluntary on the part of the marginalized group and justified by anti-subordination advocates on the grounds of minority empowerment. As Rebecca Bethard points out in her discussion of segregation as it applies to HMHS, "[t]he extreme dropout rates for LGBT youth sets these children apart in a manner that has been documented and can be verified."¹¹² This LGBT student empowerment argument is reinforced by HMHS's mission statement, which explicitly proclaims that it serves students "who have not met success in at least one other high school prior to admission,"¹¹³ and not simply any and all LGBT children. As Senator Diaz pointed out, however, students who experience other types of harassment do not have similar alternative schools available to them.¹¹⁴ This inconsistency—that HMHS is not a school for bullied or harassed children, but for a special subset of those children—highlights the fact that LGBT identity is actually the criterion being used as a classification. It begs the question—could we use this justification to establish schools for children who have been victims

108. Hedlund, *supra* note 34, at 425.

109. *Id.* at 427–28.

110. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

111. Bethard, *supra* note 26, at 421.

112. *Id.*

113. Harvey Milk High School, *Overview*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/SchoolPortals/02/M586/AboutUs/Overview/default.htm> [<https://perma.cc/F8C4-MW56>].

114. Erik K. Ludwig, *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny*, 8 U. PA. J. CONST. L. 513, 516 (2006); *see also* Gary Younge, *New York to Open Gay High School*, *GUARDIAN* (July 29, 2003) (quoting Mike Long, who facetiously remarked, "Maybe we should have schools for chubby kids who get picked on."), <http://www.theguardian.com/world/2003/jul/29/usa.international.educationnews> [<https://perma.cc/NN2S-T4NU>].

of racism? Currently, no—school districts are specifically banned from using hostility to justify racially segregating children.¹¹⁵

Homophobic hostility towards LGBT children, while widespread and detrimental, does not provide a legal defense for segregation of LGBT children under strict scrutiny review; the Court specifically noted in *Cooper v. Aaron* that hostility towards a certain group does not provide adequate constitutional justification for maintaining a mandatory segregated school system.¹¹⁶ The Court in *Cooper* quoted a case from the early 1900s, *Buchanan v. Warley*, which echoes rationales for LGBT-segregated schools:

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.¹¹⁷

Cooper thus articulated the Court’s view that neither private bias nor the preservation of law and order are acceptable justifications for segregation. In his analysis of segregation claims against HMHS, Hedlund points out that any harassment faced by LGBT students is no more severe than that which was endured by the Black students who first integrated formerly all-white schools.¹¹⁸ He notes that the Supreme Court recognized the importance of racial integration despite the “obvious harassment” of Black children that would result.¹¹⁹ Under constitutional law, fear of harassment does not justify differential treatment based on identity.

One survival strategy for LGBT schools is simply to privatize the schools. After all, HMHS continued to educate LGBT students between 1985 and 2003 without receiving public funding—it and other LGBT schools could feasibly survive as private charities. Under *Bob Jones*, however, even privatization of LGBT schools may not fully resolve the constitutional issues. Tax exemptions of private schools remain imperiled if they participate in segregation contrary to established public policy.¹²⁰ In *Bob Jones*, the Supreme Court noted that “racial

115. *Cooper v. Aaron*, 358 U.S. 1, 7 (1958). The Court goes on to explain: “The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature...law and order are not here to be preserved by depriving the Negro children of their constitutional rights.” *Id.* at 16 (citing *Buchanan v. Warley*, 245 U.S. 60, 81 (1917)).

116. *Id.*

117. *Buchanan v. Warley*, 245 U.S. at 81 (quoted in *Cooper*, 358 U.S. at 16).

118. Hedlund, *supra* note 34, at 429–30.

119. *Id.*

120. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1982) (“Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established

discrimination in education violates a most fundamental national public policy, as well as rights of individuals.”¹²¹

Various sectors of the federal government have expressed a commitment to the promotion of LGBT rights.¹²² This commitment suggests that under strict scrutiny for sexual orientation, the federal government would revoke tax exemptions for LGBT-segregated schools, as it did for whites-only schools in *Bob Jones*. Even *Bob Jones*, however, dealt with a school whose admissions policies were *de jure* racially segregated, not merely *de facto* segregated. In examining the case against LGBT schools, Hedlund misunderstands the threat to LGBT schools posed by desegregation case law, including both *Bob Jones* and *Green*, in failing to make the doctrinal distinction between *de facto* and *de jure* segregation. The Supreme Court has never actually outlawed *de facto* segregation, merely *de jure* segregation. Since LGBT schools do not exist in the historical context of a previous *de jure* segregated system, their open-admissions policies would arguably render LGBT schools constitutional.

C. A Closer Reading of *Green* Reveals No Threat to LGBT Schools

1. Hedlund's Argument About *Green*

At least one scholar has already pointed out flaws in Hedlund's approach to desegregation case law. Thomas A. Mayes, in particular, takes issue with Hedlund's analogy to *Brown*, distinguishing the situation of today's LGBT youth from that of Black children under Jim Crow. Mayes notes that sexual orientation is, at least formally, subject to rational basis review, and not the much more rigorous strict scrutiny standard.¹²³ Mayes further recognizes that in some

public policy.”).

121. *Id.* at 593.

122. For information on the U.S.'s position on promoting LGBT rights as an international policy priority, see Chris Johnson, *4 Years Later Clinton's LGBT Geneva Speech Hailed for Impact*, WASH. BLADE (Dec. 6, 2015), <http://www.washingtonblade.com/2015/12/06/4-years-later-clintons-lgbt-geneva-speech-recognized-for-impact/> [<https://perma.cc/86J3-8W6X>] (“Four years ago, Hillary Clinton delivered a high-profile speech in Geneva positioning the United States as a leader in the fight to protect LGBT human rights overseas.”); Frank Jordans, *UN Backs Gay Rights for First Time Ever*, USA TODAY (June 18, 2011) (citing an international resolution in favor of LGBT rights supported whole-heartedly by the United States federal government), http://usatoday30.usatoday.com/news/topstories/2011-06-17-2320619804_x.htm [<https://perma.cc/MNC2-GUYA>]; *LGBT News*, HUMANRIGHTS.GOV, <https://www.humanrights.gov/issues/lgbt.html> [<https://perma.cc/5BEN-YGGR>] (“[T]he U.S. government works to advance the human rights of lesbian, gay, bisexual and transgender (LGBT) individuals worldwide through foreign policy.”). The Executive branch under the Obama Administration explicitly concluded that classifications based on sexual orientation warrant heightened scrutiny, which was one of the reasons the administration decided not to defend the constitutionality of Section 3 of the Defense of Marriage. Press Release, Office of Public Affairs, Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/Q7VL-56NM>].

123. Mayes, *supra* note 2, at 343.

circumstances, segregation has support in the law and education policy, particularly when separate educational settings allow for addressing different student needs.”¹²⁴ Mayes’ logic appears to echo the anti-subordination movement’s openness to separation when that separation serves an oppressed minority.¹²⁵ Mayes addresses the illusive analogy between the “freedom of choice” statutes passed in the wake of *Brown* and HMHS’s open admission policy, characterizing freedom of choice laws as “status-quo sustaining, resistance-motivated responses to *Brown*’s commands.”¹²⁶ According to Mayes, the “true heirs” of these statutes are the educators who disregard modern-day heterosexist violence in our schools.¹²⁷ Louis Nappen has also examined the imperfect analogy between race and sexual orientation in the context of segregation in schools, though he has not addressed *Green* specifically. Instead, he accepts the rational basis and voluntariness arguments as adequate defenses and focuses on policy arguments against segregation.¹²⁸

Advocates may attempt to defend LGBT schools by arguing for a lower standard of review for sexual orientation, or make policy-based arguments employing the tenets of anti-subordination, but I argue that neither is necessary. In fact, one need not resort to policy or social justice arguments or surrender ground in the fight for higher scrutiny in order to subvert the doctrine—the case law of the post-*Brown* era itself does not ban open admission policies as a remedy for the ill of segregation. A cursory reading of *Green* would suggest that the Court has met voluntary desegregation with skepticism.¹²⁹ But *Green* was not about maintaining integration; it was about curing a pre-existing constitutional violation. Only in the post-Jim Crow context was voluntary desegregation inadequate.¹³⁰ Voluntary desegregation is not constitutionally inadequate per se, but rather is inadequate as a method to repair the harm done by past *de jure* segregation.¹³¹

124. *Id.* at 344 (“The ultimate goal for educators is to treat students differently only when they have different needs, and only to the extent their different needs require different treatment.”).

125. *See supra* notes 7–14 and accompanying text.

126. Mayes, *supra* note 2, at 346.

127. *Id.*

128. Nappen, *supra* note 3, at 134 (“Separate schools for homosexuals are most likely not in violation of *Brown* for several reasons. First, governed for the most part by state and local law, school systems are allowed to establish a variety of distinct charters for individualized education. Second, homosexuals currently attend their separate schools voluntarily, and heterosexuals are (purportedly) not prohibited from attending these schools. Third, separate schools for homosexual students are not being charged with providing inferior education, as most black schools prior to *Brown* were charged.”).

129. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 440 (1968) (“[I]n desegregating a dual system a plan utilizing ‘freedom of choice’ is not an end in itself.”).

130. Indeed, the Supreme Court has specifically disallowed school system-enforced racial desegregation in the context of a *de facto* but not *de jure* segregated school system. *Parents Involved Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007) (striking down racial desegregation plan because the school at issue had no history of *de jure* segregation).

131. *See Green*, 391 U.S. at 439–40 (“We do not hold that a ‘freedom-of-choice’ plan might

Arguing that LGBT schools are unconstitutional, Hedlund compares HMHS's open-admissions policy to the New Kent County School Board's freedom of choice plan addressed in *Green*:

New Kent County, Virginia sought to desegregate their black and white schools by allowing students their choice of schools. During the first three years the plan was in place, no white student enrolled in the all black school. Moreover, though 115 black students enrolled in the white school, 85% remained at the all black school. The effect was the perpetuation of the dual system and the Court therefore found the freedom of choice plan was insufficient to produce realistic desegregation. . . . Harvey Milk relies exclusively on a freedom of choice plan similar to Virginia in that the burden of ensuring desegregation rests on the students and parents. Not only is this burden misplaced, the plan as a result appears ineffective.¹³²

Hedlund thus claims that HMHS relies on a "freedom of choice" plan which would have been unacceptable to the Court in *Green* or *Bowman*, citing *Bowman* as requiring "effective" desegregation plans which ensure the burden of desegregation rests on school officials, instead of students and parents.¹³³ The court in *Bowman*, however, actually stated that "freedom of choice," where used to mean a system of "permissive transfers" out of racially unitary schools, where the initial assignments are "both involuntary and dictated by racial criteria," is an impermissible cure to an earlier constitutional violation.¹³⁴ However, when employed, as it was in this case, as "descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choice govern the assignments," the court found it permissible.¹³⁵ This concurrence, discussed below, does include a ringing condemnation of the notion that freedom of choice is a "sacred talisman" which renders segregation constitutional.¹³⁶

The *Bowman* majority actually made the subtle distinction between freedom of choice plans implemented to right the wrong of prior mandatory segregation and an "uninhibited choice" that must be made by each pupil, the latter of which bears greater resemblance to HMHS's open-admission policy. The majority states:

of itself be unconstitutional, although that argument has been urged upon us. . . . Although the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device."); *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.").

132. Hedlund, *supra* note 34, at 427-28.

133. *Id.* at 428.

134. *Bowman v. Cty. Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring).

135. *Id.*

136. *Id.*

‘Freedom of choice’ is a phrase of many connotations. Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, it is an illusion and an oppression which is constitutionally impermissible...Employed as descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choice govern the assignments, it is a very different thing. If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free.¹³⁷

Bowman thus lays out the distinction between a reparative freedom of choice plan and a freedom of choice plan in a vacuum, where context determines constitutionality.

Hedlund construes *Green* as casting freedom of choice plans as ineffective and burdensome to students and parents, but this misstates the true meaning of the holding. In *Green*, the Court quoted the Fourth Circuit *Bowman* concurrence, reiterating the inadequacy of voluntariness alone *in the quest to de-segregate a historically dual system*:

“Freedom of choice” is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a “unitary, nonracial system.”¹³⁸

In *Green*, it was unacceptable for Virginia to desegregate by *merely allowing* students to enroll in any school they wished, and indeed, this method of desegregation was manifestly ineffective; during the first three years the plan was in place, no white student enrolled in the formerly all-Black school.¹³⁹ While one hundred and fifteen Black children did enroll in the formerly all-white school,¹⁴⁰ the Court recognized that the burden of dismantling the dual school system must lie on the School Board, and not on children and their parents.¹⁴¹

137. *Id.* at 327 (majority opinion).

138. *Id.* at 333 (Sobeloff, J., concurring) (quoted in *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 440 (1967)).

139. *Green*, 391 U.S. at 441.

140. *Id.*

141. *Id.* at 441–42. Hedlund has noted that HMHS also shares this problem: “[T]he Court found Virginia’s freedom of choice plan placed the burden of desegregation on the shoulders of students and their parents, yet *Brown II* specifically placed this burden on school officials. Harvey Milk relies exclusively on a freedom of choice plan similar to Virginia in that the burden of ensuring desegregation rests on the students and parents. Not only is this burden misplaced, the plan as a result appears ineffective.” Hedlund, *supra* note 34, at 428.

2. *Green as an Application of the Reparative Principle*

Hedlund treats *Green* as though it ruled freedom of choice plans unconstitutional to remedy any and all racial segregation. *Green* dealt not with desegregation in a vacuum, however, but with freedom of choice plans that were created to comply with *Brown II*.¹⁴² *Green* held that New Kent County's voluntary integration plan did not adequately fulfill its responsibility to create a unitary school system.¹⁴³ The Supreme Court did not rule that freedom of choice plans were always unconstitutional, but rather that the plan in this case was ineffective such that it violated the Constitution.¹⁴⁴ In *Green*, the voluntary desegregation was unacceptable in the historical context of a nation-wide effort to dismantle a dual system rooted in the mandatory racial segregation of an oppressed racial minority. Other post-*Brown* cases also point to this "reparative principle" as the main justification for judicial oversight of school districts.¹⁴⁵ In the case of sexual orientation, no previously state-imposed *de jure* segregation has ever existed.

LGBT-segregated schools are thus not governed by *Brown*, which was responding to racial segregation under a very specific set of historical circumstances. The constitutional violation outlawed by *Brown* concerned Jim Crow-era racial segregation. The Supreme Court has long recognized that the constitutional violation of segregation was not merely separation by identity, but rather the existence of a dual school system based on the impermissible criteria of race.¹⁴⁶ In the case of separate schools for LGBT children, there is no dual school system to be broken down; accordingly, the *Brown* case law does not apply to schools like Alliance and HMHS. Again, unlike the mandatory segregated school system to be dismantled in *Green*, LGBT schools have open-admission policies that specifically enumerate "straight" as an accepted identity.¹⁴⁷

142. In *Brown II*, the Supreme Court delegated the actual work of dismantling the dual school system to district courts, with "all deliberate speed." *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

143. *Green*, 391 U.S. at 441.

144. *Id.* at 440-41.

145. *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) ("A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation."); *United States v. Fordice*, 505 U.S. 717, 728 (1992) (emphasizing State's obligation to cure prior constitutional violation in the form of a racialized dual system); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (emphasizing that it was the State-imposed *de jure* segregation that was invalidated in *Brown I* and sought to be corrected by *Brown II*); see also Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits Green and Swann*, 42 EMORY L.J. 821, 842-43 (1993).

146. See *Swann*, 402 U.S. at 15 ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); *Freeman*, 503 U.S. at 489 (noting that the ultimate objective of all desegregation remedies should be alleviating a past constitutional violation); *Fordice*, 505 U.S. at 728.

147. See, e.g., HMHS Admissions Application, *supra* note 27, at 1 ("Many of our students take advantage of the after-school program and services provided by HMI, an organization with

This *de facto* segregation bears more similarity to the permissible post-*Brown* re-segregation, which was the product of private choices and thus had no constitutional implications under *Freeman v. Pitts*, than it does to the pre-*Brown* dual school system.¹⁴⁸ Future desegregation advocates will therefore have to bring a fresh equal protection claim under applicable state law, if extant.¹⁴⁹ This litigation strategy has already been victorious in court; in *Sheff v. O'Neill*, advocates brought a fresh equal protection claim under the Connecticut Constitution, instead of relying on *Brown II*, successfully arguing that the state constitution banned *de facto* as well as *de jure* racial segregation.¹⁵⁰ Due to the lack of a pre-existing dual school system based on sexual orientation, future opponents of LGBT schools—like the desegregation advocates in *Sheff*—will be unable to rely on *Brown* for the proposition that separation based on student identity is a *per se* constitutional violation.

Advocates of LGBT schools might argue that they are not truly practicing segregation, and that therefore the schools would be permissible even under strict scrutiny.¹⁵¹ In reality, however, the Supreme Court has not ruled on the constitutionality of *de facto* segregation, as opposed to *de jure* segregation. Thus, the desegregation case law after *Brown* has no direct implications for LGBT schools like HMHS and Alliance.¹⁵²

D. The Comparison to Sex-Based Segregation

Advocates for LGBT segregated schools have recognized the analogous nature of LGBT schools and all-girls schools.¹⁵³ Supreme Court jurisprudence is

over a 25 year history of working with lesbian, gay, bisexual, transgender, questioning, at-risk, and straight youth.”).

148. *Freeman*, 503 U.S. at 495 (1992) (holding that resegregation is permissible when it is a product of private actions, as opposed to state action).

149. Kevin Brown, *The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students*, 29 CONN. L. REV. 999, 1000 (1997) (“Unlike school desegregation cases under the Equal Protection Clause, the affirmative obligation being imposed on the state in *Sheff* does not remedy any prior intentional segregative conduct by state officials.”) (construing *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996)).

150. *Sheff v. O'Neill*, 678 A.2d at 1283.

151. Opponents of LGBT segregation will point to other applications of *Brown* that have nothing to do with the legacy of racial segregation under Jim Crow. For example, *Brown* was recently cited to ban new segregation of Latino children within schools, in *Santamaria v. Dallas Indep. Sch. Dist.*, which struck down recently-implemented internal segregation of Latino students. *Santamaria v. Dallas Indep. Sch. Dist.*, CIV A 306-CV-0692-L, at 7 (N.D. Tex. Sep. 30, 2007). In this case, however, a basic Equal Protection claim would have been effective, as they were treating Latino students differently from other students without a compelling purpose, in a way not narrowly tailored to the governmental objective, thus failing plain strict scrutiny.

152. Part IV of this article does, however, address the danger posed by the proliferation of LGBT schools purely as a policy matter.

153. Indeed, advocates have cautioned anti-sex segregation activists to avoid creating a standard that would preclude LGBT segregated schools. *See, e.g.*, Kirkley, *supra* note 43, at 128 (“Such schools have been set up to provide an education for this special group of youth, just as special schools have been set up to provide a single-sex education for a special group of

ambivalent about differential treatment based on sex. In *U.S. v. Virginia* (“*VMI*”), the Court examined the constitutionality of maintaining a military college exclusively for males where a separate college for women was also available, appearing to accept the existence of some legitimate differences between the sexes that merit different treatment.¹⁵⁴ But while Ginsburg notes in *VMI* that sex differences were once used to perpetuate the societal inferiority of women,¹⁵⁵ acknowledging difference need not be anti-feminist. For instance, Christine Littleton articulates a flaw in the commonly accepted concept of equality that she calls the “mathematical fallacy,” or “the view that only things that are the same can ever be equal.”¹⁵⁶

To Littleton, a more meaningful way of dealing with injustice is to accept differences—whether biological or sociocultural in origin—and to strive to make them costless.¹⁵⁷ Equality can be achieved, according to Littleton, by spreading out the costs of “culturally female behavior, such as childrearing” as well as the rewards of “culturally male behavior, such as private law firm practice.”¹⁵⁸ Similarly, equality is also advanced by spreading out the rewards of culturally female behavior, such as learning to build resilient social networks of loving friends over the course of a lifetime,¹⁵⁹ and the costs of culturally male behavior, such as higher rates of fatal accidents.¹⁶⁰ The segregated LGBT schools discussed in this article, of course, are not designed to deal with either such gendered behavior differences or “inherent differences” between the sexes noted by Justice Ginsburg in *VMI*, but are instead reactions against homophobic sentiment that disempowers LGBT children. Still, there may be some merit to the contention that it is not helpful to treat different populations exactly the same as a means for achieving equality—that there may be a more nuanced approach. Thomas Mayes critiques what he calls “over-reliance on the *Brown* analogy,” claiming that it may lead to “inappropriate treatment of sexual minority

students.”).

154. As Justice Ginsburg explained: “The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring . . . ‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *United States v. Virginia (VMI)*, 518 U.S. 515, 533–34 (1996) (citations omitted).

155. *Id.* at 534.

156. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282 (1987).

157. *Id.* at 1285.

158. *Id.*

159. Beth Hess, *Sex Roles, Friendship, and the Life Course*, 1 RESEARCH ON AGING 494 (1979).

160. L. Hussain & A. Redmond, *Are Pre-Hospital Deaths from Accidental Injury Preventable?*, 308 BMJ 1077 (1994) (“Young men in road traffic accidents account for the largest proportion of pre-hospital deaths . . .”).

students.”¹⁶¹ While educating all students in a common setting despite all differences “may be the ideal and attainable in nearly all situations,” he writes, “an unwavering adherence to this concept may ignore the real needs of real students caused by real differences. In other words, sometimes equal treatment is unjust and masks injustice.”¹⁶² In this light, it is understandable that both girls and LGBT students might face challenges in receiving an equal education within a system originally designed to best serve straight (cisgender, white) boys.¹⁶³ Kim Kirkley draws an explicit connection between HMHS and the Young Women’s Leadership School of East Harlem (YWLS), casting the schools as strategic mechanisms to combat the violence both girls and LGBT youth face in our schools today:

[T]oo many schools ignore the very real obstacles, including violence, homophobia, and sexism, that prevent young people from attaining the skills, tools, and credentials necessary for finding direction in their own lives and the world. The Harvey Milk School and the East Harlem Girl’s School provide alternatives to documented inequities in the public education system. As society attempts to provide an equal education to all children, such alternatives must be considered and supported, especially where they seem to provide the only viable avenue to the public education that is every young person’s right.¹⁶⁴

The fact that single-sex schools are multiplying, however, does not mean they are constitutional. The closest the Court has come to addressing the constitutionality of sex segregation was in *VMI*, in which the Court held that it was unconstitutional to exclude women from a school when the substitute provided was inadequate—a fairly narrow holding.¹⁶⁵ The Court held that the constitutional violation was not cured by the women’s school that was established, Virginia Women’s Institute for Leadership, because it did not “provide equal opportunity,” not because no similarly sex-segregated institution could *ever* provide equal opportunity, or because sex segregation is a *per se* evil.¹⁶⁶ While government actors may not use sex classifications to perpetuate the legal or social subordination of women, under *VMI*, they may use such classifications to benefit women in ways that compensate them for past wrongdoing.¹⁶⁷ While the Supreme Court in *Brown* held segregation by race to

161. Mayes, *supra* note 2, at 345.

162. *Id.*

163. See Pamela J. Smith, *Our Children’s Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 *How. L.J.* 133, 136 (1999) (explaining that “part of the problem may be that the public school system, Eurocentrically created, focused and run, has never made it its actual mission to educate all children equally and effectively.”).

164. Kirkley, *supra* note 43, at 137.

165. *United States v. Virginia (VMI)*, 518 U.S. 515, 534 (1996).

166. *Id.*

167. Ginsburg stated: “Sex classifications may be used to compensate women ‘for particular

be impermissible, under *VMI*, segregation by gender remains an open question; “separate but truly equal” schools for boys and girls may yet stand under current case law.¹⁶⁸ Thus, supporters of LGBT schools may argue that the Court should take the *VMI* approach for sexual orientation as well as gender.

IV.

LGBT SCHOOLS SHOULD BE MAINTAINED BUT NOT EXPANDED

While LGBT schools may withstand constitutional challenges, LGBT rights advocates should not allow them to proliferate in a way that is detrimental to true, LGBT-affirming student integration. While HMHS and Alliance are voluntarily segregated schools established to promote LGBT-affirming ideals, there is a risk that less tolerant school districts may try to establish separate schools for LGBT students rather than promoting tolerance, ending bullying, and changing cis-heterosexist school cultures. If the Court decides to maintain “rational basis with bite” as the standard of review for classifications based on sexual orientation, the establishment of involuntarily segregated LGBT schools may actually be constitutional, since “rational basis with bite” allows for scientific or non-animus-based rationales for classifications—even those which have the effect of disadvantaging LGBT individuals.¹⁶⁹ Thus, hypothetically, under “rational basis with bite,” if some studies were to show that the knowledge of homosexuality’s existence in schools negatively impacted achievement, or that resources drawn from traditional classes towards conflict resolution skills or diversity education caused performance to drop, a clever litigant might be able to use that justification to support involuntary segregation of LGBT students.¹⁷⁰ As discussed below, this would unfairly burden LGBT students and their families, as well as impoverishing the educational environment for all students—including straight children.

economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ to advance full development of the talent and capacities of our Nation’s people.” *Id.* at 533–34 (citations omitted).

168. See Brittenham, *supra* note 14, at 886–87 (comparing the *Brown* and *VMI* decisions, and pointing out that *VMI* did not prohibit educational segregation on the basis of gender).

169. *The Benefits of Unequal Protection*, *supra* note 75, at 1367–68.

170. Of course, mere bias also presents its own threat; the “Don’t Ask, Don’t Tell” policy of the military, for example, was repeatedly upheld under “rational basis with bite.” *Id.*; see, e.g., *Witt v. Dep’t of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (upholding the suspension of an Air Force reservist nurse on account of her lesbian relationship, applying *Lawrence*-style “rational basis with bite” scrutiny and upholding DADT as advancing the important governmental interest of military management). Admitting that “*Lawrence* requires something more than traditional rational basis review,” *Witt*, 527 F.3d at 813, the Court in *Witt* still relied on earlier rational basis case law to uphold DADT: “Philips clearly held that DADT does not violate equal protection under rational basis review, and that holding was not disturbed by *Lawrence*, which declined to address equal protection,” *id.* at 821 (citations omitted).

A. Creating Separate LGBT Schools Shifts Burden to LGBT Students

While LGBT schools are likely constitutional under desegregation case law for the reasons discussed above, the schools raise potential negative policy consequences that merit careful consideration. Broadly speaking, segregation as a response to hostility sidesteps bad behavior instead of addressing it head-on.¹⁷¹ Segregation of LGBT children may help maintain the physical security of individual victims, but it does not address administrative neutrality towards bullying, which may cause real psychological damage in and of itself. LGBT schools formed in reaction to hostility risk giving tacit approval to that hostility by treating LGBT students' difference as the problem, rather than aiming to prevent homophobic and transphobic violence. As Michael Ritter explains, “[w]hile administrative neutrality may not have as direct of an effect as targeted physical and verbal abuse by student bullies, it nevertheless signals a preference for heterosexuality and gender conformance and compounds the scourge of anti-LGTBQ bullying.”¹⁷²

Voluntary segregation of LGBT children provides schools with an “out,” shifting the onus to parents and LGBT children to transfer to more tolerant schools, which may entail transportation or relocation costs, in addition to the psychological adjustment to a new school environment. Louis Nappen contends that the availability of segregated public schools, given the current violent environment, is akin to implicitly pressuring LGBT students out of their home schools.¹⁷³ Opponents of LGBT-segregated schools argue that rather than referring students to alternative schools, districts should proactively defend victimized LGBT students, discipline offenders, and offer self-defense and conflict-resolution classes.¹⁷⁴

1. The Bathroom Debate

The bathroom debate around transgender students exemplifies the harm that can be done, both to society and to transgender children, by treating students differently based on their social identities. Consider the case of Coy Mathis, a

171. See UNESCO BANGKOK, SINGLE-SEX SCHOOLS FOR GIRLS AND GENDER EQUALITY IN EDUCATION – ADVOCACY BRIEF 1, 5 (2007) [hereinafter UNESCO BANGKOK ADVOCACY BRIEF] (noting that instead of addressing boys' tendencies to talk over girls during class, or asking that boys learn to listen, the girls are removed from the environment as though their learning style is the problem), <http://www.ncgs.org/Pdfs/Resources/161194eo.pdf> [<https://perma.cc/8NE3-N5AU>]; Nappen, *supra* note 3, at 129 (“NOW reported that separating girls from boys “treats girls as the problem by removing them from the presence of their male peers.””).

172. Michael J. Ritter, *Teaching Tolerance: A Harvey Milk Day Would Do A Student Body Good*, 19 TEX. J. WOMEN & L. 59, 62–63 (2009).

173. Nappen, *supra* note 3, at 122. Nappen also points out the perverse incentive structure in place for admission to HMHS: “Indeed, applicants to HMHS are given acceptance preferences based on their past experiences in schools. Essentially, the more traumatic the past experiences, the better the chance of getting into HMHS.” *Id.*

174. See *id.* at 133.

transgender girl who wanted to use the girls' bathroom at her elementary school.¹⁷⁵ A few months after Coy entered first grade, the school informed her parents that Coy could no longer use the girl's restroom.¹⁷⁶ Instead, she would be provided access to either the boys' restroom, or to one of the single-user restrooms—the staff or health office restroom.¹⁷⁷ In their defense brief, the school district employed rhetoric that superficially echoed some of the same justifications used to promote the existence of LGBT schools: safety and prevention of harassment and bullying.¹⁷⁸ In its decision in favor of the Mathis family, the Colorado Division of Civil Rights compared the school's policy to that of "separate but equal," and discussed the essential but non-academic learning that takes place in schools, including the learning of "social skills, such as respect, communication, trust, how to appropriately interact with people from different backgrounds, and how to become part of a community," all of which would be threatened by prohibiting Coy from using the girls' restroom.¹⁷⁹ As the director of the Division explained:

Relegating [Coy] to a set of restrooms which no other student is likely to use, even if permitted to do so, would prove disruptive to her learning environment and overtly demonstrate her separateness from the other students . . . This deprives [Coy] of the acceptance that all students require to excel in their learning environment, creates a barrier where none should exist, and entirely disregards [her] gender identity.¹⁸⁰

This decision shows the Division's recognition of the huge value of normalization of LGBT identities in the lives of children. This normalization cannot be realized via separate schools, or even via separate facilities for non-cisgender or non-straight children. Allowing schools to resort to separation of students unfairly places the burden on them and their family, when it should be the responsibility of the school district to enforce its own policies against bullying, harassment and violence.¹⁸¹

175. See *Mathis v. Fountain Fort Carson Sch. Dist. 8*, Charge No. P20130034X (Colo. Dep't of Regulatory Affairs, Div. of Civil Rights, June 17, 2013) (Colorado State Division of Civil Rights Determination), http://www.transgenderlegal.org/media/uploads/doc_529.pdf [<https://perma.cc/7VZQ-R7ZV>].

176. *Id.* at 5.

177. *Id.*

178. *Id.* at 12.

179. *Id.* at 13.

180. *Id.*

181. The *Mathis* decision actually compares the burden-shifting inherent in Coy's treatment by her school, and posited that such behavior would be immediately and intuitively unacceptable to her school authorities if it were a question of racial difference: "The Respondent's concern for the Charging Party and future transgender students must be handled in the same manner as it would handle any other type of safety concern for its students. For example, the Respondent would likely not consider having a separate classroom for African American students because it was concerned that they may be subjected to racial harassment, even though that harassment had not

B. Segregation by Sexual Orientation Harms Everyone

Maintaining segregated schools as a solution to heterosexism and the psychological distress of LGBT students does not address the broader problem of heterosexism in mainstream public schools, which hurts everyone, including straight students. In the *Diaz v. Bloomberg* challenge to HMHS, the plaintiff claimed that LGBT schools violate the rights of heterosexual students.¹⁸² This claim is stronger than it may first appear—while it is unlikely that LGBT school students were getting an unfair advantage in terms of resources (as Senator Diaz argued), separating out LGBT students reduces student diversity in mainstream schools, thus diminishing those schools’ ability to provide an optimal educational environment for all students.

Advocates of desegregation have argued that identity-based separation is harmful in that it compromises students’ engagement with the diversity of their broader societies, including in-group diversity.¹⁸³ Consider, for example, separation by sex—for all the purported benefits for girls, there remain risks. UNESCO has actually conducted research on this topic, compiling sociological data on single-sex schools and applying it to the very different regional context of Asia.¹⁸⁴ In sex-segregated school systems, UNESCO found that there is a risk that all-boys schools may “fan the flames of sexism,” and cause “alienation between boy students.”¹⁸⁵ Arguably, separating children based on identity may harm the more powerful group, by limiting their view of humanity. In this way, tolerance of diversity in schools not only benefits the oppressed group, but also allows nonconforming members of the dominant group to better self-actualize.¹⁸⁶ Not all cisgender or all heterosexual students fit within the same mold of rigid gender expectations, and increased tolerance of sexual orientation and gender spectrum diversity allows for *all* children to have more freedom—not

yet occurred. It is assumed that the Respondent would not tolerate such harassment and would discipline the alleged harasser. In similar fashion, the Respondent’s response to potential harassment or bullying of the Charging Party and future transgender students would be to discipline the alleged harasser, not to segregate the students who were being harassed. Otherwise, the Respondent risks inciting the very harassment it is attempting to prevent and implicitly endorses further harassment.” *Id.* at 12.

182. Herszenhorn, *supra* note 25.

183. *See, e.g.*, UNESCO BANGKOK ADVOCACY BRIEF, *supra* note 171, at 5 (discussing the negative impacts of gender-based separation, such as the reinforcement of stereotypes).

184. *Id.*

185. *Id.*

186. A UK-based study of boys’ education phrases it well: “there are those boys who define their sexuality differently from the ‘mainstream’ macho, football-loving boys: gentle caring boys who find their comfort zone in the company of girls and women. Whilst there are boys who can be aggressive perpetrators of homophobic aggression against other boys, not all boys act in the same way.” MIKE YOUNGER & MOLLY WARRINGTON, U.K. DEP’T FOR EDUC. & SKILLS, RAISING BOYS’ ACHIEVEMENT 18–19 (2005) (internal citations omitted), <http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/RR636.pdf>.

just LGBT children.¹⁸⁷ Thus heterosexism hurts all students, not just LGBT students.

In Kristina Brittenham's sweeping discussion of anti-segregation arguments, she takes a comprehensive but ultimately very *Brown*-like perspective on separate schools for LGBT children.¹⁸⁸ That is, she places concerns about minority children's feelings of inferiority at the forefront, along with the alarming possibility that the majority will make negative assumptions about the minority.¹⁸⁹ Heterosexual, cisgender students, however, are directly harmed by cisheterosexism; in one very concrete example, straight students allied with LGBT peers face harassment similar to that with which LGBT students themselves are confronted.¹⁹⁰ This is also true for straight, cisgender students who are merely suspected of being LGBT.¹⁹¹ The harm of heterosexism and heterosexist violence goes still deeper, terrorizing even students not currently perceived as LGBT, who learn to fear future bullying if they are ever perceived as being different.¹⁹² As Michael Ritter puts it: "heterosexism in public schools indiscriminately and adversely affects all students, regardless of their sexual orientations or gender identities."¹⁹³ Thomas Mayes agrees, explaining that "toxic, heterosexist school climates have additional and negative effects on straight students."¹⁹⁴

Randy Hedlund argues that gay students are harmed by segregation because it does not prepare them for the monolithic heteronormative¹⁹⁵ culture he believes they will face upon graduation.¹⁹⁶ If we assume instead that both

187. Inmaculada de Melo-Martin, *Sex Selection and the Value-Ladenness of the Procreative Liberty Framework*, in *DESIGNER BIOLOGY: THE ETHICS OF INTENSIVELY ENGINEERING BIOLOGICAL AND ECOLOGICAL SYSTEMS* 16 (John Basl & Ronald Sandler, eds. 2013) (stating that historically, rigid gender expectations have been used to limit the life options of both men and women).

188. Brittenham, *supra* note 14, at 881–82 ("Segregated minorities often experience disturbing feelings, such as a sense of inferiority, internal conflict regarding self-worth, aggressiveness, martyrdom, submissiveness, and a tendency to withdraw.").

189. *Id.*

190. Ritter, *supra* note 172, at 62.

191. *Id.*

192. *Id.*

193. *Id.*

194. Mayes, *supra* note 2, at 342.

195. Oxford Dictionaries defines "heteronormative" as "Denoting or relating to a world view that promotes heterosexuality as the normal or preferred sexual orientation." *Heteronormative Definition*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/heteronormative> [<https://perma.cc/H7YC-ESEQ>].

196. Hedlund, *supra* note 34, at 429 ("Separating homosexual students from heterosexual students . . . fails to prepare students for a homogenous society that awaits them after graduation. Outside Harvey Milk's protective walls lies a world that requires the interaction of all races, ethnicities and sexual preferences. Education is not found merely in books; much is learned from the interaction and diversity of a student's peers. The Supreme Court has approved of institutions of higher learning that place great emphasis in establishing diversity in the classroom. Shielding gay students from this reality until they graduate high school defeats a crucial objective of compulsory education.").

straight and LGBT students will face a diverse national culture after graduation, then Hedlund's logic suggests that integration is actually necessary for the adequate instruction of straight children. That is, Hedlund's argument faults LGBT schools for mispreparing students for adulthood by presenting them only with other LGBT students as peers, when in fact, mainstream schools would misprepare students for adulthood by *not* presenting them with LGBT students as peers. One important way that cisheterosexism hurts cisgender, straight children, similar to how racism hurts white people, is that it limits their conception of what it means to be human.¹⁹⁷ Teaching racism to children has even been called child abuse;¹⁹⁸ homophobia or heterosexism is no different.

C. We Should Nevertheless Maintain Existing LGBT Schools as Havens of Last Resort

Ending homophobia and hatred in mainstream society should be a major goal of public education. However, many public schools remain physically and psychologically dangerous places for LGBT children. We should thus maintain existing LGBT schools as havens of last resort.

LGBT students face evils very different from those confronted by the Black children whose rights were addressed in *Brown*.¹⁹⁹ Additionally, school districts

197. See, e.g., Judy Katz & Allen Ivey, *White Awareness: The Frontier of Racism Awareness Training*, 55 PERSONNEL & GUIDANCE J. 485, 485 (1977); John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1794 (2000) (“[Segregation] worked a terrible evil. Although I cannot speak for my African-American neighbors, since segregation foreclosed my opportunity ever to know them, it was a psychologically damaging and educationally destructive experience for my white friends and myself and, I venture, for millions of other [white] children. It has taken literally decades for my generation to begin to shed the unconscious, but pernicious, grip of the segregated environments in which we were brought up, with all of the fears, suspicions, and misunderstanding that they created.”). The website of the Massachusetts Conference of the United Church of Christ also has a fascinating page on the drawbacks of racism for white people: “While there is no comparison with the effects on people of color, white people are also dehumanized and burdened by racism.... The position of supremacy is inherently dehumanizing to individuals in the dominant group, in addition to the terrible costs to the subordinated group. Our full humanity can only be realized in full community with other human beings—in situations of reciprocity, equity, fairness, and mutuality—with all of God’s children.” *Racism Hurts Everyone - Costs to White People*, MASS. CONF. OF THE UNITED CHURCH OF CHRIST, <http://www.macucc.org/racismhurtseveryone/coststowhitepeople> [<https://perma.cc/7TLJ-Z7PY>] (emphasis added).

198. See Brooke A. Emery, *The Upbringing of a Creature: The Scope of a Parent’s Right to Teach Children to Hate*, 4 MOD. AM. 60, 62 (2008) (“Some members of the psychiatric community have argued that teaching racism to a child is a form of psychological abuse, which constitutes child abuse in some States.”) (citing several state statutes defining the psychological/mental/emotional abuse of children).

199. As Mayes explains:

[T]he evidence demonstrates that the nature and sources of inferiority based on race and based on sexual orientation or gender identity are different. Specifically, while segregation in education based on race served to transmit and reinforce the racist ideology of white supremacy . . . educating sexual minority students in the toxic, heterosexist environments characteristic of most schools serves to “punish targets for transgressing norms about sex roles and to

may want to address their fears differently this time around; while it may be constitutional to ignore children's concerns of assault or violence, I posit that it would nevertheless be unconscionable. Judges or attorneys could feasibly cite to *Cooper* and assert that private bias is not a defense to unlawful segregation of children;²⁰⁰ "private bias," however, is a euphemistic way of referring to the murder and suicide of children that continues to occur in the United States at alarming rates.²⁰¹ It is true that in the wake of *Brown*, courts were unsympathetic to claims that segregation would help avoid racial conflict.²⁰² But it is also true that Black children and their families were the ones victimized by this violence in schools. Louis Nappen advocates a similar response to homophobic violence in schools, saying that we should "do the equivalent of sending in the National Guard" to ensure the safety of LGBT children.²⁰³ Sending in the National Guard, however, does not necessarily solve the problem—the "Little Rock Nine," for example, a group of Black teenagers who attended a formerly segregated white high school while accompanied by armed federal guards, were "kicked, punched, pushed, scalded with hot food, rendered unconscious by blows to the head, threatened to have their eyes burned and faces scarred by acid sprays," and threatened with lynching, despite the presence of the National Guard.²⁰⁴ LGBT students in integrated schools also face assault on a regular basis; two thirds of LGBT students feel unsafe at school; thirty-eight percent of LGBT students were assaulted because of their identity in 2010 alone.²⁰⁵

Black children, in the wake of desegregation, bore the sins of our country's racist past on their bodies in a very literal sense; it would be callous and inhumane to demand that LGBT children do the same with our nation's homophobia. The Little Rock Nine deserved better than the horrific violence they were subjected to while pursuing their education, and it is unconscionable to preserve the status quo for bullied LGBT students merely out of anti-segregation ideals which may be untethered to their lived experience.²⁰⁶ Norman Rockwell's painting *The Problem We All Live With* depicts Ruby Bridges, one of the first Black children to attend a previously all-white school, surrounded by

enforce 'compulsory heterosexuality.'" . . . While the racially segregated school systems in *Brown* communicated the government's view of nonwhite students as inferior, the Harvey Milk High School has the opposite effect.

Mayes, *supra* note 2, at 345–46.

200. See *Cooper v. Aaron*, 358 U.S. 1, 7 (1958) (discussing how a desire to preserve the peace cannot justify the segregation of Black children).

201. See *supra* notes 49–64 and accompanying text.

202. See *Cooper*, 358 U.S. at 7.

203. Nappen, *supra* note 3, at 130.

204. Smith, *supra* note 163, at 219.

205. GLSEN, 2011 NAT'L SCH. CLIMATE SURVEY, *supra* note 44, at xiv.

206. See Nappen, *supra* note 3, at 116 (discussing suicide and drop-out rates, explaining that, "Under safety and health rationales, LGBTQ students deserve for new approaches to be taken toward their educations.").

deputy United States marshals.²⁰⁷ But the violence of racial integration in schools was not a problem “we all” lived with; it was a problem Black children lived with, and sometimes died from.²⁰⁸

As was the case in *Brown*, neither alternative is fair to the students—bullying or separate schools, subordination or isolation. Separate educational environments that are affirming for marginalized students, however, do offer one escape from violence and oppression. Some educators in the Black community, for example, still recognize the value of culturally-affirming education, as evidenced by the continued existence of the Betty Shabazz International Charter School, an Afro-centered network of charter schools in Chicago.²⁰⁹ The school claims to produce high-achieving students with “a strong sense of cultural identity.”²¹⁰ This anti-subordination model of education reflects the belief that separate schools have the power to enhance both marginalized community cohesion and individual student success. For LGBT students, separate schools have the potential to empower them by removing them from harm and affirmatively developing minority community pride and acceptance. In the current educational climate, these schools also have the potential to save lives.

Teachers at The Alliance School understand the misgivings of anti-segregation advocates, and acknowledge the risks of impunity for bullies, but they cite more pressing concerns to justify LGBT schools, such as immediate safety.²¹¹ HMHS similarly tries to reconnect students with traditional schools, but advocates would argue that because it was founded and still serves as a last resort for many, the students who find refuge at HMHS would often otherwise be living on the streets.²¹² Civil rights attorney Kim Kirkley implicitly advocates for a more compassionate approach to desegregation this time around:

207. See Norman Rockwell, *The Problem We All Live With*, NORMAN ROCKWELL MUSEUM, http://www.nrm.org/2011/05/norman-rockwells-the-problem-we-all-live-with-to-be-exhibited-at-the-white-house/problem_web-3/ [<https://perma.cc/8A9V-9XVZ>].

208. See SARA BULLARD, *FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE 64* (1994) (discussing the deaths of two school-aged boys, Virgil Lamar Ware and Johnny Robinson, in the wake of anti-desegregation violence).

209. *History*, BETTY SHABAZZ INTERNATIONAL CHARTER SCHOOLS http://www.bsics.org/apps/pages/index.jsp?uREC_ID=179003&type=d [<https://perma.cc/28FW-LTRC>].

210. *Id.* Its website explains how African-centered education can improve the lives of students: “This model has shown that by integrating African culture, history and values into our rigorous academic curriculum and throughout our school environment, and by hiring loving and committed teachers, the children we educate will develop the cultural pride and self-confidence they need to accelerate their pace of learning and excel academically.” *Id.*

211. Calefati, *supra* note 5 (“Moore says he worried about what they could accomplish, since students who graduated would return to environments that might not fully accept gay individuals. But he concluded that the bullying would not dissipate anytime soon and that if gay students felt safer in school, they could better learn the skills that could help them succeed as adults. ‘Trying to fix a problem like bullying by forcing students to go through a bad experience is a bad approach,’ Moore says.”).

212. See, e.g., Kirkley, *supra* note 43, at 131–32; Carrie Kilman, ‘*Homo High*’, 37 *TEACHING TOLERANCE* 36, 39 (Spring 2010) (quoting then-executive director of the Gay, Lesbian & Straight Education Network, Eliza Byard, as saying, “Given the inequalities in the existing system, these

Ultimately, of course, the goal is to eradicate homophobia and to provide gay young people an education along-side others. In the meantime, however, there are students for whom the public school environments are so extremely hostile that sometimes their only chance is outside of the mainstream public school environment.²¹³

Kirkley concedes that ideally, LGBT students would no longer need separate schools because “all public institutions would recognize and respect the intrinsic dignity of all human beings regardless of race, gender, national origin, economic status, religion or sexual orientation.”²¹⁴ She contends, however, that LGBT children should not have to suffer through terrifying school environments for the sake of integration, as the Little Rock Nine were forced to do.²¹⁵ She does not ask that LGBT children pay for the failures of adults to protect them from discrimination.²¹⁶ These arguments, and those of anti-subordination advocates, prioritize the “real educational needs of real children who face obstacles in public schools over any perceived abstract need to treat them the same as everyone else.”²¹⁷ Finally, even if physical violence were eradicated in mainstream schools, there is still risk of psychological violence against LGBT students.²¹⁸ Much as Black students did not benefit from the ignorant cultural expectations of white teachers during desegregation,²¹⁹ mainstream schools retain heterosexist and transphobic pressure on LGBT children to “pass” as straight and cis in order to avoid persecution from their peers and teachers.²²⁰

schools are essential resources of last resort for students who may otherwise not graduate. They fill a pressing need.”), http://www.tolerance.org/sites/default/files/TT37_complete_issue.pdf [<https://perma.cc/TW7Y-FEDA>].

213. Kirkley, *supra* note 43, at 128.

214. *Id.* at 137.

215. Smith, *supra* note 163, at 219 (describing the physical violence perpetrated on the Little Rock Nine when they integrated Central High School).

216. Kirkley, *supra* note 43, at 136–37 (arguing that the severity of the problem of harassment of lesbian and gay students justifies the continued support of schools such as the Harvey Milk School).

217. Brittenham, *supra* note 14, at 880.

218. *See, e.g.*, GLSEN, 2011 NAT’L SCH. CLIMATE SURVEY, *supra* note 44, at xiv (noting that the vast majority of LGBT students surveyed had heard homophobic language at school, and that the vast majority of those who heard homophobic remarks felt “distressed” because of it).

219. *Cf.* Derrick A. Bell, Jr., *Book Review*, 92 HARV. L. REV. 1826, 1830 (1979) (“The Portland school board’s policy equated integration and racial assimilation. This policy, Rist explains, is a ‘means of socializing nonwhite students to act, speak, and believe very much like white students’ It leaves dominant group values intact, does no damage to notions of White superiority, and helps to gain the support of those Whites who view it as a means of helping ‘nonwhite’ peoples to become fully human by instilling in them ‘white’ ways of thinking and feeling.”).

220. *See* Ritter, *supra* note 172, at 62–63 (discussing how schools’ administrative neutrality signals a preference for heterosexuality and gender conformance).

V.
CONCLUSION

Creative advocates have established identity-affirming schools for some of our nation's most vulnerable children. These schools provide an education to students who might otherwise have been denied this basic human right.²²¹ Recent legal victories for the LGBT community arguably point towards incipient heightened scrutiny for sexual orientation, which may actually threaten some programs that have benefited the LGBT community. Opponents may even try to use heightened scrutiny to attack separate LGBT schools, which are less vulnerable under the current unofficial standard of review for sexual orientation classifications, "rational basis with bite."

A close reading of post-*Brown* desegregation case law, however, reveals that even strict scrutiny presents no special threat to schools like HMHS and Alliance. *Brown* did not ban *de facto* segregation, but instead ordered the dismantling of a dual school system. While fraught as a policy choice, segregated LGBT schools provide vital benefits for marginalized groups, including a sense of cultural identity, community pride and acceptance, and increased physical safety. They should thus be maintained as havens of last resort in light of the continued harassment LGBT students face in mainstream public schools.

221. See G.A. Res. 217 (III) A, art. 26, Universal Declaration of Human Rights (Dec. 10, 1948) (declaring education that promotes tolerance and understanding to be a human right), <http://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/78LB-UT2Z>].