

# BORN TO EQUALITY: Minor Children, Equal Protection, and State Laws Targeting LGBTQ+ Youth

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*States throughout the country are targeting LGBTQ+ youth, singling out transgender youth in particular. Part I of this Article provides an overview of laws targeting LGBTQ+ youth, and argues that many of these laws express animus towards and impose a stigma upon LGBTQ+ minor children. Though they are distinct doctrines, the Court has interwoven animus and stigma-based arguments throughout its gay rights jurisprudence to protect LGBTQ+ individuals from state action that imposes dignitary harm. Laws targeting LGBTQ+ youth often evince the same irrational hostility and stigmatizing purpose that the Court rejected decades ago.*

*Historically the Court's LGBTQ+ jurisprudence has focused on adults. Yet, as Part II argues, minor children have a special claim to be protected from animus and stigmatic harm. Throughout its equal protection doctrine, the Supreme Court has repeatedly resolved profound questions of race, sex, gender, sexual orientation, and citizenship by considering how state action affects the lives, interests, and relationships of minor children. This Article demonstrates that the Court has recognized that minor children deserve heightened protection from laws that impair their ability to view themselves, their peers, and their families as equal members of the community.*

*The upshot of these arguments is that, when considering state laws targeting LGBTQ+ youth, the Court should probe the state's proffered justification for pretext. As Part III argues, the most common justification for laws targeting LGBTQ+ youth—that such laws protect parental rights—is indeed pretextual. In fact, many recent state laws undermine the rights of parents of LGBTQ+ youth. Part IV proposes an alternative interpretation of recent parental rights rhetoric, arguing that this rhetoric masks a concerted political effort to re-stigmatize LGBTQ+ identity itself.*

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## INTRODUCTION

“Rarely has so much fear and anger been directed at so few.”  
– Utah Governor Spencer Cox

“Children, I confess, are not born in this full state of Equality, though they are born to it.” – John Locke

It is a distressing time to be young and queer in America. Consider, for example, the experience of LGBTQ+ youth in our nation’s public schools. Bills restricting or banning the mere mention of sexual orientation or gender identity in public education have been proposed or enacted in over twenty states.<sup>1</sup> Much of the rhetoric accompanying these bills portrays LGBTQ+ identity as pathological and depraved, unsuitable to be included in any way in public school curricula.<sup>2</sup> Florida’s House Bill 1557 (“H.B. 1557”), an early model for such legislation, has now been expanded to cover *all* grade-levels in Florida public schools.<sup>3</sup> LGBTQ+ students in Florida, some of whom are legal adults, are now forbidden from learning about or discussing their identities or families in the classroom.

H.B. 1557 has already prompted within Florida schools the removal of LGBTQ+-inclusive iconography, the banning of innocuous reading materials, the suppression among students and faculty of discussion of gay family members, and, predictably, an increase in bullying and harassment targeting LGBTQ+ students.<sup>4</sup> That some Florida students would demean their LGBTQ+ peers is hardly surprising in light of the fact that Florida officials involved in the creation and promotion of H.B. 1557 often describe proponents of LGBTQ+ education as child sexual predators.<sup>5</sup> The lesson is clear: LGBTQ+ individuals, and their allies, are beyond the pale.

Additionally, public hostility toward LGBTQ+ identity has grown considerably outside of the classroom. Flagrantly unconstitutional bans on drag

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1. See Eesha Pendharkar, *Which States Are Considering ‘Don’t Say Gay’ Bills and Where They Stand*, EDUC. WEEK (Feb. 28, 2023), <https://www.edweek.org/policy-politics/which-states-are-considering-dont-say-gay-bills-and-where-they-stand/2023/02>.

2. See *infra* Part I.

3. See Hannah Natanson, *Florida Bans Teaching About Gender Identity in All Public Schools*, WASH. POST (Apr. 19, 2023, 6:32 PM), <https://www.washingtonpost.com/education/2023/04/19/florida-bans-teaching-gender-identity-sexuality>.

4. See Matt Lavietes, *As Florida’s ‘Don’t Say Gay’ Law Takes Effect, Schools Roll Out LGBTQ Restrictions*, NBC NEWS (June 30, 2022, 10:18 AM), <https://www.nbcnews.com/nbc-out/out-news/floridas-dont-say-gay-law-takes-effect-schools-roll-lgbtq-restrictions-rcna36143>; see also Abbie E. Goldberg, *Impact of HB 1557 (Florida’s Don’t Say Gay Bill) on LGBTQ+ Parents in Florida*, WILLIAMS INST. AT UCLA SCH. L. (Jan. 2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf>.

5. See *infra* Part I.

performances proliferate.<sup>6</sup> Extremist violence targeting LGBTQ+ individuals, and transgender individuals in particular, has dramatically increased.<sup>7</sup> Harassment and violent threats toward employees of public institutions supportive of LGBTQ+ individuals occur in some areas with alarming regularity.<sup>8</sup> Amidst this backlash, at least one Supreme Court Justice has called for the Court to ‘reconsider’ *Lawrence v. Texas* and *Obergefell v. Hodges*,<sup>9</sup> and at least one state Attorney General has stated publicly that, should the Court overturn *Lawrence*, the state would enforce its anti-sodomy laws.<sup>10</sup>

Meanwhile, several states and public schools are blocking access to resources that support LGBTQ+ identity. Public schools in several states have investigated, disbanded, or made it more difficult for students to form or join organizations supportive of LGBTQ+ identities.<sup>11</sup> Several states are also seeking

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6. See Josie Lenora, *Despite All the Talk, No States Have Active Laws Banning Drag in Front of Kids*, NPR (July 29, 2023, 12:31 PM), <https://www.npr.org/2023/07/29/1190306861/drag-bans-fail-lgbtq-first-amendment-prurient-arkansas-florida-tennessee-montana> (describing the inability of states to enforce drag bans in light of the First Amendment).

7. See Hannah Allam, *Pride Events Targeted in Surge of Anti-LGBTQ Threats, Violence*, WASH. POST (June 17, 2022, 7:00 AM), <https://www.washingtonpost.com/national-security/2022/06/17/lgbtq-pride-violence/> (“The Human Rights Campaign, the nation’s largest LGBTQ advocacy group, says the past year saw record violence against transgender and gender-nonconforming people.”).

8. See Mario Koran, *Bomb Threats, Canceled Events, Empty Schools: How a Bullying Probe Paralyzed a Wisconsin Town’s Democracy*, WIS. WATCH (July 16, 2022), <https://wisconsinwatch.org/2022/07/how-a-bullying-probe-paralyzed-a-wisconsin-towns-democracy/> (describing bomb threats that were made at a middle school after the school opened a Title IX investigation against three students for “allegedly bullying a transgender student”); see also Pablo Arauz Peña, *Denton Library Cancels LGBTQ-Friendly Event Due to Threats and Misinformation*, ART&SEEK (Nov. 16, 2021, 7:03 PM), <https://artandseek.org/2021/11/16/denton-library-cancels-lgbtq-friendly-event-due-to-threats-and-misinformation/> (describing a “viral response on social media” that included “calls for violence” after a library planned a “[children’s story time] event for the Transgender Day of Remembrance”); Kim Bellware, *Proud Boys Disrupt Drag-Queen Reading Event, Prompting Hate-Crime Probe*, WASH. POST (June 13, 2022, 7:12 PM), <https://www.washingtonpost.com/nation/2022/06/13/proud-boy-drag-queen/> (describing how, at a library, “a group of five men interrupted [Drag Queen Story Hour] and began hurling homophobic and transphobic insults at attendees, including the drag performer”); Samantha Hernandez, *Iowa Library, Roiled by Book Banning Debate, Temporarily Closes with No Director*, DES MOINES REG. (July 16, 2022, 1:04 PM), <https://www.desmoinesregister.com/story/news/politics/2022/07/15/vinton-iowa-library-embroiled-banned-book-debate-temporarily-closes-director/10012526002/> (describing the resignations of one library director who “faced criticism over the hiring of LGBTQ employees and certain books in the library” and another director who was worn down by vitriol as an openly gay man); Blake Farmer, *Families Fear a Ban on Gender-Affirming Care in the Wake of Harassment of Clinics*, NPR (Nov. 1, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/11/01/1132891918/families-fear-a-ban-on-gender-affirming-care-in-the-wake-of-harassment-of-clinic> (describing that doctors working at clinics providing gender-affirming care “have been harassed, despite following the evolving standards of care for trans teens” and are “worried about losing [their] license to practice medicine”).

9. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (arguing that “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*”).

10. Wells Dunbar, *Ken Paxton Says State Could Prosecute Sodomy Laws Should Supreme Court, Texas Law Allow It*, TEX. STANDARD (July 1, 2022, 1:20 PM), <https://www.texasstandard.org/stories/ken-paxton-says-state-could-prosecute-sodomy-laws-should-supreme-court-texas-law-allow-it>.

11. See Hannah Natanson, *LGBTQ Clubs Were Havens for Students. Now They’re Under Attack*, WASH. POST (June 28, 2022, 6:12 AM), <https://www.washingtonpost.com/education/2022/06/28/gay-straight-alliance->

to prevent minors from accessing materials that are supportive of LGBTQ+ identity. The American Library Association has noted that 2022 featured an “unprecedented number of attempts to ban books,” most of which “were by or about Black or LGBTQIA+ persons.”<sup>12</sup> Virginia Governor Glenn Youngkin’s administration went so far as to remove a LGBTQ+ suicide-prevention hotline from the Virginia Department of Health webpage.<sup>13</sup>

Often unsafe in school, LGBTQ+ youth also face new threats at home. Florida Representative Anthony Sabatini, for example, has proposed terminating the parental rights of adults who take their children to drag performances.<sup>14</sup> Florida custody law was recently amended to allow Florida parents to apply for a “warrant to take physical custody” of their child if the child’s out of state parent provides access to gender-affirming care.<sup>15</sup> In Texas, nine families who have provided gender-affirming care to their transgender teenagers have been investigated by the Department of Family and Protective Services for child abuse—investigations that have included unannounced school visits by state agents.<sup>16</sup> In both states, LGBTQ+ parents and parents of LGBTQ+ youth report feeling under threat; some have fled.<sup>17</sup>

In addition to investigating LGBTQ+ families, many states have either criminalized and categorically banned gender-affirming care or are seeking to do so.<sup>18</sup> While it is true that medical experts in some countries continue to refine gender-affirming care treatment protocols, categorical bans on gender-affirming care have been rejected by major medical organizations devoted to youth medicine.<sup>19</sup> Moreover, bans on gender affirming-care often depict such

indoctrination-school-club (describing a “burgeoning nationwide opposition to GSA [Gay-Straight Alliance] club activities and, in some places, their existence”).

12. *State of America’s Libraries Report 2022*, AM. LIBR. ASS’N (Apr. 2022), <https://www.ala.org/news/state-americas-libraries-report-2022>.

13. Sarah Vogelsong, *Youngkin Administration Removes Webpage on LGBTQ Resources for Youth*, VIRGINIA MERCURY (July 6, 2023, 7:35 PM), <https://www.virginiamercury.com/2023/07/06/youngkin-administration-removes-webpage-on-lgbtq-resources-for-youth>. See also Jenna Portnoy, *Youngkin Officials Quietly Pull LGBTQ+ Youth Resources Offline*, WASH. POST (July 6, 2023, 2:28 PM), <https://www.washingtonpost.com/dc-md-va/2023/07/06/youngkin-lgbtq-resources-removed/>.

14. Mandalit del Barco, *Some Lawmakers Hope to Crack Down on Drag Shows Watched by Children*, NPR (June 16, 2022, 7:52 PM), <https://www.npr.org/2022/06/16/1105544325/drag-shows-children>.

15. S.B. 254, 125th Leg., Reg. Sess. § 1 (Fla. 2023).

16. Madeleine Carlisle, *‘I’m Just Waiting for Someone to Knock on the Door.’ Parents of Trans Kids in Texas Fear Family Protective Services Will Target Them*, TIME (May 19, 2022, 6:24 PM), <https://time.com/6178947/trans-kids-texas-families-fear-child-abuse-investigations>.

17. David Artavia, *These Families with Trans Kids are Leaving Their Home States to Escape Criminalization: ‘We’re Ready to Fight and Defend’*, YAHOO!LIFE (Oct. 20, 2022), <https://www.yahoo.com/lifestyle/families-trans-kids-home-states-criminalization-fight-lgbtq-190044550.html>.

18. Annette Choi & Will Mullery, *19 States Have Laws Restricting Gender-Affirming Care, Some with the Possibility of a Felony Charge*, CNN (June 6, 2023, 1:30 PM), <https://edition.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html>.

19. See Alta Spells & Jen Christensen, *Florida Health Department Advises Against Gender-Affirming Care for Youth*, CNN (Apr. 20, 2022, 10:32 PM), <https://edition.cnn.com/2022/04/20/health/florida-gender-affirming-care-health-department-guidance/index.html>.

treatment in gruesome, fearful terms.<sup>20</sup> One state lawmaker, for example, compared transgender medical care to Nazi medical experimentation.<sup>21</sup>

Some of the laws described above violate core First Amendment principles and have been successfully challenged on freedom of expression grounds.<sup>22</sup> While First Amendment analyses are warranted in these cases, they only capture part of the problem. LGBTQ+ youth lie at the center of a maelstrom of state legislation and public debate, much of which is openly hostile toward LGBTQ+ identity. Statements from lawmakers, activists, and public supporters indicate that laws targeting LGBTQ+ youth are often motivated by irrational hostility or disgust towards LGBTQ+ individuals. The objective of these bills often seems to be not merely to preclude materials concerning sexual orientation from reaching youth but to demean and stigmatize LGBTQ+ individuals as a class.

This context is vital to consider in order to assess the legal merits of laws like Florida's H.B. 1557. From one point of view, H.B. 1557 and other, similar bills merely reflect the legitimate concerns of parents who object to the recent and rapid changes in social norms surrounding sexual orientation and gender identity. Indeed, the most common legal argument offered by proponents of laws targeting LGBTQ+ youth is that such laws are necessary to enforce a parent's fundamental right to control the upbringing and education of their child.<sup>23</sup> This is a colorable constitutional argument; parental rights are among the oldest fundamental rights still recognized by the contemporary Court. Whatever uncertainties attend other areas of substantive due process, it hardly seems plausible that the Court—or the general public—will retreat from the idea that parents possess the fundamental right to shape their minor child's upbringing.

From another point of view, however, the parental rights argument is mere pretext; the real aim of laws like H.B. 1557 is to reverse the gains of the recent past and to re-stigmatize non-traditional sex and gender identities. Over the last several decades, efforts to subordinate gay and lesbian adults have largely failed, with both the Court and the public moving broadly in favor of accepting non-traditional sexual orientations and gender identities. Rather than abandon the fight, opponents of LGBTQ+ rights have shifted tactics. Bills like H.B. 1557 and the public rhetoric of their drafters and supporters portray LGBTQ+ identity as disgusting and cast LGBTQ+ adults as child predators. By emphasizing fictional threats to minor children, opponents of LGBTQ+ rights seek to generate fear

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20. See *infra* Part I.

21. See Lisa Kaczke, *S.D. Lawmaker Compares Transgender Surgeries to Holocaust's 'Bizarre Medical Experiments'*, ARGUS LEADER (Jan. 27, 2020, 5:11 PM), <https://www.argusleader.com/story/news/politics/2020/01/27/rep-fred-deutsch-pictures-transgender-surgery-scars-remind-him-holocaust-nazis/4586822002/>.

22. See, e.g., *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at \*18–19 (W.D. Tenn. June 2, 2023) (striking down Tennessee's "Adult Entertainment Act" as unconstitutionally vague and substantially overbroad); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 893–94 (E.D. Ark. 2021) (striking down Arkansas' Act 626 on the grounds that the Act prevents doctors from informing their patients where gender transition treatment may be available).

23. See *infra* Part III.

and disgust—hostile emotions which can then be directed towards LGBTQ+ individuals.

In this Article I defend the latter point of view. Part I provides an overview of laws targeting LGBTQ+ youth. I argue that many laws targeting LGBTQ+ youth exemplify irrational animus towards and impose a stigma upon LGBTQ+ individuals. Though they are distinct doctrines, the Court has interwoven animus- and stigma-based arguments throughout its gay rights jurisprudence to protect LGBTQ+ individuals from state action that imposes dignitary harm. Laws targeting LGBTQ+ youth today rely on the same kinds of irrational hostility and stigmatizing purposes that the Court rejected decades ago.

But the problem is not just that these laws are motivated by the same stigmatizing arguments and irrational fears that the Court has seen before. These laws are aimed at minor children, who possess an even stronger claim to the Court's protection from demeaning treatment. As I argue in Part II, it is an underappreciated fact about equal protection doctrine that the Supreme Court has repeatedly resolved profound questions of race, sex, gender, sexual orientation, and citizenship by considering how state action affects the lives, interests, and relationships of minor children. I demonstrate that in its equal protection jurisprudence, the Court has recognized that while minor children are not the equals of adults, they nonetheless possess what I shall refer to as "equality interests." An equality interest is the interest a minor child has in coming to see themselves and their peers as equal members of the political community.

To ground the notion of an equality interest, I introduce a series of equal protection cases that involve minor children. In these cases, the Court argues that minor children, especially in the public-school setting, must be socialized into democratic values. Part of this socialization process involves fostering within children a sense of themselves and their peers as equals. In the cases I discuss, the notion of an equality interest helps to explain why the Court is more skeptical of stigmatizing or irrationally hostile state action that targets minor children: stigmatizing state action impairs a child's ability to view themselves as an equal citizen.

The upshot of this argument is that the Court should be particularly wary of laws that threaten the equality interests of LGBTQ+ minor children. More precisely, the Court should probe the states' rationales for pretext and should require states to produce evidence sufficient to justify their policy choices. In Part III, I argue that the most common rationale put forward for laws targeting LGBTQ+ youth—the protection of parental rights—is entirely pretextual. I examine several conceptions of parental rights, drawn from the Court's jurisprudence and from the work of parental rights scholars. Far from protecting parental rights, state laws targeting LGBTQ+ actually undermine the rights of parents of LGBTQ+ children. I conclude in Part IV by proposing an alternative interpretation of parental rights rhetoric.

## I. STATES TARGETING LGBTQ+ YOUTH

In Part I.A, I canvass recently proposed and recently enacted state legislation targeting LGBTQ+ youth. While this legislation is primarily state-driven, it reflects a broader movement—the impact of which can also be seen at the federal and local levels. This legislation is breathtakingly broad: states are categorically forbidding youth from discussing or learning about LGBTQ+ issues, accessing gender-affirming medical care, and expressing non-traditional gender identities. Often, this legislation is defended in terms that demean and stigmatize LGBTQ+ identity.

Examining these laws reveals a profound mismatch between the ‘problems’ posed by youth who reject traditional gender categories and the solutions that many states have adopted. In the last few years alone, state legislators have introduced hundreds of bills concerning LGBTQ+ youth, many specifically focused on transgender youth.<sup>24</sup> However, only 0.5% of American adults and only 1.4% of American minors identify as transgender.<sup>25</sup> According to Utah Governor Spencer Cox, for example, only 4 of the 75,000 children participating in school sports in Utah identify as transgender, and only one of these transgender children competes in girls’ sports.<sup>26</sup> As Cox explained his decision to veto Utah’s House Bill 11 (“H.B. 11”), which bans transgender girls from participating in girls’ sports, “[r]arely has so much fear and anger been directed at so few.”<sup>27</sup>

In most states, LGBTQ+ youth comprise a miniscule percentage of the overall population, generally lack access to medical care or psychological services, and are at greater risk of bullying, subjection to violence, and poor mental health.<sup>28</sup> Categorical bans on access to social or medical services, recreational athletics, or classroom discussion do not consider the harms that such bans inflict upon LGBTQ+ youth. In fact, major medical organizations devoted to youth mental health and wellness reject such bans.<sup>29</sup>

To be sure, the laws discussed in Part I.A range across a broad swathe of activity—professional and recreational athletics, medical care, public school curriculum, student speech, and more. These laws raise myriad legal and

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24. See *Over 120 Bills Restricting LGBTQ Rights Introduced Nationwide in 2023 So Far*, ACLU (Jan. 19, 2023, 10:00 AM), <https://www.aclu.org/press-releases/over-120-bills-restricting-lgbtq-rights-introduced-nationwide-2023-so-far>.

25. See Jody L. Herman, Andrew R. Flores & Kathryn K. O’Neil, *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. AT UCLA SCH. L. (June 2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states>.

26. Press Release, Spencer J. Cox, Utah Governor, Gov. Cox: Why I’m Vetoing HB11 (Mar. 22, 2022), <https://governor.utah.gov/2022/03/24/gov-cox-why-im-vetoing-hb11>.

27. *Id.*

28. See generally Grayce Alencar Albuquerque, Cintia de Lima Garcia, Glauberto da Silva Quirino, Maria Juscinaide Henrique Alves, Jameson Moreira Belém, Francisco Winter dos Santos Figueiredo, Laércio da Silva Paiva, Vânia Barbosa do Nascimento, Érika da Silva Maciel, Vitor Engrácia Valenti, Luiz Carlos de Abreu & Fernando Adami, *Access to Health Services by Lesbian, Gay, Bisexual, and Transgender Persons: Systematic Literature Review*, 16 BMC INT’L HEALTH & HUM. RTS. (2016).

29. See Spells & Christensen, *supra* note 19.



constitutional issues, each of which must be addressed separately. Thus, it is important to be clear about the scope of my argument.

While I mention below a number of state laws governing the behavior of LGBTQ+ youth, I do *not* claim that *every* such law is motivated solely by animus or a desire to stigmatize. Nor do I assert that there is only one appropriate set of LGBTQ+ policies for every state or organization. Reasonable people will surely disagree over how best to guide a young person through matters involving gender, sex, and sexual orientation. Medical protocols for gender-affirming medical care continue to be refined. In some areas, competing interests may need to be fairly balanced.<sup>30</sup> The analysis I offer here is thus limited to a subset of laws most clearly motivated by stigma and animus and those which target LGBTQ+ youth in public schools.

Nevertheless, my discussion of state laws in the following Subpart is deliberately overinclusive for the following reason. As I discuss below, the Court has often rigorously scrutinized state action that stigmatizes minor children. In the Court's view, laws that impress upon children the notion that they are not equal citizens warrant more rigorous scrutiny because children are especially vulnerable to dignitary harm. The state must take extra precaution, in other words, not to damage a child's developing sense that they are equal members of their community. But this requires taking account of how state action affects minor children, specifically, LGBTQ+ minor children, and the minor children of LGBTQ+ parents. Thus, my discussion in Part I.A ranges broadly because to provide some sense of what it must be like to be a young LGBTQ+ person amid a nationwide retreat from respectful consideration of the rights and interests of LGBTQ+ individuals.

#### A. STATE LAWS TARGETING LGBTQ+ YOUTH

Many states are seeking to suppress education and discussion related to LGBTQ+ identity in school classrooms. Florida's House Bill 1557 ("H.B. 1557"), for example, prohibits "[c]lassroom instruction . . . by school personnel or third parties on sexual orientation or gender identity . . . in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards."<sup>31</sup> Though initially limited in scope, H.B. 1557 has now been expanded to cover students in *all* grade levels. Similar bills have been enacted or proposed in at least twenty other states.<sup>32</sup> For example, Louisiana's proposed House Bill 466 ("H.B. 466") would ban teachers from

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30. See generally Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 *SPORTS MED.* 701 (2017).

31. H.B. 1557, 124th Leg., Reg. Sess. § 1 (Fla. 2022).

32. See, e.g., S.B. 184, 2022 Leg., Reg. Sess. § 5(2) (Ala. 2022); see also Kate Sosin, *In Some States, Versions of 'Don't Say Gay' Bills Have Been Around for Awhile*, PBS (Apr 21, 2022, 4:22 PM), <https://www.pbs.org/newshour/nation/in-some-states-versions-of-dont-say-gay-bills-have-been-around-for-awhile>.

discussing sexual orientation or gender identity with students in any grade.<sup>33</sup> Iowa's Senate Bill 159 ("S.B. 159") would ban "[a]ny program, curriculum, material, test, survey, questionnaire, activity, announcement, promotion, or instruction of any kind relating to gender identity or sexual orientation."<sup>34</sup>

These bills typically fail to include criteria for what counts as "instruction" or criteria for determining what content is "age appropriate," and they tend to be ambiguously drafted. For example, while the text of H.B. 1557 prohibits "instruction" in sexual orientation or gender identity, the Preamble to H.B. 1557 states that the bill aims to prohibit "classroom discussion" of these topics.<sup>35</sup> Though the precise scope of H.B. 1557 is debatable, unclear standards for enforcement will incentivize school districts to take a highly restrictive approach to classroom discussion. Caution is doubly warranted because H.B. 1557 establishes a private right of action for parents who believe that a school district has violated the bill's terms and requires school districts that violate H.B. 1557 to pay attorney's fees and court costs.<sup>36</sup>

Though these bills purport to ban discussion of "sexual orientation," the actual effect of these bills is to foreclose any mention of non-traditional sexual orientations and gender identities in the classroom.<sup>37</sup> It is hardly plausible to suppose, for example, that H.B. 1557 is intended to forbid heterosexual teachers from mentioning their spouses or partners or conventional aspects of their sexual orientation. Only LGBTQ+ teachers and students bear this burden. Likely this reflects the true purpose of bills like H.B. 1557. As one Florida state senator acknowledged, the concern underlying this bill is in part "a big uptick in the number of children who are coming out as gay or experimenting."<sup>38</sup>

At the national level, Congressional Republicans introduced the "Stop the Sexualization of Children Act of 2022," which, if enacted, would prohibit the use of federal funding "to develop, implement, facilitate, or fund any sexually-oriented program, event, or literature for children under the age of 10, and for other purposes."<sup>39</sup> "Sexually-oriented material" is defined in the proposed bill as "any depiction, description, or simulation of sexual activity, any lewd or lascivious depiction or description of human genitals, or any topic involving gender identity, gender dysphoria, transgenderism, sexual orientation, or related subjects."<sup>40</sup> As with H.B. 1557, it is implausible to suppose that sexual

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33. H.B. 466, 124th Leg., Reg. Sess. § 1 (La. 2023).

34. S.B. 159, 90th Gen. Assem. (Iowa 2023).

35. H.B. 1557, 124th Leg., Reg. Sess. (Fla. 2022).

36. *Id.*

37. Matt Lavietes, *Here's What Florida's 'Don't Say Gay' Bill Would Do and What It Wouldn't Do*, NBC NEWS (Mar. 16, 2022, 3:34 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/floridas-dont-say-gay-bill-actually-says-rena19929>.

38. See Kathryn Varn, *Historians Draw Parallels Between 'Don't Say Gay' Legislation and Purge of Gay Teachers Decades Ago*, HERALD-TRIB. (Mar. 14, 2022, 10:22 AM), <https://www.heraldtribune.com/story/news/2022/03/14/history-repeats-florida-dont-say-gay-bill/7002804001>.

39. H.R. 9197, 117th Cong., § 4(e)(1) (2022) (enacted).

40. *Id.*

orientation here refers to heterosexuality. Nor is there an obvious reason for placing sexual orientation, gender dysphoria, or “transgenderism” alongside “lewd or lascivious depiction . . . of human genitals” or “simulation of sexual activity,” other than to associate the former with the moral stigma of the latter.

Many other bills recently proposed or enacted criminalize and categorically forbid medical care for transgender youth. For example, under Alabama Senate Bill 184, the “Alabama Vulnerable Child Compassion and Protection Act,” it is now a state felony to “engage in or cause . . . to be performed” upon a minor medical procedures that “alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex.”<sup>41</sup> Similarly categorical restrictions on access to transgender medical care are now in force in Arkansas,<sup>42</sup> Arizona,<sup>43</sup> Tennessee,<sup>44</sup> Florida,<sup>45</sup> and Utah,<sup>46</sup> and similar bans have been proposed in many other states.<sup>47</sup> By contrast, none of these states have banned aesthetic plastic surgery for cisgender minor children, despite the fact that it is risky, permanent, and of uncertain benefit.<sup>48</sup> It is only medical care for youth who express non-traditional gender identities that seems to provoke the ire of state legislators, one of whom likened gender-affirming care to the “bizarre medical experiments” of the Holocaust.<sup>49</sup>

Not content with categorically banning access to gender-affirming care, some states also require medical professionals to cease ongoing treatment, forcing transgender youth to de-transition. South Dakota’s House Bill 1080 (“H.B. 1080”), for example, bans several medical procedures that would “validate a minor’s perception of, the minor’s sex, if that appearance or perception is inconsistent with the minor’s sex.”<sup>50</sup> The bill sets a deadline of December 31, 2023 for the cessation of all such treatments.<sup>51</sup> Yet H.B. 1080 explicitly exempts medical care that is necessary for “disorder[s] of sex development,” such as when a child possesses “external biological sex characteristics that are irresolvably ambiguous” or when a child lacks sex

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41. S.B. 184, Reg. Sess. § 4(a) (Ala. 2022).

42. H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

43. S.B. 1138, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

44. S.B. 126, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

45. Anthony Izaguirre, *Florida to Ban Transgender Health Care Treatments for Minors*, U.S. NEWS (Nov. 4, 2022, 6:52 PM), <https://www.usnews.com/news/us/articles/2022-11-04/florida-to-ban-transgender-health-care-treatments-for-minors>.

46. S.B. 16, 2023 Gen. Sess. (Utah 2023).

47. See generally *LGBTQ Policy Spotlight: Efforts to Ban Health Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Apr. 2021), [www.lgbtmap.org/2021-spotlight-health-care-bans](http://www.lgbtmap.org/2021-spotlight-health-care-bans).

48. Diana Zuckerman & Anisha Abraham, *Teenagers and Cosmetic Surgery: Focus on Breast Augmentation and Liposuction*, 43 J. ADOLESCENT HEALTH 318, 319–21 (2008) (“[M]ore than 11,300 breast augmentations for teens [eighteen] and under in 2003” despite the fact that there are “no conclusive studies that indicate that cosmetic surgery improves overall body image or quality of life for adolescents or adults.” (citing AM. SOC’Y FOR AESTHETIC PLASTIC SURGERY, COSMETIC SURGERY NAT’L DATA BANK (2003), <https://cdn.theaestheticsociety.org/media/statistics/2003-TheAestheticSocietyStatistics.pdf>)).

49. See Kaczke, *supra* note 21.

50. H.B. 1080, 98th Leg. Sess. § 2 (S.D. 2023).

51. *Id.* at § 6.

hormones or chromosomes that are “normal for a biological male or biological female.”<sup>52</sup> It is unclear why, under H.B. 1080, medical interventions necessary to make children biologically “normal” are permissible, while medical interventions necessary for gender dysphoria are not.

While some states now threaten medical professionals who provide gender-affirming care with criminal punishment, others are investigating families that provide this care for their children. In Texas, for example, nine families who provided gender-affirming care to their transgender teenagers have been investigated by the Department of Family and Protective Services for child abuse.<sup>53</sup> These investigations have included unannounced visits to the children’s schools and family interviews.<sup>54</sup> Many LGBTQ+ families in states restricting access to gender-affirming care are traveling long distances for care or are considering fleeing to other states; some have already done so.<sup>55</sup>

Yet other bills seem to reinforce parental control over a child’s identity and to dissuade youth from expressing non-traditional sexual orientations or gender identities. Arizona’s House Bill 2161 (“H.B. 2161”), for example, requires parents to opt their children into sex education classes; reaffirms the rights of parents to all counseling records, psychological records, and “reports of behavioral patterns;” and permits parents to sue state officials for “any . . . action that interferes with or usurps the fundamental right of parents to direct the upbringing, education, health care and mental health of their children.”<sup>56</sup> Bills proposed in various states would require public schools to emphasize biological sex instead of gender identity;<sup>57</sup> to notify a student’s parents if the student wishes to adopt a different name or pronoun;<sup>58</sup> and, in schools that offer curriculum about gender identity, to “include educational materials and references to . . . potential harm and adverse outcomes of social and medical intervention.”<sup>59</sup>

Though this Article is primarily concerned with state laws targeting LGBTQ+ youth, it is difficult not to perceive a generalized anxiety over how American youth are introduced to identity and inequality more broadly. It is worth noting, for example, that state bans on LGBTQ+ educational content follow closely on the heels of or in conjunction with similar attempts to suppress education in racial injustice or (what is claimed to be) “critical race theory.” Bills suppressing education in historical racial injustice have been proposed or

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52. *Id.* at § 3.

53. Eleanor Klibanoff, *Texas Supreme Court Allows Child Abuse Investigations into Families of Transgender Teens to Continue*, TEX. TRIB. (May 13, 2022, 6:50 PM), <https://www.texastribune.org/2022/05/13/transgender-teens-child-abuse-texas>.

54. *See* Artavia, *supra* note 17.

55. *Id.*

56. H.B. 2161, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

57. H.B. 2285, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

58. H.B. 755, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

59. H.B. 326, 89th Gen. Assemb., Reg. Sess. § 1 (Iowa 2021).

enacted in thirty states.<sup>60</sup> Many of these state bills are modeled after former President Trump’s now-rescinded “Executive Order on Combating Race and Sex Stereotyping,” which banned federal departments and agencies from promoting a set of “anti-American,” “divisive concepts” popularly associated with critical race theory.<sup>61</sup> The Florida Department of Education, has, of this writing, banned Advanced Placement African American history courses in public high schools, citing its supposed inclusion of critical race theory, as well as its lack of “educational value and historical accuracy.”<sup>62</sup>

## B. ANIMUS, STIGMA, AND EQUAL PROTECTION

In this Subpart, I introduce evidence demonstrating that many laws targeting LGBTQ+ youth are imbued with animus and stigma. First, it is necessary to understand what constitutes animus or stigma and how these doctrines alter the Court’s standard method of analysis. When state action is challenged on equal protection grounds, the Court will typically apply rational basis review, a highly deferential standard. Under rational basis review, the Court refrains from second-guessing the state’s evidence or questioning the state’s motives. If a constitutionally sound motive is not apparent, the Court may supply one. Overall, state action that receives rational basis review is virtually certain to be left standing.

Generally, under equal protection principles, the Court will exercise a heightened level of review only when state action targets a suspect or quasi-suspect classification.<sup>63</sup> When state action targets a suspect or quasi-suspect classification, the Court will then apply strict scrutiny, in the former case, or intermediate scrutiny, in the latter. Both forms of heightened scrutiny require the state to justify its actions by identifying a rationale that, in the Court’s view, is sufficiently important to survive the applicable level of review. The Court may also require the state to produce evidence demonstrating that its actions are sufficiently closely connected to its underlying justification.

The Court has declined to recognize LGBTQ+ individuals or minors as members of suspect or quasi-suspect classes. Doctrinally, then, for equal protection purposes, the Court should apply rational basis review to laws that target LGBTQ+ youth. Yet in a number of equal protection cases, the Court has

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60. See *Welcome to The #TruthBeTold Campaign*, AFR. AM. POL’Y F., <https://www.aapf.org/truthbetold> (last visited Feb. 14, 2024); see also Jonathan Friedman & James Tager, *Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach*, PEN AM. (Nov. 2021), <https://pen.org/report/educational-gag-orders> (discussing how twenty-four legislatures across the United States have introduced fifty-four separate bills intended to restrict teaching and training in K-12 schools, higher education, and state agencies and institutions).

61. *Combating Race and Sex Stereotyping*, 85 Fed. Reg. 60683, 60685 (Sept. 28, 2020).

62. Eesha Pendharkar, *College Board: No State Has Sway over Final Version of AP African American Studies*, EDUC. WEEK (Jan. 26, 2023), <https://www.edweek.org/teaching-learning/college-board-no-state-has-sway-over-final-version-of-ap-african-american-studies/2023/01>.

63. For clarity and to focus solely on the equal protection issues, I am omitting cases in which the Court exercises heightened scrutiny of laws that bear on fundamental rights.

applied a more “rigorous” form of rational basis review to state action targeting groups that would not otherwise receive heightened scrutiny.<sup>64</sup> The Court has repeatedly applied this rigorous rational basis review to state action targeting gays and lesbians. Moreover, as I discuss in Part II, the Court has also applied a more demanding form of review to state action that imposes certain types of dignitary harm upon minor children. Ultimately, I argue in this Article that many laws targeting LGBTQ+ youth should trigger the Court’s rigorous rational basis review and should be struck down.

To appreciate what is at stake, however, it is important to be clear about what triggers rigorous rational basis review and what this type of scrutiny entails. Across a number of cases, the Court has employed ‘heightened’ rational basis review when it suspects that a law expresses irrational hostility toward or imposes a stigma upon outcast groups. But equal protection scholars differ over how to characterize this more demanding form of rational basis review. Some have claimed that a finding of animus is akin to a “silver bullet” in the sense that it is immediately fatal to the underlying state action.<sup>65</sup> Others have argued that a finding of animus merely shifts the burden of persuasion to the state, which must then identify a constitutionally permissible justification and produce evidence sufficient to justify the means it has adopted.<sup>66</sup> Regardless of which position is ultimately correct, for my purposes, it suffices to point out that, under rigorous rational basis review, the state has the burden of producing evidence sufficient to persuade the Court that the state is acting according to a constitutionally permissible rationale. Under rigorous rational basis review, the Court will probe the state’s proffered justifications for pretext and may demand further evidence from the state to justify the legal intervention.

Across its gay rights jurisprudence, the Court has generally cited animus or stigma, or both, as justification for shifting the burden of persuasion to the state. Accounts of animus typically begin with *United States Department of Agriculture v. Moreno*, in which the Court asserted that “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>67</sup> While identifying the origins of animus doctrine with *Moreno* is not inaccurate, it is misleading in several respects. First, as William Araiza has shown, animus jurisprudence has much deeper roots, traceable to Founding-era fears of “class legislation,” or state action designed solely to benefit majorities at the expense of the broader public, or at the expense of unpopular minorities.<sup>68</sup> Second, as I discuss below, the Court’s willingness to protect unpopular

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64. I draw the phrase “rigorous rational basis review” and the account of this level of scrutiny from Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377 (2012).

65. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889, 930 (2012).

66. McGowan, *supra* note 64, at 382.

67. 413 U.S. 528, 534 (1973).

68. WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 19 (2017).

minorities, especially minority families, from irrational hostility is evident as early as the 1920's, roughly half a century prior to *Moreno*.<sup>69</sup>

While *Moreno* suggests that animus is fundamentally about the subjective motivation of particular lawmakers, this is not the case. As Araiza has argued, the Court's criteria for concluding that a law is motivated by animus is "impressionistic."<sup>70</sup> The Court considers a variety of factors, including legal text; political and social context; statements by state officials or private parties; legislative history and procedure; and the harms a law imposes.<sup>71</sup> But there is no prescribed order of analysis, nor does one factor predominate, nor do all factors necessarily need to be present. Most importantly, the search for animus is an objective inquiry, based on the factors just noted. It is not an assessment of the subjective motivations of each individual lawmaker, even though statements by lawmakers might be relevant to a finding of animus.

As with animus, stigma doctrine also involves dignitary harm. And, like animus, stigma has deep constitutional roots that are easily overlooked. As the Court has acknowledged, the prevention of stigmatic harm "reflects the central concern of the Fourteenth Amendment."<sup>72</sup> Stigma typically involves the deprivation of a right, privilege, or important material resource based on a group's status. Stigmatizing state action inflicts dignitary harm insofar as it signifies that the group targeted is inherently unworthy. As the Court observed in one of its earliest stigma cases, *Strauder v. West Virginia*, stigmatizing state action "single[s] out" and "brand[s]" low status groups; depriving a disfavored group of an important right or resource constitutes an "assertion of their inferiority."<sup>73</sup>

Compared with animus, stigma analysis is typically more focused on the rights, privileges, or resources denied of stigmatized groups and with whether the deprivation demeans the group as a class. Statements indicating that state actors regard the group with fear or hostility are thus less relevant in stigma inquiries. At the same time, however, stigma analysis calls for sensitivity to the social meaning of the rights, privileges, or resources in question since depriving a group of an important right is one way to convey that group's inferiority.<sup>74</sup> Thus, stigma doctrine, like animus doctrine, also requires an interpretation of the political context that frames the state action in question.

Though they are distinct doctrines, the Court has often raised animus and stigma arguments together, particularly throughout its gay rights

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69. See *infra* Part III.

70. Araiza, *supra* note 68, at 136.

71. *Id.* at 89–104.

72. *Powers v. Ohio*, 499 U.S. 400, 408 (1991) (quoting *Peters v. Kiff*, 407 U.S. 493, 507 (1972) (White, J., concurring)).

73. 100 U.S. 303, 308 (1880).

74. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015) (arguing that because "the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects").

jurisprudence.<sup>75</sup> Of course, stigmatized groups are likely to be targets of irrational fear and hostility, and thus, a certain amount of conceptual overlap is to be expected. Moreover, to know whether a law imposes a stigma or expresses animus, it is necessary to understand the social context in which the law operates, the harms it imposes, and the state's actual motives. To some extent, animus and stigma doctrines involve similar inquiries. My argument below takes this shared territory for granted. Some evidence I present may fit more naturally within animus doctrine, whereas other evidence will support an argument for stigma; many will do both at once. Regardless, the many examples I present below of irrational antipathy towards LGBTQ+ youth should be more than sufficient to warrant the Court's rigorous rational basis review.

Consider, for example, Florida's H.B. 1557. H.B. 1557 prohibits "[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity . . . in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards."<sup>76</sup> On its face, H.B. 1557 is fairly unremarkable; surely no reasonable person could object to a requirement that classroom instruction on matters of sexual orientation or gender identity be age or developmentally appropriate. As I noted above, however, the lack of clear standards for enforcement, the ambiguity between forbidding classroom "instruction" and classroom "discussion," and the enforcement mechanisms, heavily incentivize school districts to chill any student speech related to LGBTQ+ issues. Reports of school districts doing precisely this—removing books with gay characters, forbidding mention of homosexuality itself—are indicative of the harms that H.B. 1557 is already imposing upon Florida LGBTQ+ students.<sup>77</sup>

The notion that homosexuality is taboo and unfit for discussion at any grade level, but that heterosexuality is not, itself imposes dignitary harm upon LGBTQ+ students. But the text of the bill as well as the language of its supporters and drafters heighten the impression that H.B. 1557 degrades non-traditional gender identities and sexual orientations. In his public defense of H.B. 1557, for example, Florida Governor Ron DeSantis argued that parents "should be protected from schools using classroom instruction to sexualize their kids as young as 5 years old."<sup>78</sup> Similarly, Governor DeSantis' press secretary, Christina Pushaw, has argued that opponents of Florida's H.B. 1557 are

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75. Compare *United States v. Windsor*, 570 U.S. 744, 769–70 (2013) (striking down the Defense of Marriage Act, which defined "marriage" and "spouse" for federal purposes as excluding same-sex partners, on the grounds that it reflected animus) with *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (striking down bans on same sex sexual relationships as stigmatizing).

76. H.B. 1557, 124th Leg., Reg. Sess. § 1 (Fla. 2022).

77. See Laviertes, *supra* note 4; Goldberg, *supra* note 4.

78. Press Release, Ron DeSantis, Governor of Fla., Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education (Mar. 28, 2022), <https://www.flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/#:~:text=HB%201557%20takes%20three%20key,need%20to%20be%20age-appropriate.>



“probably . . . groomer[s] or at least . . . don’t denounce the grooming of 4–8-year-old children.”<sup>79</sup>

According to Governor DeSantis, critics of H.B. 1557 must be “in favor of injecting sexual instruction into 5-, 6- and 7-year-old kids.”<sup>80</sup> DeSantis’s violent imagery (‘injecting’ children with ‘sexual instruction’) is meant to raise fears that children are being forcibly harmed in the classroom. His rhetoric exploits an ambiguity in the word ‘sexualize;’ the implication is that discussions of non-traditional human sexual orientations or gender identities are inherently erotic, and proponents of discussing LGBTQ+ identity thus must be attempting to introduce children to erotic materials.

Among right-wing political elites generally, this rhetoric of child predation is ubiquitous. House Representative Marjorie Taylor Greene, for instance, claims that “Democrats support . . . children being sexualized” and refers to her political opponents as “pedophiles.”<sup>81</sup> Texas Lieutenant Governor Dan Patrick argues that “Disney . . . actively plan[s] to indoctrinate and sexualize their children.”<sup>82</sup> A Houston County Commissioner objected to creating a committee for LGBTQ+ individuals on the grounds that they “deal with the grooming of children.”<sup>83</sup> This rhetoric is not necessarily limited to LGBTQ+ individuals or LGBTQ+ issues. House Representative Elise Stefanik, for example, blamed a recent infant formula shortage on child sexual predators.<sup>84</sup>

According to Christopher Rufo, a conservative political activist and leading proponent of H.B. 1557, child predation rhetoric is useful for “winning the

79. Stephen Adams & Liz Crawford, *DeSantis’ Press Secretary Says Bill Critics Dubbed ‘Don’t Say Gay’ Could Be Called ‘Anti-Grooming’*, WTSP-TV (Mar. 07, 2022, 7:07 PM), <https://www.wtsp.com/article/news/regional/florida/christina-pushaw-gay-bill-tweet/67-f1207aaf-43ae-4a8d-989b-e12667e54414>; see also *Digital Hate: Social Media’s Role in Amplifying Dangerous Lies About LGBTQ+ People*, CTR. FOR COUNTERING DIGIT. HATE & HUM. RTS. CAMPAIGN, 12–32 (2022), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/CCDH-HRC-Digital-Hate-Report-2022-single-pages.pdf> (describing grooming language on social media).

80. Sara Luterman, *LGBTQ+ Parents Fear the Impacts of Florida’s ‘Don’t Say Gay’ Bill*, 19TH NEWS (Mar. 28, 2022, 10:02 AM), <https://19thnews.org/2022/03/florida-dont-say-gay-bill-lgbtq-parents-worried-impacts>.

81. See Summer Concepcion, *Marjorie Taylor Greene Defends Calling Democrats ‘Pedophiles’*, NBC NEWS (Apr. 3, 2023, 5:54 AM), <https://www.nbcnews.com/politics/congress/marjorie-taylor-greene-defends-calling-democrats-pedophiles-rcna77869>.

82. See Christopher Hooks, *Is Our Children Learning Too Much?*, TEX. MONTHLY (Apr. 13, 2022), <https://www.texasmonthly.com/news-politics/moral-panic-school-children-texas>.

83. See Jen Rice, *Harris County Commissioner Ramsey Draws Backlash for ‘Grooming’ Comment After LGBTQ+ Committee Vote*, HOUS. CHRON. (June 15, 2023), <https://www.houstonchronicle.com/politics/houston/article/lgbtq-advocates-grooming-comment-18152202.php>.

84. See, e.g., Benjamin Wallace-Wells, *The Political Strategy of Ron DeSantis’s “Don’t Say Gay” Bill*, NEW YORKER (June 28, 2022), <https://www.newyorker.com/news/the-political-scene/the-political-strategy-of-ron-desantiss-dont-say-gay-bill> (“Rep. Elise Stefanik, the third-ranking member of the Republican leadership team in the House of Representatives, tweeted that the ‘usual pedo grifters’ had failed to respond to the infant-formula shortage.”).

language war.”<sup>85</sup> Rufo’s public statements are rife with conspiratorial claims, such as that the “educational establishment is openly grooming kindergarteners.”<sup>86</sup> He encourages political conservatives to describe “teachers who indoctrinate their students” as “political predators” and to use words with a “lurid set of connotations” to “shift[] the debate to sexualization.”<sup>87</sup>

A similar rhetorical strategy is on display in the “Stop the Sexualization of Children Act of 2022,” which, if enacted, would prohibit the use of federal funding “to develop, implement, facilitate, or fund any sexually-oriented program, event, or literature for children under the age of 10, and for other purposes.”<sup>88</sup> “Sexually-oriented material” is defined in the proposed bill as “any depiction, description, or simulation of sexual activity, any lewd or lascivious depiction or description of human genitals, or any topic involving gender identity, gender dysphoria, transgenderism, sexual orientation, or related subjects.”<sup>89</sup> Additionally, the proposed legislation would deny federal funding to and the usage of federal facilities for “any program, event, or literature that exposes children under the age of 10 to nude adults, individuals who are stripping, or lewd or lascivious dancing.”<sup>90</sup>

Neither of these bills contain provisions that attempt to genuinely address child victimization. Nor do these bills or their drafters cite any evidence of sex education taking place in the manner described in the bill’s terms. Nor is there any obvious reason why these bills place discussions of gender identity on par with stripping, lewd dancing, or erotic materials. The implication again seems to be that only discussions of non-traditional gender identities or sexual orientations are sexualizing; presumably, the bill’s authors would not find discussions of traditional gender roles analogous to lewd dancing. The point of using this language is to do precisely what the bill’s leading supporters claim to be doing, namely, using language with a “lurid set of connotations” to generate irrational hostility and disgust by associating discussions of gender identity with the idea that children are being intentionally exposed to erotic materials.

Casting LGBTQ+ individuals and their supporters as child predators is hardly a novel strategy. As a number of historians of the gay rights movement have shown, the child predator framing device became particularly prominent

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85. Kieran Press-Reynolds, ‘Grooming’ and ‘Pro-Pedophile’ Surge as Conservative Buzzwords Amid Battle Over ‘Don’t Say Gay’ Bill, INSIDER (Apr. 15, 2022, 12:22 PM), <https://www.insider.com/grooming-pedophile-disney-baseless-buzzword-conservatives-dont-say-gay-2022-4>.

86. Christopher F. Rufo (@realchrisrufo), X (Jan. 06, 2022, 1:38 PM), <https://twitter.com/realchrisrufo/status/1479205637242322945?lang=en>.

87. Christopher F. Rufo (@realchrisrufo), X (Aug. 31, 2021, 12:30 PM), <https://twitter.com/realchrisrufo/status/143278777133760515?lang=en>; see also Brandon Tensley, *How Age-Old Homophobic Language is Being Used to Miseducate Voters*, CNN (Oct. 27, 2022, 12:58 PM), <https://www.cnn.com/2022/10/27/us/rhetoric-lgbtq-midterms-race-deconstructed-newsletter-rea/j/index.html> (discussing Christopher Rufo tweets).

88. H.R. 9197, 117th Cong. (2022).

89. *Id.* at § 4(e)(1).

90. *Id.* at § 4(a).

starting in the late 1970s, as debates over local ordinances extending anti-discrimination protections to gays and lesbians generated national debate over the moral permissibility of homosexuality.<sup>91</sup> To generate opposition to anti-discrimination protections for gays and lesbians, opponents of gay rights would often raise baseless fears of gay men, in particular, ‘recruiting’ or seducing minor children. Opponents of anti-discrimination protections for gays and lesbians would employ this rhetorical tactic at local, state, and federal levels for the next several decades.<sup>92</sup>

Though the Court has generally refrained from explicitly naming the hostile attitudes underlying laws that target gays and lesbians, they were often driven by irrational fears of child victimization. In *Romer v. Evans*, for example, the Court struck down Colorado’s Amendment 2, which repealed local anti-discrimination protections for gays and lesbians.<sup>93</sup> While the *Romer* Court’s analysis treats Amendment 2 in isolation, Amendment 2 was the outgrowth of a much broader movement to repeal state and local anti-discrimination protections for gays and lesbians that had begun decades earlier.<sup>94</sup> Leading proponents of these repeals commonly argued that LGBTQ+ individuals posed a unique threat to children.<sup>95</sup> In *Romer* itself, one of the state’s expert witnesses was a discredited researcher who had authored a number of pamphlets advancing the false claim that gay men “are more likely than heterosexuals to recruit, seduce, and molest children.”<sup>96</sup>

Fears of child predation also lie in the subtext of an exchange between Justice Scalia and Justice Kennedy in *Lawrence v. Texas*. At oral argument, Justice Scalia had haltingly broached the fear of gays and lesbians preying on children in terms highly consonant with the rhetoric of anti-LGBTQ+ political movements. The harm of allowing gay men as schoolteachers, Justice Scalia awkwardly suggested, was that “children might . . . might be induced . . . to follow the path of homosexuality.”<sup>97</sup>

This same worry appears in Justice Scalia’s written dissent, wherein he argues that “many Americans” do not want gays or lesbians “as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home.”<sup>98</sup> After casting gays and lesbians as potential predators in environments

91. See *id.* at § 2(2); William N. Eskridge Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1014–19 (2005).

92. See Eskridge, *supra* note 91, at 1019 (describing a national, anti-gay political movement that “affect[ed] politics at every level of government”).

93. 517 U.S. 620, 635–36 (1996).

94. See Eskridge, *supra* note 91, at 1014–29, 1043.

95. See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 28–36 (2012).

96. Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative That Gays and Lesbians Are Harmful to Children*, 21 DUKE J. GENDER L. & POL’Y 125, 157 (2013).

97. CARPENTER, *supra* note 95, at 231 (“Scalia answered that the concrete harm of allowing gay people to teach schoolchildren was that ‘the children might . . . might be induced to’—again, he seemed hesitant to say what was really on his mind—‘to follow the path of homosexuality.’”).

98. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

that grant access to young children, Justice Scalia then depicts proponents of anti-sodomy laws as merely seeking to “protect[] themselves and their families” from this “immoral and destructive” threat.<sup>99</sup> By contrast, in his discussion of the historical enforcement of anti-sodomy laws, Justice Kennedy for the majority repeatedly and explicitly distinguishes between child sexual predation and adult gay and lesbian relationships.<sup>100</sup> While as a matter of formal doctrine Justice Kennedy’s argument sounds in substantive due process, rhetorically it serves to defuse the fears raised by the dissent.

Gay men were not the only targets of the child predator slur. Just one year before *Romer*, a United States Senator equated gender dysphoria with pedophilia and described gays and lesbians as “weak, morally sick wretches” who ought to be quarantined.<sup>101</sup> Neither, as this remark suggests, was child predation the only framing device used to demean LGBTQ+ individuals. The second major framing device used to stigmatize LGBTQ+ individuals centered around (what was claimed to be) the disgusting features of LGBTQ+ bodies and disgusting acts of LGBTQ+ individuals. As legal scholar William Eskridge has argued, after the emergence of the HIV/AIDS epidemic, anti-LGBTQ+ political movements sought to generate public disgust at the prospect of contagious, AIDS-infected bodies.<sup>102</sup> Those suffering from AIDS had acquired the condition, the argument went, by engaging in disgusting, morally condemnable behavior, such as sodomy or drug use, that was characteristic of LGBTQ+ individuals as a class.<sup>103</sup>

Opponents of LGBTQ+ rights have often sought to generate disgust in response to LGBTQ+ bodies because feelings of disgust are bound up with the “strong human desire[] to maintain and reaffirm boundaries,” boundaries that may be physical but also moral and political.<sup>104</sup> For those motivated by disgust, the presence of disgusting persons “threatens the integrity of the body politick,” and thus targets of disgust are often ostracized and occluded from public life.<sup>105</sup> Indeed, as a number of social-scientific studies have demonstrated, disgust, particularly disgust triggered by the perception of gay AIDS sufferers, increases hostility towards LGBTQ+ individuals.<sup>106</sup> Though disgust was not often cited explicitly as a reason for denying rights to LGBTQ+ individuals, feelings of disgust may be articulated as moral condemnations of or legal objections to gay rights.<sup>107</sup> Throughout the Court’s gay rights jurisprudence, for example, Justice

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99. *Id.*

100. *Lawrence v. Texas*, 539 U.S. 558, 569 (2003).

101. See Mark Hosenball, *Jesse’s World*, NEWSWEEK (Dec. 05, 1994).

102. See Eskridge, *supra* note 91, at 1043, 1063.

103. *Id.* at 1043.

104. *Id.* at 1020.

105. *Id.* at 1063.

106. See generally Mark J. Kiss, Melanie A. Morrison & Todd G. Morrison, *A Meta-Analytic Review of the Association Between Disgust and Prejudice Toward Gay Men*, 67 J. HOMOSEXUALITY 1 (2020) (providing “additional empirical evidence that disgust . . . amplifies homonegativity toward gay men”).

107. See Eskridge, *supra* note 91, at 1022 (reviewing evidence demonstrating that “sexual taboos are particularly susceptible to disgust-driven rather than harm-driven moral reactions”).

Scalia's frequent references to homosexual sodomy, and his comparisons of homosexuality to bestiality and incest, seem to prime the reader for a disgust reaction at the prospect of granting legal rights to gays and lesbians.<sup>108</sup>

Laws targeting LGBTQ+ youth, especially those targeting transgender youth or gender-affirming medical care, are also often framed in terms that tend to evoke disgust. However, it is important to see how this disgust framing has evolved over time. Older disgust tropes aimed at LGBTQ+ individuals, which heavily emphasized same-sex sodomy and AIDS, are likely no longer as effective for several reasons. First, Americans' feelings of "warmth" towards gays and lesbians have nearly doubled since the late 1970s, and presumably disgust is less easily triggered in response to a group about which one has a preexisting, positive emotional disposition.<sup>109</sup> Second, the sexual practices popularly associated with gays and lesbians have lost much of their stigma among the general public, and thus are likely less reliable disgust triggers.<sup>110</sup> Finally, the decreasing public visibility of the AIDS epidemic in the United States has likely further decreased the salience of AIDS as a disgust trigger.<sup>111</sup>

Hence, opponents of LGBTQ+ rights have shifted their targets. Explicit references to the effects of AIDS have given way to lurid depictions of transgender medical care and of transgender bodies. By characterizing gender-affirming care and transgender individuals themselves in gruesome terms, proponents of laws targeting LGBTQ+ youth aim to trigger feelings of disgust. These feelings can then be directed towards LGBTQ+ individuals. Recent research has suggested that, as with disgust targeting gay individuals, disgust targeting transgender individuals may underlie support for laws that restrict transgender rights.<sup>112</sup>

As I noted above, one state lawmaker equated gender-affirming care with Nazi medical experimentation.<sup>113</sup> The rhetoric of 'experimentation' or, more commonly, 'mutilation' often appears in the text of bills banning gender-affirming care and in the statements of politicians opposed to transgender

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108. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 590–95 (2003) (Scalia, J., dissenting).

109. See Andrew R. Flores, *National Trends in Public Opinion on LGBT Rights in the United States*, WILLIAMS INST. AT UCLA SCH. L. 5 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-LGBT-US-Nov-2014.pdf>.

110. See Debby Herbenick, Jessamyn Bowling, Tsung-Chieh (Jane) Fu, Brian Dodge, Lucia Guerra-Reyes & Stephanie Sanders, *Sexual Diversity in the United States: Results from a Nationally Representative Probability Sample of Adult Women and Men*, 12 PLOS ONE 1, 3 (2017).

111. *HIV/AIDS at 30: A Public Opinion Perspective*, HENRY J. KAISER FAM. FOUND. 4 (2011), [https://www.kff.org/wp-content/uploads/2013/07/8186-hiv-survey-report\\_final.pdf](https://www.kff.org/wp-content/uploads/2013/07/8186-hiv-survey-report_final.pdf) (reviewing public opinion polling suggesting that "the American public is more likely than not to see the epidemic as increasingly under control").

112. See generally Matthew E. Vanaman & Hanah A. Chapman, *Disgust and Disgust-Driven Moral Concerns Predict Support for Restrictions on Transgender Bathroom Access*, 39 POL. & LIFE SCIS. 200 (2020) (suggesting that disgust and disgust-driven moral concerns impact policy for bathroom facilities for transgender folks).

113. See Kaczke, *supra* note 21.

rights.<sup>114</sup> One bill proposed in Texas, for example, referred to gender-affirming care as “genital mutilation.”<sup>115</sup> Former President Donald Trump promised to “prohibit[] child sexual mutilation in all 50 states.”<sup>116</sup> This disgust framing is reserved specifically for gender affirming care; many bills exclude from their coverage medical care undertaken to ‘normalize’ a child who is born with ambiguous sex characteristics.<sup>117</sup> But this exclusion is surely no accident. Rather, it reflects the underlying objective of the bill’s supporters, which, according to the Texas Republican Party platform, is to “oppose all efforts to validate transgender identity.”<sup>118</sup>

## II. BORN TO EQUALITY

It is an underappreciated fact about equal protection doctrine that the Supreme Court has repeatedly resolved profound questions of race, citizenship, and sexual orientation by considering how state action bears on the interests, relationships, and lives of minor children. In this Part, I foreground the role of minor children in equal protection doctrine. My argument, in short, is that the Court has often applied rigorous rational basis review in cases where state action threatens to harm the dignitary interests of minor children. The Court views minor children as developing citizens and for this reason is more skeptical of laws that would impose stigma upon or express animus towards minors.

To be clear, minor children do not comprise a suspect or quasi-suspect class; nor, in my view, should they. Compared with adults, minor children are “different . . . in relevant respects;” they lack experience, emotional and cognitive development, judgment, and are more vulnerable to material and psychological harm.<sup>119</sup> Laws that treat minor children with special regard based on these differences are not inherently worrisome from an equal protection standpoint.

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114. See Dan Diamond & Samantha Schmidt, *Exchange Between GOP Senator, Transgender Nominee Draws Fire from Democrats*, WASH. POST (Feb. 25, 2021, 6:29 PM), [washingtonpost.com/health/2021/02/25/rand-paul-rachel-levine/](https://www.washingtonpost.com/health/2021/02/25/rand-paul-rachel-levine/) (quoting Kentucky Senator Rand Paul as comparing gender affirming care to “genital mutilation”); see also Audrey Dutton, *Medical Care for Teens with Gender Dysphoria Would be a Felony Under Idaho Legislation*, IDAHO CAP. SUN (Jan. 31, 2023, 5:23 PM), <https://idahocapitalsun.com/2023/01/31/medical-care-for-teens-with-gender-dysphoria-would-be-a-felony-under-idaho-legislation> (quoting Idaho Representative Bruce Skaug describing gender affirming care as “cutting off healthy body parts”).

115. S.B. 249, 88th Leg. Sess. (Tex. 2022).

116. See Eric Bradner, Steve Contorno & Kate Sullivan, *Republicans Ramp up Attacks on Transgender People, in Statehouses and on the Campaign Trail*, CNN (Apr. 30, 2023, 8:06 AM), <https://edition.cnn.com/2023/04/30/politics/republicans-transgender-attacks-statehouse-haley-trump/index.html>.

117. H.B. 1080, 98th Leg. Sess. § 2 (S.D. 2023).

118. See *Platform and Resolutions as Amended and Adopted by the 2022 State Convention of the Republican Party of Texas*, REPUBLICAN PARTY TEX. (2022), <https://texasgop.org/wp-content/uploads/2022/07/2022-RPT-Platform.pdf>.

119. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (declining to recognize the cognitively disabled as a quasi-suspect class because they are “different, immutably so, in relevant respects”).

Yet this does not mean that the Court regards “minor child” as simply another permissible legislative classification that warrants only rational basis review. Throughout its equal protection jurisprudence, the Court has recognized that minor children, though not the equals of adults, possess what I shall refer to as “equality interests.” The idea of an equality interest refers to the fact that although minor children are not full and equal citizens, they one day will be. To become full and equal citizens, however, minor children must be socialized into the values, beliefs, and norms that comprise democratic political culture. Most importantly, they must learn to view themselves and their peers as equal members of the political community.

Doctrinally, this means that the Court has tended to look more skeptically at state action that impairs a child’s sense that they are (or one day will be) an equal citizen. To establish this claim, it is first necessary to consider how the Court understands childhood. There is a rich legal literature on the Court’s understanding of childhood as a distinct phase of life, and a complete analysis of the Court’s understanding of childhood is outside the scope of this Article.<sup>120</sup> Instead, I will focus more narrowly on three distinctions that the Court has drawn between minor children and adults. I then show how these distinctions have become especially significant within equal protection doctrine.

First, the Court often describes minor children as uniquely vulnerable and shapes legal outcomes in light of this perceived vulnerability. Second, the Court views minor children as inhabiting a developmental trajectory oriented toward adulthood. The Court is thus often more willing to protect the interests of minor children, given the more serious developmental consequences of early childhood harm. Third, the Court recognizes that minor children develop not just into adults but into adult *citizens*. This view that has prompted the Court to be relatively more protective of children when state action threatens a child’s ability to view themselves and their peers as equals.

With these distinctions in place, I then examine the Court’s equal protection jurisprudence concerning minor children. I demonstrate that the Court views minor children as more vulnerable to dignitary harm than adults, and thus in greater need of protection from stigmatizing or animus-based state action. For example, the Court has struck down state legislation on the grounds that it stigmatized minor children, even though minor children were not directly targeted by the state and did not themselves possess the relevant stigmatized characteristics.<sup>121</sup> I also demonstrate that, in the Court’s view, children must be educated in the practices and values of democratic citizenship, and thus, ought to be protected from state action that impairs this democratic education. By contrast, the Court has explicitly denied such protection to adults.

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120. For an overview of the Court’s child-related jurisprudence, see generally Lois A. Weithorn, *A Constitutional Jurisprudence of Children’s Vulnerability*, 69 HASTINGS L.J. 179 (2017).

121. See *infra* Part II.B.

Overall, in its equal protection jurisprudence, the Court has developed several arguments to the effect that minor children warrant heightened protection from state action that is irrationally hostile or stigmatizing. Laws targeting LGBTQ+ youth threaten to impose animus and stigma upon minor children. Thus, the Court should probe state justifications for pretext and should require states to produce persuasive evidence supporting these laws. In the following Part II.A, I argue that leading defenses of laws targeting LGBTQ+ youth are indeed pretextual and thus should not survive rigorous rational basis review.

#### A. MINOR CHILDREN AS DEVELOPING CITIZENS

Over the last several decades, legal scholars have paid increasing attention to how the Court frames and understands childhood as a distinct stage of life.<sup>122</sup> These scholars have come to focus in particular on the Court's depiction of childhood as a phase of life characterized by a "peculiar vulnerability."<sup>123</sup> Drawing on psychological research or, more often, its own intuitions, the Court has repeatedly cited vulnerability as a basis for crafting legal outcomes that are responsive to children's unique needs and interests. To be sure, the precise nature of this vulnerability is context-dependent. In some areas, the Court emphasizes children's vulnerability to physical or psychological harm; in others, the Court emphasizes children's vulnerability to outside influence or institutional authority.<sup>124</sup> Nonetheless, this conception of minor children as uniquely vulnerable often plays a significant role in the Court's minor child-related jurisprudence.

The Court views children as especially vulnerable in part because children do not yet possess the resources, maturity, and experience typical of adulthood. The Court's interventions are thus often couched in terms of crafting legal rules that assist children to navigate the developmental pathway to adulthood.<sup>125</sup> This "developmental approach" to childhood requires considering "the developmental differences between minors and adults and how such differences should be accounted for in doctrine."<sup>126</sup> The Court's citations to child development are context-sensitive and do not yield uniform doctrinal outcomes. Nevertheless, the Court's reasoning about minor children often revolves around developmental considerations.

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122. See, e.g., Weithorn, *supra* note 120, at 182 ("Notions of children as vulnerable are most commonly employed to justify the constitutionality of differential treatment of children and adults.").

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

124. For a typology of the Court's various usages of vulnerability, see Weithorn, *supra* note 120, at 203–15.

125. Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 101, 108 (2006) ("Developmental ideas have been an important but largely unacknowledged part of constitutional decisionmaking for almost a century."); see, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) ("It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.").

126. Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2016).



The Court's conception of minor children as developing adults is driven, in part, by the fact that children will one day become adult citizens. As the Court observed in *Prince v. Massachusetts*, children must be "safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens."<sup>127</sup> This conception of children as developing citizens has often led the Court to closely scrutinize state action that threatens to stifle a child's democratic development.

In its early parental rights jurisprudence, for example, the Court repeatedly cites the developmental consequences of coercive state education policies upon minority children.<sup>128</sup> State indoctrination not only frustrates this democratic development, it also usurps the role of parents, who are the parties primarily responsible for socializing children into democratic values.<sup>129</sup> As Anne Dailey has observed, the Court's "understanding of children's place in a democratic polity follows from the Justices' views about the vulnerability of children to state coercion and the important role that parental rights play in shielding young children from state indoctrination."<sup>130</sup>

Yet, while the Court has sought to protect children from overbearing state action that might impair their development into full citizens, it has also recognized that for most children, socialization into democratic values will take place inside the public school system. As the Court argued in *Ambach v. Norwick*, "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests" has "long has been recognized by our decisions."<sup>131</sup> Public schools, in the Court's view, have traditionally been regarded as important sites for democratic socialization. Thus, in its public school jurisprudence, the Court is often concerned less with how to shield children from the state's influence and more with how to ensure that this influence is directed towards its proper end, namely, assisting children in developing into adult citizens.

As Dailey points out, social and political transformations at home and abroad have the Court's view of public schools as important sites for democratic socialization. On the domestic front, throughout the early twentieth century "the movement for universal public education was at the forefront of social reform efforts."<sup>132</sup> The Court's view of public schools, particularly its claims about their anti-assimilationist character, reflected a "broader progressive-era movement for democracy that rested on a belief in the importance of educating children for

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127. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

128. *See Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.")

129. *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972) (quoting *Pierce*, 268 U.S. at 535).

130. *See Dailey, supra* note 125, at 110.

131. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

132. *See Dailey, supra* note 125, at 110.

democratic citizenship.”<sup>133</sup> But fears of totalitarian ideological systems from abroad also tempered the Court’s willingness to invest too much formative power in the public school system. Early parental rights decisions that involved public education shifted power away from public schools, thereby “defus[ing] the threat of excessive state authority [and] fostering the development of democratic citizens free from state control.”<sup>134</sup>

Though progressive-era intellectual movements undoubtedly influenced the Court’s public education jurisprudence, conceptions of minor children as developing citizens and schools as sites of democratic socialization can be traced much further back to the work of the liberal political philosopher John Locke. Locke’s philosophy of education deeply influenced Founding-era views of education. His short treatise on child development and education, “Some Thoughts Concerning Education”—one of “the most important books in early America”—sets forth a broader view of children as developing towards adult citizenship.<sup>135</sup> Minor children, Locke argues, though not “born in” equality, are nonetheless “born to” it.<sup>136</sup> Children, in other words, will one day become full and equal citizens, and this developmental trajectory must inform how they are to be educated and socialized.

In Locke’s view, education must be geared towards developing a child’s rational faculties and towards fostering in children the civic virtues that the child will need in order to live within a liberal society free of domination.<sup>137</sup> As Locke writes, children “should be taught to have all the Deference, Complaisance, and Civility for one another imaginable” and should be dissuaded from developing an “insolent Domineering” attitude towards their peers.<sup>138</sup> Ultimately, for Locke, education should prepare a child to take on the role of a free and equal citizen fully capable reasoned moral judgment.

Many Founding-era figures sought to broaden the nascent egalitarianism in Locke’s account of education.<sup>139</sup> Whereas Locke’s treatise was intended to guide the development of the aristocratic gentleman, for Founding figures like John Adams, public education in America was for “the common people...the

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133. *Id.*

134. *Id.* At 111.

135. CLAIRE RYDELL ARCENAS, AMERICA’S PHILOSOPHER: JOHN LOCKE IN AMERICAN LIFE 9 (2022); see LORRAINE SMITH PANGLE & THOMAS L. PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 75 (1993) (noting that “[b]y the middle of the eighteenth century, the influence in America of Locke’s educational treatise . . . was massive.”).

136. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 304 (Peter Laslett ed., Cambridge Univ. Press 2003) (1689).

137. JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING ix (Ruth W. Grant and Nathan Tarcov eds., Hackett Publishing Co., Inc. 1996) (1693).

138. *Id.* At 80–81.

139. See PANGLE & PANGLE, *supra* note 135, at 91 (describing early “Americans’ departure from Locke . . . [becoming] more pronounced after the Revolution, as they tried to devise a civic education that would harmonize with a polity rather different from that of the monarchic, imperial . . . England to which Locke had directly addressed his thoughts on education”).

tradesmen, the husbandman, the laboring people.”<sup>140</sup> “Their education,” Adams argued, “their understanding, and their knowledge” would be “as nearly equal as their birth, fortune, dignities, and titles.”<sup>141</sup> Similarly, for Thomas Jefferson and other Founders, an egalitarian system of public education, aimed at “illuminat[ing] . . . the minds of the people at large,” was thought to be essential to sustaining democratic governance.<sup>142</sup> As Jefferson described the aim of public education, “[e]qual right . . . is the polar star to be followed.”<sup>143</sup>

There is thus a long history underlying the Court’s observation in *Ambach* that public schools are sites of democratic socialization and that teachers may have “an obligation to promote civic virtues.”<sup>144</sup> Indeed, this view of public schools was one of the initial organizing principles underlying the American public education system itself. Public schools are constitutionally unique spaces that preserve and transmit democratic values; they are spaces where minor children from all walks of life may come to see themselves and their peers as equal citizens. In the following Part II.B, I focus specifically on one form of state action that, in the Court’s view, uniquely harms children’s democratic socialization: state action that is imbued with animus or stigma.

## B. MINOR CHILDREN AND EQUAL PROTECTION

Here, I present two arguments drawn from the Court’s jurisprudence to the effect that children warrant heightened protection from state action that harms their equality interests. As discussed in Part I.B, state action inflected with animus and stigma violates the equal protection clause. Animus-based state action demeans individuals or groups based on irrational fear or hostility. Stigmatizing state action deprives groups of important rights or opportunities to reinforce their outcast status. Though the Court has never squarely addressed how minor children fit within its equal protection jurisprudence, it has, in many ways, suggested, plausibly, that children warrant special protection from the dignitary harms that animus and stigma impose.

First, the Court has noted in several cases that children are particularly vulnerable to stigmatic harm. For example, the Court has argued that children are more susceptible to psychological injury and thus are likely to suffer more from stigmatization.<sup>145</sup> According to the Court, the psychological harm of stigma is compounded by the fact that children are less able to understand the

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140. John Adams, Letter VII (Oct. 10, 1780), in *TWENTY-SIX LETTERS, UPON INTERESTING SUBJECTS, RESPECTING THE REVOLUTION OF AMERICA*, 28 (1789).

141. *Id.*

142. See PANGLE & PANGLE, *supra* note 135, at 107 (describing the “political or civic educational goals that were uppermost in Jefferson’s mind and, more nebulously, in the minds of most other Founders”).

143. *Id.*

144. *Ambach v. Norwick*, 441 U.S. 68, 80 (1979).

145. *Plyler*, 457 U.S. 202, 223 (describing the “stigma of illiteracy” as an “enduring disability” with an “inestimable toll” on the “psychological well-being” of children); see *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494 (1954) (arguing that segregation imposes “[a] sense of inferiority” upon African American children).

justification for a particular law and thus are unable to understand why they are being treated unequally.<sup>146</sup> Children are also relatively more vulnerable to material deprivation, in the Court's view, and thus the denial of resources that often accompanies animus- or stigma-inflected state action may harm children more deeply and for a longer period of time, relative to adults.<sup>147</sup>

Second, the Court has argued that stigmatization in the public-school environment is especially wrongful because it interferes with the transmission of democratic values.<sup>148</sup> Stigmatized students will likely fail to develop a sense of their own equal status and worth as citizens. Moreover, stigmatized students will suffer in ways that will make it much more difficult for them to embrace and participate in democratic decision-making.<sup>149</sup> Of course, similar dynamics surely attend adult stigmatization. Yet, because minor children, especially younger children, are in the early stages of socialization into democratic values, child stigmatization is more worrisome, as it may prevent these values from taking root.

To see how these arguments operate doctrinally, it is necessary to examine cases in which children and their families face stigmatic harm or irrational hostility from state actors. Surprisingly, the earliest modern cases in which the Court protects minority families and their children from invidious discrimination come not from equal protection caselaw but from the Court's parental rights jurisprudence. Early parental rights cases like *Meyer v. Nebraska*,<sup>150</sup> *Pierce v. Society of the Sisters*,<sup>151</sup> and *Farrington v. Tokushige*<sup>152</sup> are shot through with antidiscrimination arguments. In each case, the Court protects minority families from hostile state action that sought to ban distinctive cultural practices from the home and/or classroom. Moreover, in some of these cases, the Court gestures

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146. *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (“By giving recognition and legal structure to their parents’ relationship, marriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’ . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”).

147. *See Plyler v. Doe*, 457 U.S. 202, 223 (1982) (“The inestimable toll of [illiteracy] on the social, economic, intellectual, and psychological well-being of [children], and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.”); *see also Brown*, 347 U.S. at 483 (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”); *United States v. Windsor*, 570 U.S. 744, 773 (2013) (striking down the Defense of Marriage Act partly on the grounds that the Act “brings financial harm to children of same-sex couples”).

148. *See infra* note 174.

149. *Plyler*, 457 U.S. at 223 (“By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”); *Brown*, 347 U.S. at 493 (describing education as “the very foundation of good citizenship” and “required in the performance of our most basic public responsibilities, even service in the armed forces”); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”).

150. 262 U.S. 390, 397 (1923).

151. 268 U.S. 510, 534–35 (1925).

152. 273 U.S. 284, 298 (1927).

toward what would ultimately become animus doctrine. In *Meyer*, for example, the Court notes that bare hostility toward Germans is an insufficient basis for state action that restricts the rights of minority families and their children.<sup>153</sup>

Though they are not often interpreted through an antidiscrimination frame, this is how later courts would interpret the early parental rights cases. In the famous footnote four of *Carolene Products*, for example, the Court cites *Meyer*, *Pierce*, and *Farrington* as precedents for the proposition that state action that targets religious and ethnic or racial minorities warrants heightened scrutiny.<sup>154</sup> Part III of this Article discusses in further depth the antidiscrimination implications of the Court's early parental rights jurisprudence.<sup>155</sup> I mention these cases here, however, as they provide the foundation for the Court's later child equality jurisprudence.

Though cases like *Meyer* and *Pierce* are important precedents, the Court's child equality jurisprudence properly begins with *Brown v. Board of Education*, where the Court first raises the argument that the state violates equal protection when it singles out children for status-based deprivation. However, this point has become slightly overshadowed by the debate over how the *Brown* opinion describes the harmful effects of child stigmatization. While the *Brown* opinion states plainly that public school segregation had "deprive[d] the children of the minority group of equal educational opportunities," the Court's basis for this claim is notoriously equivocal.<sup>156</sup> On the one hand, the Court notes that, even when "the physical facilities and other 'tangible' factors may be equal," segregation in public education is "inherently unequal" because segregation is "usually interpreted as denoting the inferiority" of African Americans.<sup>157</sup>

This reasoning seems to suggest that school segregation inherently violates equal protection because it publicly expresses a stigmatizing view of African Americans. Yet the Court precedes this conclusion by arguing that segregation generates in African American children "a feeling of inferiority as to their status in the community," which is "amply supported by modern authority."<sup>158</sup> This argument suggests that the constitutional violation derives not from the inherent social meaning of public school segregation, but from its damaging psychological effects.<sup>159</sup> The Court then cites, in footnote eleven of *Brown*, seven studies, ranging from Kenneth and Mamie Clark's psychological studies

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153. *Meyer*, 262 U.S. at 402 ("Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error.").

154. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (describing "religious" and "national" minority groups as "discrete and insular minorities") (citing *Meyer*, 262 U.S. at 390; *Farrington*, 273 U.S. at 284).

155. *See infra* Part III.

156. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954).

157. *Id.* At 493–94.

158. *Id.* At 494.

159. *Id.*

of African American children to broader, sociological accounts of race in the United States.<sup>160</sup>

Much ink has been spilt over the role of footnote eleven of *Brown* and the studies cited therein, most of it highly critical.<sup>161</sup> The conventional view is that the *Brown* Court's reliance on social science was a strategic error—the Clark study the weakest link in the logic of the decision. As Jack Balkin has argued, “[i]f anything, footnote 11 gave critics of the decision more ammunition than if Warren had simply omitted any reference to the studies.”<sup>162</sup> Some objected to the usage of social science in constitutional argument generally; others, to the Clark study in particular, given that its weaknesses were well known at the time and its inclusion was debated even among the NAACP lawyers who argued *Brown*.<sup>163</sup> Others thought the footnote is largely irrelevant, “merely corroboratory of common sense,” as Charles Black wrote in his somewhat qualified defense of the opinion.<sup>164</sup> For Black, the harmfulness of segregation was obvious to any honest observer; so obvious, that the Court did not even need to address children specifically. In his view, segregation and racial subordination are “generally not good for children needs less talk than the Court gives it.”<sup>165</sup>

While the reliance of courts upon social scientific research is an important and vexed issue, the furor over footnote eleven has obscured one of the larger lessons of *Brown*. In *Brown*, the Court presents an argument for protecting children's equality interests, but to see this it is necessary to distinguish between two questions: first, should the Court have considered psychological and social scientific findings concerning child self-esteem; second, should the Court be particularly skeptical of state action that treats certain groups of children unequally? Many readings of *Brown* either conflate these two questions or simply fail to address the latter.<sup>166</sup>

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160. *Id.* At 494–95 n.11.

161. Stephan Michelson, Paul L. Rosen & Stephen L. Wasby, *History and State of the Art of Applied Social Research in the Courts*, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 2, 9 (Michael J. Saks & Charles H. Baron eds., 1980) (describing footnote eleven as “the most controversial footnote in American constitutional law”).

162. See Jack M. Balkin, *Rewriting Brown: A Guide to the Opinions*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION*, 44, 51 (Jack M. Balkin ed., 2001).

163. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY*, 356 (First Vintage Books ed., 2004).

164. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 430 n.25 (1960).

165. *Id.*

166. For example, Drew Days and Michael McConnell both argue that reliance on social scientific studies of psychological harm is unnecessary. See Drew S. Days, *J., Concurring*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION*, 92, 97 (Jack M. Balkin ed., 2001) (asserting that the Court has “developed criteria for evaluating the constitutionality of racial classifications that do not depend upon findings of psychic harm or social science evidence.”); Michael W. McConnell, *McConnell, J., Concurring in the Judgment*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION*, 158, 159 (Jack M. Balkin ed., 2001) (declining to take note of social scientific studies suggesting that segregation harms African American children). Though Jack Balkin does not

It is entirely plausible, however, to maintain that child stigmatization poses unique equal protection problems, irrespective of the empirical literature on child self-esteem. Indeed, *Brown*'s most important observation about child stigmatization—that it “generates a feeling of inferiority that may affect their hearts and minds in a way unlikely ever to be undone”—is fundamentally sound.<sup>167</sup> The truth of this observation lies in the fact that children who are stigmatized are *morally* injured; the harm done is to their developing self-conceptions as citizens. Whether this harm reliably leads to lowered personal self-esteem is an important empirical question but ultimately not decisive with respect to the equal protection issues raised by child stigmatization. The constitutional problem stems from the fact that stigmatic harm does profound, lasting damage to a child's ability to view themselves as an equal citizen.

In its post-*Brown* child equality jurisprudence, the Court has further developed this line of argument. Consider, for example, *Plyler v. Doe*, a case in which the Court reviewed a Texas education law that permitted local school districts to deny enrollment to children not “legally admitted” to the country and withdrew funding from school districts that enrolled these children.<sup>168</sup> *Plyler* has long been regarded as doctrinally puzzling, as the Court partly adopts the language of heightened scrutiny while acknowledging that Texas had neither burdened a fundamental right nor targeted a suspect or quasi-suspect classification. Yet *Plyler* bears the hallmarks of a rigorous rational basis review case. Despite the fact that neither a fundamental right nor a suspect classification are implicated in the Texas law, the Court is plainly skeptical of the state's motives. What raises the Court's suspicion is that the Texas law targets undocumented children, “special members” of what threatens to become “a permanent caste of undocumented resident aliens.”<sup>169</sup>

In *Plyler*, the Court is much more forthright about the fact that the individual, social, and political burdens of stigmatic harm fall more heavily upon children than adults. Whereas the *Brown*'s Court sought to bolster its authority by citation to social science, the *Plyler* Court's analysis of child stigmatization is presented simply as fact. But this is arguably an improvement on *Brown* because the Court's main argument, that imposing the “stigma of illiteracy”

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reject reliance on these studies, he argues that the wrongfulness of segregation inherent in the social meaning of subordination conveyed by laws requiring separate educational facilities. See Balkin, *supra* note 162, at 44, 52. These responses render unnecessary the Court's recourse to psychological studies, yet they are silent as to whether the Court should more carefully scrutinize state action that stigmatizes children. Nor do these responses grapple with the distinctive harms that stigma inflict upon minor children. Conversely, Catherine MacKinnon maintains that psychological studies *can* yield insight into the harm imposed upon children by segregation, but she, too, seems to assume that stigmatic harm directed towards adults is essentially no different from stigmatic harm directed towards children. See Catherine A. MacKinnon, *MacKinnon, J.*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION*, 143, 146 (Jack M. Balkin ed., 2001).

167. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494 (1954).

168. 457 U.S. 202, 202 (1982).

169. *Id.* At 218–19.

upon undocumented children will take an “inestimable toll . . . on the social, economic, intellectual, and psychological well-being of the individual,” is hardly contestable.<sup>170</sup>

As to the social and political burdens of hostile and stigmatizing state action, the Court notes that illiteracy “foreclose[s] the means by which that group might raise the level of esteem in which it is held by the majority,” thereby reinforcing the political insularity of the minority group to which these children belong.<sup>171</sup> As the Court puts it, stigmatizing children in this way will “deny them the ability to live within the structure of our civic institutions.”<sup>172</sup>

Of course, this argument is slightly overstated; individuals with little or no formal education not only live within but also contribute meaningfully to civic life.<sup>173</sup> But the claim should be understood in light of the *Plyler* Court’s citations to *Meyer*, *Ambach*, and *Brown* regarding the role of the public school in transmitting democratic values and the harm of excluding outsiders from the education system.<sup>174</sup> As the Court observes in one footnote, “[t]he public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.”<sup>175</sup> Denying an education to a particular group of children is pernicious because it denies these children the ability to become socialized into democratic values and to fully participate in democratic life as equals. As they develop into citizens, illiterate, undocumented children will be less able to articulate their needs and interests in the language of democratic values and less able to contribute to and enrich public discourse. Surely, they are unlikely to be viewed, or to view themselves, as equal citizens. This is not an empirical observation about child self-esteem. Rather, it is a normative point about teaching children to regard themselves as equal members of the community.

*Plyler* reaffirms that the classroom is an important site for preserving and transmitting democratic values and that the Court’s oversight is warranted when local policies threaten children’s ability to participate in democratic socialization. But *Plyler* adds to *Brown*’s child equality analysis considerably. *Plyler* indicates that, even absent a suspect classification or a protected characteristic, the fact that children face state-imposed stigmatization is an important factor in the Court’s analysis, sufficient to trigger rigorous rational basis review. At several points in the Court’s argument, the fact that minor children are being stigmatized makes a key difference to the outcome. For

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170. *Id.* At 222–23.

171. *Id.* At 222.

172. *Id.* At 223.

173. As Suzanna Sherry has pointed out, “despite some claims that illiteracy is inevitably disenfranchising, one *can* vote—as well as earn a living, own property, raise a family, and do whatever else might be suggested as a right of citizenship—without an education. Millions do.” Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 132 (1995).

174. *Plyler*, 457 U.S. at 221.

175. *Id.* At 222 n.20.



example, while the Court notes that the “State may withhold its beneficence” from undocumented adults, undocumented children are not similarly situated; the “lasting impact” of stigmatization upon vulnerable, minor children, the Court argues, must be taken into account.<sup>176</sup>

Similarly, though the Court maintains that undocumented status is an important consideration with respect to adults, the fact that the *Plyler* plaintiffs are not citizens is not ultimately decisive. As the Court explains in a footnote, an “indeterminate number [of undocumented children] will eventually become citizens,” and even those who do not “may play a role—perhaps even a leadership role—in other areas of import to the community.”<sup>177</sup> Here, one can see a developmental logic at work: A child’s undocumented status cannot be used to deny that child educational opportunities because what children will become is an open question and heavily dependent upon state action. Many undocumented minor children will indeed one day become citizens. As such, undocumented children possess equality interests no less than children who are citizens.

So far, this Article has argued that the Court has developed a subtly distinct method of analysis when children’s equality interests are threatened by state action. The roots of this method of analysis lie in early parental rights cases. In *Brown*, the Court makes explicit what remains implicit in these earlier cases, that state educational policies that stigmatize minor children violate equal protection. But the state action in *Brown* explicitly mentioned race, and so warranted strict scrutiny. *Plyler*, by contrast, did not involve formal racial classifications. In *Plyler*, the Court applies something like rigorous rational basis review, and it does so explicitly because minor children are being targeted with stigma. The *Plyler* Court reasons that hostile, stigmatizing state action impairs a minor child’s ability to develop into an equal citizen. Given the profound harms at stake to the child and to the broader political community, the state must provide convincing evidence that it is addressing a genuine social problem and not merely ratifying public hostility.

To be clear about the scope of this Article’s argument, I do not claim that the Court applies rigorous rational basis review *any* time a child is threatened with harm, dignitary or otherwise. The argument is that the Court will employ a more demanding form of review when a child’s equality interests in particular are threatened. On this point, it is instructive to compare *Brown* and *Plyler* with *Palmore v. Sidoti* because *Palmore* is the rare case in which the Court explicitly *permits* child stigmatization. *Palmore* yields further insight into how the Court reasons about a child’s equality interests. As I argue below, it also foreshadows arguments that the Court develops more fully in its gay rights jurisprudence.

In *Palmore*, the Court reviewed a Florida trial court’s order divesting a mother of custody over her three-year-old daughter in part because the mother

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176. *Id.* At 219, 221.

177. *Id.* At 222 n.20.

had remarried an African American man.<sup>178</sup> The trial court claimed that, by granting custody to the white biological father, it was thereby protecting the child from the “inevitable . . . social stigmatization” that was bound to accompany growing up in a multiracial household.<sup>179</sup> While acknowledging that the child in question, Melanie Sidoti, might suffer from social condemnation, the Court appropriately rejects the trial court’s reasoning.

The brief majority opinion, however, is not a model of clarity. On the one hand, Chief Justice Burger observes that it is a state duty “of the highest order to protect the interests of minor children” and that “granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.”<sup>180</sup> Yet Chief Justice Burger fails to then follow through with a “best interests” analysis. Instead, he simply concludes that “the law cannot, directly or indirectly, give . . . effect” to racial biases.<sup>181</sup>

As a number of legal scholars have pointed out, Chief Justice Burger may have cut the argument short at this crucial point because it is not at all clear that a best interests analysis would yield the outcome the *Palmore* Court reached.<sup>182</sup> The problem is that the best interest standard alone is “simply too amorphous” to do the necessary dialectical work.<sup>183</sup> While Chief Justice Burger seems to think that Melanie’s interests were best served by growing up in a racially mixed household, one could just as well argue that shielding her from social condemnation and ostracism would have better served her interests. Either outcome could have served Melanie’s interests, depending on how those interests are defined. While the best interest standard is not entirely contentless, neither does it require the outcome that the *Palmore* Court settled upon.

Chief Justice Burger thus does not ultimately explain why Melanie’s interests will be best served by growing up with a parent in an interracial relationship. Nonetheless, the decision was plainly correct; allowing the state to deny custody to parents who join interracial relationships surely violates the Equal Protection Clause. To understand the outcome in *Palmore* it is important to keep in mind that the Court attempts to assess the child’s best interests *in light of* the equal protection values at stake. In other words, the Court implicitly recognized in *Palmore* that equal protection requires the state to consider a

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178. *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984).

179. *Id.* At 431 (citation omitted).

180. *Id.* At 433.

181. *Id.*

182. See Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 58 (1990) (noting that *Palmore* “sheds no light on the really critical question: What is the relationship between race and the child’s best interests?”); Marshall H. Silverberg & Lisa A. Jonas, *Palmore v. Sidoti: Equal Protection and Child Custody Determinations*, 18 FAM. L.Q. 335, 341–42 (1984) (arguing that “[t]he problem in applying the best interests concept is that it is vague and susceptible to subjective interpretation”).

183. David D. Meyer, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL’Y 183, 200 (2007).

minor child's equality interests—that is, their interest in being able to see themselves and others as equal citizens.

To appreciate this point, it is helpful to consider the implications of the Court's decisions for Melanie. The lower court was likely correct in maintaining that Melanie would be subjected to community-imposed stigma were she to live with her mother. Yet, had the Court granted custody to Melanie's father, it would have conveyed to Melanie that her mother had entered into a relationship that the local community viewed as pathological; so pathological that the state found it necessary to remove her from her mother's custody. Such an outcome would not only deeply warp her relationship with her mother, but it would also signal to Melanie that the surrounding community was right to condemn the interracial relationship her mother had joined, even though the Court had earlier identified prohibitions on interracial relationships as “endorsement[s] of . . . White Supremacy.”<sup>184</sup> Likely, Melanie would have taken on such views herself.

*Palmore* deepens the Court's child equality jurisprudence in two respects. First, *Palmore* confirms that the Court places unique importance upon a child's equality interests relative to other kinds of harm that a child might endure. Difficult as it must have been for Melanie Sidoti to suffer her community's condemnation, a custody judgment in favor of the father would have deeply impaired Melanie's ability to view members of other races as equal citizens. It is this latter type of harm that the Court regards as determinative with respect to assessing Melanie's best interests. Second, *Palmore* suggests that a minor child's equality interests can be harmed not only when the child is stigmatized but also when the child's family is formally regarded as unequal in important respects to other families. The Court was unwilling to ratify the community's racist condemnation of Melanie's mother, in part because Melanie would have come to view her own mother as an outcast, with the profoundly harmful effects this belief would entail for Melanie herself. This suggests that minor children, unlike adults, can suffer from stigma not only when they themselves are singled out but also when hostile state action targets their families.

In this respect, *Palmore* foreshadows major gay rights decisions like *United States v. Windsor*<sup>185</sup> and *Obergefell v. Hodges*.<sup>186</sup> In *Windsor*, the Court struck down Section 3 of the Defense of Marriage Act, which defined “marriage” and “spouse” in federal law as limited to heterosexual unions because it stigmatized and expressed animus towards gay couples.<sup>187</sup> While much of the opinion is understandably focused upon the harms that this restriction imposed upon gay couples, the majority repeatedly emphasizes the harms that DOMA imposes upon minor children. The Court argues that limiting federal benefits to straight couples “humiliates tens of thousands of children now

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184. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

185. *See generally* 570 U.S. 744 (2013).

186. *See generally* 576 U.S. 644 (2015).

187. *Windsor*, 570 U.S. at 774–75.

being raised by same-sex couples.”<sup>188</sup> And, as in *Palmore*, the Court seems especially disturbed at the prospect of state action that causes children to view their parents and their families as inherently inferior. Yet another reason to strike down DOMA, the Court argues, is that it signifies to minor children that the marriage of their same-sex parents “is less worthy than the marriages of others.”<sup>189</sup>

Similarly, in *Obergefell*, the Court strikes down state laws banning same-sex marriage, partly on the grounds that such laws express animus towards and stigmatize—they “harm and humiliate”—children of gay and lesbian marriages.<sup>190</sup> Children of gay and lesbian unions, the majority argues, should not be forced by the state to endure the “the significant material costs of being raised by unmarried parents” or to “suffer the stigma of knowing their families are somehow lesser.”<sup>191</sup> According to the Court, invalidating laws forbidding same-sex marriage serves a child’s best interests, in that such children will both materially benefit and will be able to view themselves and their families as social equals, in “concord with other families in their community.”<sup>192</sup> That is, minor children possess an interest in seeing themselves and their families as equal members of the community.

The fact that children are being treated unequally provides the *Obergefell* majority with a wholly independent rationale for invalidating the state laws at issue.<sup>193</sup> According to the Court, invalidating state bans on gay marriage “safeguards children.”<sup>194</sup> But it is important to note that the analysis of children’s equality interests in *Obergefell*, and *Windsor* as well, differs in important respects from prior cases. In *Brown* and *Plyler*, the children targeted shared with their parents the relevant disfavored attribute, namely, racial identity and undocumented status, respectively. This follows the Court’s adult stigma jurisprudence, according to which stigmatizing state action generally picks out a class of individuals, all of whom possess a disfavored characteristic.

In *Windsor* and *Obergefell*, however, the Court does not limit its stigma analysis to gay and lesbian children but to *all* children of gay and lesbian unions, whatever their sexual orientation. Children, these cases suggest, have greater need of the Court’s protection because their equality interests may be harmed not only when the state directly singles them out, but also when the state singles out their families. Given the influence that families possess over one’s sense of identity, this is a plausible conclusion. Children whose families are regarded as unequal by the state will surely come to view themselves as somehow lesser.

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188. *Id.* At 772.

189. *Id.* At 775.

190. *Obergefell*, 576 U.S. at 668.

191. *Id.*

192. *Id.*; *Windsor*, 570 U.S. at 772.

193. *Obergefell*, 576 U.S. at 667–68.

194. *Id.* At 667.

The *Obergefell* Court's citations to *Meyer* and *Pierce* brings us full circle. As I argued above, *Meyer* and *Pierce* were early examples of the Court protecting minority families and their children from hostile or demeaning state action. *Windsor* and *Obergefell* bring this latent aspect of the Court's parental rights jurisprudence to full fruition. State action that irrationally or unfairly restricts the rights of minority parents is wrongful not just because it infringes upon a fundamental right. It is also wrongful because it damages a minor child's sense of themselves as an equal citizen.

While the Court's child equality jurisprudence may not constitute formal doctrine, it is nonetheless a distinct mode of legal analysis structured around a coherent and normatively plausible set of principles and opinions. Animus or stigma targeting minor children poses unique equal protection problems for two reasons: First, children are especially vulnerable to the dignitary harms that state action inflected with animus and stigma inflicts. Second, children must be socialized into democratic values, but state action driven by animus and stigma impairs a child's ability to view themselves and their peers as equal citizens.

These principles have provided the Court with grounds for extending more robust protection to children threatened with stigmatic or demeaning state action. The Court has protected children from dignitary harm that will impair their transition to adult citizens and from demeaning state action that targets their families. Most importantly, the Court has employed a more rigorous method of review in several cases precisely because the state sought to target minor children from stigmatized families.

### III. THE ARGUMENT FROM PARENTAL RIGHTS

In Part I, I argued that many laws targeting LGBTQ+ youth are demeaning and stigmatizing. Traditionally laws that contain stigma or animus are subjected to some form of heightened scrutiny. In Part II, I argued that the Court has also looked more critically at laws that impose stigma and animus upon minor children. Thus, the Court has several reasons to subject laws targeting LGBTQ+ youth to a more rigorous standard of review. As it has done in previous cases by applying a more rigorous rational basis review, the Court should shift the burden of persuasion to the state by probing the state's rationale for pretext and requiring the state to provide evidence sufficient to justify its ends and choice of means.

In this Part, I argue that the most common justification for laws targeting LGBTQ+ youth is indeed pretextual. Many proponents of laws targeting LGBTQ+ youth assert that these laws are necessary to enforce a parent's right to control the upbringing and education of their child. But as I demonstrate below, this argument is untenable. There is simply no plausible argument to the effect that parents have a fundamental right to control LGBTQ+ youth in the classroom or to deny LGBTQ+ youth medical care. Worse, many recent state laws undermine the rights of parents of LGBTQ+ youth. Because state laws

targeting LGBTQ+ youth are deeply inconsistent with parental rights caselaw and theory, I conclude that the parental rights argument is mere pretext. In Part IV, I propose an alternative way of interpreting parental rights rhetoric.

#### A. THE ARGUMENT FROM PARENTAL RIGHTS

Laws targeting LGBTQ+ youth are often defended in terms of parental rights. For example, according to the Florida House of Representatives Staff Analysis of H.B. 1557, the bill “specifies how a parent’s fundamental right to make decisions regarding the care and upbringing of his or her child must be addressed in the public school setting.”<sup>195</sup> Citing canonical parental rights cases such as *Meyer v. Nebraska*, *Pierce v. Society of the Sisters*, and *Wisconsin v. Yoder*, the analysis notes that “it is well settled that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the recognized fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment.”<sup>196</sup> Florida Governor Ron DeSantis has echoed this parental rights framing, defending H.B. 1557 on the grounds that “[p]arents have every right to be informed about services offered to their child at school.”<sup>197</sup>

H.B. 1557 has served as a model for similar bills in several other states that are also often justified in terms of parental rights. For example, Arizona’s proposed House Bill 2285 (“H.B. 2285”) sets forth a number of purported parental rights and requires public and charter school sex education programs to “emphasize biological sex and not gender identities.”<sup>198</sup> Georgia’s “Parents Bill of Rights” grants parents “[t]he right to review all instructional materials intended for use in the classroom”<sup>199</sup> and was enacted alongside a ban on “divisive concepts,” a phrase understood primarily to refer to “critical race theory.”<sup>200</sup> As with bans on educational content related to sex or gender, bans on teaching historical racial inequality are also typically justified in terms of parental rights.<sup>201</sup>

Though proponents of state laws targeting LGBTQ+ youth are generally quick to cite parental rights caselaw, rarely do they offer substantive legal analyses showing how these laws fit within or follow from the Supreme Court’s

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195. STAFF OF FLA. H.R. JUDICIARY COMM., 124TH REG. SESS., ANALYSIS OF PARENTAL RIGHTS IN EDUCATION 1 (Comm. Print, 2022).

196. *Id.* At 2.

197. See Press Release, Ron DeSantis, *supra* note 78.

198. H.R. 2285, 55th Leg., 2d Reg. Sess. § 2A(1)(b) (Ariz. 2022).

199. Cal Beverly, *Gov. Kemp Signs ‘Parents Bill of Rights,’ Other Education Bills*, CITIZEN (Apr. 28, 2022), <https://thecitizen.com/2022/04/28/gov-kemp-signs-parents-bill-of-rights-other-education-bills>.

200. *Id.*; Sharon Bernstein, *Georgia Becomes Latest U.S. State to Ban ‘Divisive’ Concepts in Teaching About Race*, REUTERS (Apr. 28, 2022, 3:13 PM), <https://www.reuters.com/world/us/georgia-becomes-latest-us-state-ban-divisive-concepts-teaching-about-race-2022-04-28/#:~:text=The%20bills%20prohibit%20any%20instruction,Oklahoma%2C%20have%20passed%20similar%20bans>.

201. Melissa Moschella, *Critical Race Theory, Public Schools, and Parental Rights*, HERITAGE FOUND. (Mar. 24, 2022), <https://www.heritage.org/education/commentary/critical-race-theory-public-schools-and-parental-rights>.

parental rights jurisprudence. The argument seems to be simply that parents possess the right to control their child's upbringing and education, and state laws targeting LGBTQ+ youth merely specify how parents may exercise their lawful authority.

While I argue below that this conception of parental authority is implausible, it is undoubtedly true that the general right of parents to control the upbringing and education of their children is deeply rooted within Supreme Court jurisprudence. Parental rights are among the few substantive due process rights to survive the *Lochner* era. As the Court observed in *Parham v. J.R.*, parental rights jurisprudence “historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”<sup>202</sup> It is thus worth considering just how far this broad grant of parental authority plausibly extends.

One immediate problem for the parental rights argument is that the relatively few Supreme Court cases directly on point embrace parental rights in broad principle but do not clearly identify their scope of application. For example, in *Meyer*, the Court struck down a state law that forbade teaching a non-English language “in any private, denominational, parochial or public school.”<sup>203</sup> In *Pierce*, the Court struck down an Oregon law that would have effectively closed all private and parochial schools.<sup>204</sup> In these cases, the Court considered state laws that directly foreclosed entire methods of instruction and entire schooling systems. The narrowest readings of *Meyer* and *Pierce* confine parental rights to highly similar fact patterns.<sup>205</sup> The broadest readings of *Meyer* and *Pierce* would grant parents the right of control every aspect of their child's educational environment. But between these two poles, there are innumerable possibilities and far too little textual evidence from the underlying cases to yield firm conclusions about the extent of parental rights.

Further muddying the waters, many canonical parental rights cases involve additional factors that complicate a straightforward parental rights analysis. *Meyer* and *Pierce* can be read to turn on property rights; *Pierce* and *Yoder* both plausibly involve free exercise claims.<sup>206</sup> These cases yield few unambiguous

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202. 442 U.S. 584, 602 (1979).

203. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

204. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 531 (1925) (observing that “without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of” parochial schools).

205. See, e.g., *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (“The *Meyer* and *Pierce* cases . . . evince the principle that the state cannot prevent parents from choosing a specific educational program — whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to ‘standardize its children’ or ‘foster a homogenous people’ by completely foreclosing the opportunity of individuals and groups to choose a different path of education.”).

206. See William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 178 (2000) (“Despite their ringing declarations about human rights, *Meyer* and *Pierce* were both formally decided largely on the basis of property rights.”); *Id.* at 182 (noting that contemporary courts would likely decide *Pierce* on the basis of the First Amendment’s Free Exercise clause); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“[A] State’s interest in universal education . . . is not

conclusions about the scope of parental control over the educational environment and the upbringing of children.

The Court acknowledged this uncertainty in *Troxel v. Granville*, one of the most recent cases to address parental rights squarely. While Justice Kennedy, writing in dissent, notes the “general, perhaps unanimous, agreement” among the justices regarding the “right [of parents] to determine, without undue interference by the State, how best to raise, nurture, and educate the child,” the *Troxel* plurality opinion is marked by deep division among the justices over what this right entails.<sup>207</sup> The underlying problem, as Justice Souter observes in his concurrence, is that the parental rights caselaw has “not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.”<sup>208</sup>

The Supreme Court simply has not identified the precise extent to which parents can control their children’s upbringing, especially in the classroom setting. This is not yet an argument against the parental rights justification for bills targeting LGBTQ+ youth. But it shows that the parental rights justification for these bills is by no means obvious and that merely invoking the language of parental rights is hardly sufficient. This is worth noting because parental rights arguments are often raised by conservative Christians, libertarians, and others on the political right who wish to determine the educational content of public schools. But parental rights, absent further specification of the basis and scope of these rights, do not possess an inherent political valence. There is no reason to assume, in other words, that parental rights inherently favor conservative or liberal parents, or that the rights of parents hostile to LGBTQ+ youth supersede the rights of parents accepting of LGBTQ+ youth.

The fundamental problem with the parental rights argument is that laws targeting LGBTQ+ youth deeply undermine the rights of parents of LGBTQ+ children. To demonstrate this point, I consider four conceptions of parental rights that have been adopted by the Court or advanced by legal scholars. First, parental rights are necessary to protect minority families and minority cultures from majoritarian coercion. Second, parental rights are necessary because parents are generally better situated than the state to promote their child’s interests. Third, parents deserve robust protection against state interference so that parents may transmit their values to their children. Finally, I consider the arguments that parents possess the right to control classroom policies and educational content. Ultimately, none of these accounts of parental rights provide adequate support for laws targeting LGBTQ+ youth. In fact, the fundamental problem with the parental rights argument is that laws targeting LGBTQ+ youth deeply undermine the rights of parents of LGBTQ+ children.

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totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . .”).

207. *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).

208. *Troxel v. Granville*, 530 U.S. 57, 78 (2000) (Souter, J., concurring). As Justice Thomas points out, the plurality opinion fails even to identify the applicable standard of review. *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).



### 1. *The Minority Protecting Account*

According to what I call the “minority protecting” account, parental rights serve as a bulwark between the minority family and the encroaching state.<sup>209</sup> This conception of parental rights is drawn from early Supreme Court parental rights cases, which protected parental rights most often in the name of cultural diversity and pluralism. In *Meyer*, for example, the Court struck down a state law that targeted the local German immigrant population.<sup>210</sup> According to the *Meyer* Court, the desire to “foster a homogeneous people” is insufficient justification for allowing the state to single out an unpopular minority.<sup>211</sup> In *Pierce*, the Court cited *Meyer* to strike down an Oregon law that targeted Catholics and Catholic educational institutions that had been endorsed by the Oregon Ku Klux Klan.<sup>212</sup> In *Farrington v. Tokushige*, a case involving regulations enacted in Hawaii that would effectively ban private academies teaching Asian languages, Justice McReynolds emphasized the anti-assimilationist thrust of parental rights, noting that “[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.”<sup>213</sup>

On this reading of the Court’s parental rights jurisprudence, parental rights protect families, predominantly minority families, from state interference.<sup>214</sup> Protecting parental rights to preserve cultural pluralism is understandable given that the family is often the primary site for the preservation and transmission of values, practices, and belief systems that lack majority recognition or support. Moreover, as the fact patterns in *Meyer*, *Pierce*, and *Tokushige* indicate, small networks of like-minded families acting collectively can sustain robust minoritarian cultures operating to some extent independently of the (often hostile) local political environment. Lastly, the intimate ties within families may generate sympathy and understanding for practices that seem irreverent or bizarre to the outside world. On this understanding of parental rights, the family is to be protected from the state because it is an important source of cultural and political differences.

The minority protecting account also appears to motivate the Court’s later parental rights jurisprudence. In *Moore v. City of East Cleveland*, for example, the Court observes that it is through the family that “we inculcate and pass down

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209. See, e.g., Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 178 (2003) (“Parents’ freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups.”). To be sure, the state often fails to uphold the parental rights of minority families. See *infra* Part III.C.2. See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 155–56 (2021).

210. *Meyer v. Nebraska*, 262 U.S. 390, 261 (1923).

211. *Id.*

212. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

213. 273 U.S. 284, 298 (1927).

214. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (citing *Meyer*, *Pierce*, and *Tokushige* as examples of cases involving state action targeting “discrete and insular” minority groups).

many of our most cherished values, moral and cultural.”<sup>215</sup> But the *Moore* Court also recognizes that different families will pass down different values—indeed, that different family structures are themselves reflective of different value systems. Thus, parental rights must protect not only minority parents themselves but also non-traditional family structures.

According to the *Moore* Court, “the Constitution prevents [the state] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.”<sup>216</sup> As Justice Brennan points out in his concurrence, state favoritism towards the traditional, nuclear family fails to show respect for extended and multigenerational family structures whose “prominence...among ethnic and racial minority groups” indicates that they are “a vital tenet of our society.”<sup>217</sup> The state thus must tread carefully when its regulations threaten to “slic[e] deeply into the family itself.” Here, again, parental rights are closely linked with autonomy from state intervention and the protection of non-traditional cultures and family structures.<sup>218</sup>

The minority protecting account of parental rights can also explain why parental rights protect families not only in the private home but, to some extent, in the public classroom. Consider, for example, *West Virginia v. Barnette*, in which the Court struck down public school requirements to salute the American flag.<sup>219</sup> *Barnette* is most often read as a First Amendment case or a case about student’s rights. The wrongfulness of the Pledge of Allegiance requirements, according to this view, inheres in the fact that the Pledge of Allegiance requirements compel students to express a particular viewpoint on “matters of individual opinion and personal attitude.”<sup>220</sup> Yet this reading slightly obscures the nature of the student speech at issue. While *Barnette* clearly involves student rights of expression, the refusal to salute the flag had become publicly salient because it was closely associated with the Jehovah’s Witnesses, a local, stigmatized minority group. As in earlier parental rights cases, politically dominant groups were attempting to coercively assimilate members of a minority group by targeting their distinctive child-raising practices.

Justice Jackson’s majority opinion in *Barnette* speaks as much to parental rights as to freedom of expression. First, Justice Jackson makes explicit a point that earlier parental rights cases presuppose but do not clearly state—that the diverse cultural goods produced in a pluralistic society require toleration of seemingly deviant ways of life, including seemingly deviant approaches to child raising. As Justice Jackson writes, “[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of

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215. 431 U.S. 494, 503–04 (1977) (plurality opinion).

216. *Id.* at 506.

217. *Moore v. City of E. Clev.*, 431 U.S. 494, 510 (1977) (Brennan, J., concurring).

218. *Id.* at 510–11.

219. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

220. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

occasional eccentricity and abnormal attitudes.”<sup>221</sup> Surely, for many Americans at the time, the idea of children being taught by their parents to defy symbols of state authority must have appeared not only eccentric but morally outrageous. Yet, as Justice Jackson points out, the value of public toleration is meaningless if tolerance is extended only to beliefs or practices that already enjoy broad social recognition or support. If it is to secure a truly pluralistic culture, public tolerance must extend deeply to acts or lifestyles that “touch the heart of the existing order.”<sup>222</sup>

Justice Jackson correctly recognized in *Barnette* that parental rights would mean little to minority parents if public schools were permitted to stamp out heterodox beliefs and practices. School-age children no doubt experience tremendous pressure to conform when formally shunned and stigmatized by classmates and teachers for practices that are central to their homelife. An intolerant public-school environment is thus a serious threat to the ability of minority families to sustain their ways of life and transmit their distinctive cultural practices. Moreover, intolerant public schools effectively place minority families in a double bind: The “State asserts power to condition access to public education on making a prescribed sign and profession” while at the same time “coerc[ing] attendance by punishing both parent and child.”<sup>223</sup> This is public education as forced assimilation, and as Justice Jackson’s many references to authoritarian regimes make plain, it is antithetical to a culturally pluralistic, liberal democracy.

Given the anti-assimilationist thrust of *Meyer*, *Pierce*, *Tokushige*, *Moore*, and *Barnette*, it is hard to see how state laws targeting LGBTQ+ youth vindicate parental rights. Indeed, to invoke parental rights in order to ban any discussion of LGBTQ+ issues in public schools for all students is to stand parental rights doctrine on its head. In all of these foundational parental rights cases, the Court explicitly protects the parental rights of unpopular minorities from majoritarian persecution. In these cases, the Court straightforwardly refuses to allow parents in the majority to control the behavior and upbringing of minority children in the home; and as *Barnette* indicates, to some extent this right extends to the behavior and beliefs of minority children in the public classroom. If anyone has a plausible parental rights claim, it is the parents of LGBTQ+ youth whose ability to control their child’s upbringing is seriously threatened by local and state governments.

Moreover, in these cases, the law at issue sought not only to control the public-school environment but also to restrict the private options available to minority parents with respect to their child’s upbringing. Laws targeting LGBTQ+ youth often operate similarly. For example, while Florida’s H.B. 1557 restricts discussions of LGBTQ+ identity in the classroom, the Florida

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221. *Id.* at 641–42.

222. *Id.* at 642.

223. *Id.* at 630–31.

Department of Health has issued guidelines denouncing social or medical gender transitions for youth.<sup>224</sup> Similarly, after investigating parents who provided gender-affirming care to their transgender children for child abuse, state officials in Texas now aim to ban discussions of LGBTQ+ identity in the classroom.<sup>225</sup> Such laws seek to forbid discussion or recognition of non-traditional sex or gender identities in public classrooms while restricting the ability of families to raise and care for their LGBTQ+ children in private. Thus, these laws comprise state attempts to forcibly assimilate a stigmatized minority group by foreclosing both public and private options available to minority families.

## 2. *The Relative Competence Account*

A second account of parental rights asserts that providing broad legal protection to parents is necessary because the parent is better able than the state to discern the child's best interests and to promote the child's well-being. According to this broadly consequentialist defense of parental rights, a parent possesses three advantages over the state with respect to raising a child. First, a parent is intimately motivated to care about their child's well-being and interests, whereas a state agency or state employees have little personal investment in the child's development. Second, a parent will know their child best and, in light of this knowledge, will be the best judge of what will and will not promote their child's well-being. Third, a parent will be able to act directly to promote their child's interests, whereas state agencies tend to be less effective in caring for a child's needs; moreover, even when it is effective, state action has the added detriment that it will inevitably disrupt the parent-child relationship.

This "relative competence" account of parental rights maintains that "[p]arents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances."<sup>226</sup> The relative competence account of parental rights is most clearly articulated in the 1979 case *Parham v. J.R.*, in which the Court reviewed a Georgia law providing for the commitment of minor children to mental health facilities.<sup>227</sup> In *Parham*, the Court observed that the law "historically . . . has recognized that natural bonds of affection lead parents to act in the best interests

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224. See Spells & Christensen, *supra* note 19.

225. Brian Lopez & Emily Hernandez, *Lt. Gov. Dan Patrick Wants Texas Version of Florida Law that Critics Dubbed "Don't Say Gay"*, TEX. TRIB. (Apr. 04, 2022, 7:00 PM), <https://www.texastribune.org/2022/04/04/texas-dont-say-gay-dan-patrick/#:~:text=Gov.,kids%20below%20the%20fourth%20grade>.

226. Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 647 (2002); see Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2415 (1995) ("[T]he social goal at stake in the regulation of the parent-child relationship is to ensure children the care necessary for their development into healthy, productive adults. This goal is more likely to be achieved if the law focuses principally on the relationship between parent and child, rather than on the child's needs per se. . . . [A]s a general matter, the state is not well suited to substitute for parents in the job of rearing children.").

227. 442 U.S. 584, 587 (1979).

of their children.”<sup>228</sup> The Court argued that this legal presumption underlay the state’s grant of “broad parental authority over minor children.”<sup>229</sup>

The *Parham* Court drew this conception of the parent-child relationship from English common law. For example, in his discussion of parental rights and duties, William Blackstone argued that “implant[ed] within the breast of every parent” was an “insuperable degree of affection” toward their child.<sup>230</sup> In other words, parents would be naturally motivated to care for their children, and parental rights allowed parents “effectually to perform [their] duty.”<sup>231</sup> Parental rights secured a robust parental role in childrearing in two ways. Positively, parental rights specify that parents are the primary parties charged with making decisions on behalf of their children. Negatively, parental rights restrain the state from interfering with parents’ choices concerning their child’s well-being.

Not every parent will reliably promote their child’s best interests. But proponents of the relative competence account argue that the alternative—allowing the state to intervene in the parent-child relationship whenever parents fail to promote their child’s best interests—would be worse for children. State intervention severely disrupts the child’s home environment, and disruption of the home environment generally harms a child’s well-being.<sup>232</sup> State intervention thus should be resorted to only sparingly, where it is necessary to forestall parental abuse or neglect. These narrow exceptions aside, broad protections for parental rights will generally serve the children’s best interests. Parental rights, on this account, protect the decision-making authority of the parties who are generally best positioned to discern and promote the child’s well-being.

Laws targeting LGBTQ+ youth cannot plausibly be defended as protecting or promoting the ability of parents to foster their child’s well-being. For instance, laws requiring educators to “emphasize biological sex over gender identities” or laws which categorically ban medical care for transgender youth deeply interfere with the parent’s ability to help their child develop a healthy personal identity.<sup>233</sup> Few issues are as intimate, sensitive, and child-specific as a young person’s developing sense of self, gender, sexual orientation, and social identity. And if anyone is well-positioned to assist a young person through this process of development, it is the parent. Parental rights afford parents the autonomy to assist their children in making decisions of great personal import. To revoke this authority from parents in the name of parental rights is to deeply distort parental rights doctrine.

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228. *Id.* at 602.

229. *Id.*

230. See Buss, *supra* note 126, at 756 (citation omitted).

231. Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 22 n.33 (2009) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*440).

232. See Scott & Scott, *supra* note 226, at 2445 n.132 (observing that “[m]ost child-development experts emphasize the harm to the child of any disruption of the parent-child bond”).

233. See H.B. 2161, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

Although some proponents of laws targeting LGBTQ+ youth argue that providing medical care for transgender youth is dangerous and, therefore, parents should be forbidden from allowing their children access to certain treatments or procedures, no serious attempt has been made to demonstrate that parents of LGBTQ+ children are uniformly failing to promote their child's best interests. Alabama's Senate Bill 184 ("S.B. 184"), for example, states that "[m]inors, and often their parents, are unable to comprehend and fully appreciate the risk and life implications...that result from" some forms of transgender medical care.<sup>234</sup> No evidence is offered for this demeaning claim, which simply states as a fact that parents of transgender youth are generally incapable of determining what is in their child's best interests.

To be sure, there is some uncertainty in this area of medical research and some disagreement among medical experts regarding the appropriate standards for transgender adolescent medical care. For example, medical oversight committees in some countries have recently adopted relatively more cautious approaches to transgender youth care, citing a lack of robust medical research to guide clinical practice. The World Professional Association for Transgender Health ("WPATH") recommends that "health care professionals working with gender diverse adolescents undertake a comprehensive biopsychosocial assessment of adolescents who present with gender identity-related concerns."<sup>235</sup>

Yet the existence of uncertainty or disagreement among medical experts does not provide support for state laws banning gender-affirming care. According to the *Parham* Court, for example, parents possess "plenary authority" as well as the "right, coupled with the high duty . . . to seek and follow medical advice."<sup>236</sup> The fact that a medical procedure involves risks or results in permanent physical changes "does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."<sup>237</sup> Though the *Parham* Court was considering medical decisions to which a child objected, the Court nevertheless affirmed parental autonomy from state intervention. In cases of social recognition of a child's gender or gender confirmation care, the case against state intervention is even stronger, given that both parent and child desire the same outcome.

Once again, the parental rights justification for laws targeting LGBTQ+ youth gets the doctrine exactly backwards. According to the relative competence account, parents warrant robust protection from state intervention because parents are generally in the best position to understand and promote their child's well-being. Decisions concerning intimate medical care are precisely the kinds

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234. S.B. 184, 2022 Leg., Reg. Sess. § 2, para. 15 (Ala. 2022).

235. E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S48 (2022).

236. *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979).

237. *Id.* at 603.

of choices that require careful guidance and support from someone who knows the child well. Moreover, parents, unlike local or state governments, are best able to monitor the impact of conditions like gender dysphoria on their child's mental health and best able to seek out appropriate care.

This is particularly important because there is some evidence that gender-diverse minors who do not receive appropriate care face adverse mental health outcomes. Some studies have suggested that transgender and non-binary youth who receive gender-affirming care experience lower rates of depression and suicidality.<sup>238</sup> For these reasons a number of medical organizations in the United States—including the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics, among many others—have advocated for gender-affirming care where it is warranted.<sup>239</sup> Laws categorically banning or criminalizing gender-confirming care thus directly frustrate caring parents who wish to carry out their “high duty” to seek and follow medical advice for their children.

But laws targeting LGBTQ+ youth do not simply prevent parents from caring for their children. Many of these laws will actively disrupt the home life of LGBTQ+ youth. A recent survey of LGBTQ+ parents in Florida, for example, reveals that 56% of parents surveyed have considered moving to another state and that 17% have already begun moving.<sup>240</sup> One of the primary considerations for families considering moving to another state is the impact of H.B. 1557 upon the safety and mental health of LGBTQ+ children in public schools.<sup>241</sup> In Texas, nine families have been investigated by the Texas Department of Family and Protective Services for providing gender-affirming care to their transgender children.<sup>242</sup> These investigations have included unannounced visits to the children's schools and family interviews. In Texas, as well, LGBTQ+ families

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238. See Diane Chen, Johnny Berona, Yee-Ming Chan, Diane Ehrensaft, Robert Garofalo, Marco A. Hidalgo, Stephen M. Rosenthal, Amy C. Tishelman & Johanna Olson-Kennedy, *Psychosocial Functioning in Transgender Youth After Two Years of Hormones*, 388 *NEW ENG. J. MED.* 240, 240 (2023); Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 *PEDIATRICS*, Feb. 2020, at 1.

239. Press Release, Am. Med. Ass'n, AMA to States: Stop Interfering in Health Care of Transgender Children (Apr. 26, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children> (urging “governors to oppose state legislation that would prohibit medically necessary gender transition-related care for minor patients”); *Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth*, AM. PSYCH. ASS'N (July 2020), <https://www.psychiatry.org/getattachment/8665a2f2-0b73-4477-8f60-79015ba9f815/Position-Treatment-of-Transgender-Gender-Diverse-Youth.pdf> (noting that the APA “[s]upports access to affirming and supportive treatment for trans and gender diverse youth”); Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 *PEDIATRICS*, Oct. 2018, at 1, 1 (“[T]he American Academy of Pediatrics (AAP) strives to improve health care access and eliminate disparities for children and teenagers who identify as lesbian, gay, bisexual, transgender, or questioning (LGBTQ) of their sexual or gender identity.”).

240. See Goldberg, *supra* note 4.

241. See S.B. 254, 125th Leg., Reg. Sess. § 1 (Fla. 2023).

242. See Carlisle, *supra* note 16.

are choosing to flee or to send their children out of state rather than face hostile state interference.<sup>243</sup>

Recall that, on the relative competence account of parental rights, a parent possesses the right to control their child's upbringing because they will typically possess the motivation and judgment necessary to effectively care for their child's well-being. State agencies not only lack these qualities relative to the parent, but state intervention also brings additional, and in some cases irreparable, harm of interfering in the child's home life. Once again, the parental rights justification for laws targeting LGBTQ+ youth pervert the underlying rationale for parental rights. Laws that interfere with a parent's ability to assist their children in navigating issues involving sexual orientation and gender identity—laws that cause LGBTQ+ families to flee or live in fear—simply cannot be defended on the grounds that they protect parental rights.

### 3. *The Parentalist Account*

Supreme Court parental rights jurisprudence, I have argued, does not lend support to laws targeting LGBTQ+ youth. Of course, the parental rights argument for laws targeting LGBTQ+ youth need not rely solely on the Supreme Court's understanding of familial autonomy. Critics have long argued that courts pay little attention to the rights of parents. One could argue, along these lines, that Florida and other states are simply adopting a more expansive conception of parental rights, as state legislatures and state constitutions have done for other rights. Perhaps such an argument could be marshaled in defense of state laws targeting LGBTQ+ youth.

Consider, for example, legal scholar Stephen Gilles's "parentalist manifesto," which lays out a much broader understanding of parental authority than that adopted by the Court.<sup>244</sup> In Gilles's view, "the deference we extend to parental educational choices should approach . . . the deference we give to the self-regarding choices of adult individuals."<sup>245</sup> Gilles's argument draws, in part, on the liberal commitment to pluralism. According to Gilles, liberal societies, for which toleration and pluralism are foundational values, must accommodate "traditionalist" parents who wish to transmit to their children values and ways of life that are (or appear to liberal critics to be) intolerant and illiberal. On this view, parents possess "not only the right to transmit their values to their children, but also the right to reject schooling that promotes values contrary to their own."<sup>246</sup> Gilles's manifesto might be cited as an argument in support of state bills prohibiting education in gender identity because such material interferes

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243. See Artavia, *supra* note 17.

244. See generally Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

245. *Id.* at 939.

246. *Id.* at 938.



with at least some parents' desire to teach their children traditionalist views of gender and biological sex.

Setting aside the merits of Gilles's underlying argument, even this broader conception of parental authority fails to justify the state legislation surveyed above. While Gilles is particularly concerned with the rights of traditionalist parents to pass on their values, his conception of parental rights extends to *all* parents who meet a relatively minimal threshold of concern for the child. On Gilles's view, so long as parents provide for their children's physical health, social competence, and basic civic education—each defined largely by the parent—then the state has no cause to intervene, whether through coercive legal sanctions or through a public school system that promotes values different from the parents' own.<sup>247</sup>

Thus, it follows from Gilles's arguments that parents who meet this bare minimum and who wish to educate their children on LGBTQ+ issues or historical racial injustice possess just as extensive a set of parental rights as those parents who wish to withhold this education from their children. Similarly, under Gilles's parentalist account of parental rights, parents who wish to raise their transgender child in a manner consistent with that child's gender identity would have the right to do so. Both points illustrate a more general problem for the parental rights argument. Some who defend laws targeting LGBTQ+ youth claim to support a robust conception of parental rights. Yet such views, if they are to be internally consistent, must also afford broad authority to parents supportive of LGBTQ+ identities or LGBTQ+ education. None of the state bills surveyed above do so.

Gilles provides a compelling general argument against granting expansive parental rights only to those with political power. The problem is that parents with majoritarian views will “use the state's power to privilege and enhance their efforts to pass on their values to their children while undermining the ability of parents in the minority to do the same.”<sup>248</sup> By contrast, parents in the political minority will “find themselves in an impossible predicament. The state expects them to love and care for their children, yet forbids raising them by the parents' own best lights.”<sup>249</sup>

Both observations accurately capture the predicament of parents and children targeted by the state legislation surveyed above. Arkansas's “Save Adolescents From Experimentation Act,” for example, bans transgender medical procedures for minors, frustrating the wishes of parents who seek to provide this care for their children. By contrast, religious parents in Arkansas may provide their children “treatment by spiritual means through prayer alone;” if the child is injured or dies, religious parents are exempted from criminal

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247. *Id.*

248. *Id.* at 971.

249. *Id.* at 968.

charges.<sup>250</sup> Arkansas also grants parents the right to consent to aesthetic plastic surgery for their cisgender minor children, despite the fact that it is risky, permanent, and of uncertain benefit.<sup>251</sup> Just as Gilles's analysis would suggest, parents in the political majority are using the state's power to privilege their own moral and religious views while undermining the rights of parents who reject these views.

#### 4. *The Parental Right to Control the School Environment*

While I have argued that general accounts of parental rights do not support laws targeting LGBTQ+ youth, perhaps these laws assert a more specific parental right, namely, the parental right to control the public-school environment. Indeed, as I noted above, it is plausible to read *Barnette* as an extension of the Court's parental rights jurisprudence, as *Barnette* protected minority families from certain coercive state interventions in the public-school setting. A narrower argument that parents possess a unique right to control, or at least heavily influence, public school policy would not necessarily be rebutted by arguments aimed at more general conceptions of parental rights.

The problem with this narrower argument is that courts have repeatedly rejected the idea that parents possess the right to directly control the content of public-school curriculum. Indeed, *Meyer* and *Pierce* laid the groundwork for this distinction. In *Meyer*, the Court noted that the parental right to control the upbringing of one's children does not supersede "[t]he power of the State . . . to make reasonable regulations for all schools" or the power "to prescribe a curriculum" for public schools.<sup>252</sup> Similarly, in *Pierce*, the Court observed that the case did not concern "the power of the State reasonably to regulate all schools."<sup>253</sup>

Appellate courts in the First, Second, Third, Sixth, Seventh, and Ninth Circuits have followed *Meyer* and *Pierce* in explicitly denying parents the right to dictate public school curriculum, even when public schools teach materials that some parents find controversial.<sup>254</sup> As one court wrote, "[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct *how* a public

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250. ARK. CODE ANN. § 9-30-103 (2017).

251. Zuckerman & Abraham, *supra* note 48, at 319–21 (citing the American Society for Aesthetic Plastic Surgery's estimate of "more than 11,300 breast augmentations for teens 18 and under in 2003" despite the fact that "no conclusive studies that indicate that cosmetic surgery improves overall body image or quality of life for adolescents or adults").

252. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

253. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

254. See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005), *amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006).

school teaches their child.”<sup>255</sup> This is true even when the content taught is sexual in nature. As the First Circuit concluded in *Brown v. Hot, Sexy, and Safer*, “*Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.”<sup>256</sup> It is also true even when parental rights claims are combined with free exercise claims.<sup>257</sup> So well established is this line of appellate decisions that, as one homeschool proponent lamented, “[i]t is almost impossible, in the absence of an obvious Establishment Clause violation, for parents to cause the complete removal of offensive materials from the public school curriculum.”<sup>258</sup>

As the First Circuit wrote in one parental rights case, granting parents a fundamental right “to dictate individually what the schools teach their children” is incompatible with the democratic character of public education because it would force schools “to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter.”<sup>259</sup> While the court suggests that this would be too burdensome to public school systems, the problem is not merely that delivering an individualized curriculum is practically infeasible. Rather, the problem with granting a single group of parents the right to control school curriculum is that public education in a democracy is inherently pluralistic.

As the Supreme Court observed in *Ambach v. Norwick*, public schools bring together “diverse and conflicting” constituencies “on a broad but common ground.”<sup>260</sup> Public education fosters “tolerance of divergent political and religious views” as well as a “consideration of the sensibilities of others.”<sup>261</sup> Ultimately, public school curriculum and policy must reflect the diversity and pluralism of the public itself. State legislation that excludes all LGBTQ+ content or disparages LGBTQ+ individuals in the name of parental rights is incompatible with this democratic conception of public education.

The abovementioned appellate cases involved parents seeking to change school curriculum directly via litigation asserting parental rights claims. While courts have almost uniformly denied these claims, perhaps this is simply because courts are reluctant to intervene in matters traditionally reserved to state and local governments. Courts have long recognized the “general proposition that

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255. *Blau*, 401 F.3d at 395.

256. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995); see *Fields*, 427 F.3d at 1207 (“[T]he *Meyer-Pierce* right does not extend beyond the threshold of the school door.”).

257. *Mozert v. Hawkins Cnty.*, 827 F.2d 1058, 1059 (6th Cir. 1987) (holding that a “public school requirement that all students in grades one through eight use a prescribed set of reading textbooks” does not violate parents’ rights to the free exercise of religion).

258. Michael Farris & Bradley P. Jacob, *Public Schools’ Pyrrhic Victories over Parental Rights*, 3 RICH. J.L. & PUB. INT. 123, 135 (1998).

259. *Brown*, 68 F.3d at 534.

260. 441 U.S. 68, 77 (1979).

261. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

states bear principle responsibility for education policy.”<sup>262</sup> Moreover, local control over public education is often claimed to be one of the predominant virtues of America’s federalist approach to education policy.<sup>263</sup> According to this line of reasoning, local control over public school curriculum and policy is valuable in part because it incentivizes those who are often most affected by education policy to participate in the democratic process.<sup>264</sup>

Perhaps, then, the appellate cases surveyed above indicate that while parents do not have the right to control educational policy directly via litigation, they do have the right to control—or at least influence—educational policy indirectly via participation in local democratic institutions such as school boards and state legislatures. On this line of argument, state laws and other local measures targeting LGBTQ+ youth in public educational settings merely prescribe a curriculum and an education policy that better aligns with how (some) parents wish their children to be educated. For proponents of such measures, this is precisely the sort of local, democratic engagement that education federalism facilitates and incentivizes.

Yet, while courts and other political actors have long paid lip service to the purported centrality of local control to American education policy, the reality is somewhat more nuanced. Broadly speaking, education policy in the United States, especially over the latter half of the twentieth century, has been marked by increasing centralization and federal intervention, a trend driven in significant part by federal courts themselves.<sup>265</sup> Ironically, for those who wish to assert parental rights claims, the origins of Court oversight of education policy can be found partly in early parental rights cases such as *Meyer*. While these cases protected individual parental rights, they also involved the Court deeply in local education policy. In striking down foreign-language bans, for example, the *Meyer* Court directly intervened in a local dispute over school curriculum. Even

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262. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130 (2006); see Kimberly J. Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 287 (2013) (“Education federalism in the United States traditionally embraces state and local authority over education and a restricted federal role.”).

263. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

264. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) (“Equally important, however, is the opportunity [local control over public education] offers for participation in the decisionmaking process that determines how those local tax dollars will be spent.”); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1755 (2004) (“When the choice is between federal court oversight and local or state authority over public schools, then the latter is clearly more consistent with promoting public participation in democracy.”).

265. See Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940–1980*, 52 HARV. EDUC. REV. 384, 384 (1982) (“One of the central dynamics of American educational history is the long-range trend from local and parental schooling arrangements to increasing government funding and centralized control.”) For an overview of modern Court intervention in education policy, see generally JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018).

while recognizing the “[t]he power of the State . . . to make reasonable regulations for all schools,” the *Meyer* Court nevertheless affirms its authority to review state education policy.<sup>266</sup>

Though the Court has sometimes refrained from intervening in education policy in the name of local control, never has it renounced the authority to do so.<sup>267</sup> It has just as often asserted that local educational policy and local educational institutions are bound by constitutional principles and subject to Court oversight.<sup>268</sup> As the Court observed in *Barnette*, for example, “the Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”<sup>269</sup> Thus, while parents who assert their rights to control classroom policies and curricular content may have more success at state and local levels, these policy decisions are not exempt from Court oversight. Moreover, as the Court’s holding in *Barnette* suggests, no parent has the right to an educational environment that violates established Fourteenth Amendment principles.

This general point is familiar enough in cases of race or sex discrimination. A state or local school board would plainly violate the Equal Protection Clause if it adopted a curriculum that stigmatizes a particular racial or ethnic group or a curriculum that promotes stereotypes about women.<sup>270</sup> Yet, while courts have less often considered education policies that stigmatize LGBTQ+ identities, there are plausible arguments that suggest such policies should also fail equal protection analysis.

For example, well before the current wave of state legislation, many states adopted curricular laws banning the discussion of homosexuality or requiring that homosexuality be presented “in a negative manner—as an unacceptable lifestyle, a criminal offense, or a cause of sexually transmitted infections.”<sup>271</sup> As Clifford Rosky has argued, however, these curricular policies, many of which date to the 1980s, conflict with the Court’s most recent major gay rights decisions.<sup>272</sup> Given that the Court has struck down laws criminalizing same-sex sexual relationships on the grounds that such laws impose a stigma, presumably, the Court should strike down laws that teach children that homosexuality is criminal or degrading. As Rosky points out, “[t]o the extent that the states’

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266. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

267. See Kaestle & Smith, *supra* note 265, at 389–90.

268. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (noting that “education is perhaps the most important function of state and local governments” yet concluding that “[s]eparate educational facilities . . . deprived [plaintiffs] of the equal protection of the laws guaranteed by the Fourteenth Amendment”).

269. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

270. See, e.g., *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (holding that A.R.S. § 15-112, which eliminated the Mexican American Studies program in Tucson public schools, may have been motivated by discriminatory intent and remanding for trial on this question); see also *González v. Douglas*, 269 F. Supp. 3d 948, 965 (D. Ariz. 2017) (determining that A.R.S. § 15-112 was motivated by racial animus); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (overturning an admissions policy on the grounds that it “perpetuate[d] the stereotyped view of nursing as an exclusively woman’s job”).

271. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1470 (2017).

272. See generally *id.*

curriculum laws enforce . . . unconstitutional provisions, they impose many of the same stigmas identified” in the Court’s gay rights jurisprudence.<sup>273</sup>

In other words, if the state cannot stigmatize homosexuality in its legislation, neither can it do so in its public-school curriculum. Though Rosky’s analysis predates the recent wave of laws targeting LGBTQ+ youth, these laws similarly impose stigma upon and express animus towards LGBTQ+ individuals. But school policies or curricula that stigmatize LGBTQ+ individuals are no less an equal protection violation than school policies or curricula that stigmatize racial minorities or women. Even conceding that parents have some rights to shape their local public-school policies, no parent has the right to an educational system that is incompatible with settled equal protection principles.

The recent wave of state laws targeting LGBTQ+ youth bear little relation to the Court’s parental rights jurisprudence. *Meyer* and *Pierce* protected the rights of parents from stigmatized minority groups to raise their children without interference from hostile outsiders. *Barnette* extended the scope of this right into the classroom and explicitly placed school boards and local educational policy decisions within the purview of the Fourteenth Amendment. In *Parham*, the Court recognized the general right of parents to make important medical care decisions on behalf of or in concert with their children.

State laws targeting LGBTQ+ youth would deny these rights to parents. While some have defended a more robust conception of parental rights, this would only heighten the underlying contradiction: that states are claiming to uphold parental rights while denying parents the right to educate their children in gender identity or historical racial inequality. Ultimately, it is difficult to escape the conclusion that state laws targeting LGBTQ+ youth do not protect the rights of all parents but only the rights of parents hostile to LGBTQ+ identity.

#### IV. THE RE-STIGMATIZATION OF LGBTQ+ IDENTITY

It is disturbing to reflect on the degrading rhetoric now commonly deployed against LGBTQ+ youth by our nation’s political leaders, state officials, and fellow citizens. Even more so given that this discourse has arisen nearly a decade after *Obergefell* seemingly secured the equality of gays and lesbians and roughly three decades after the *Romer* Court rejected bare hostility towards sexual minorities as a sufficient basis for legislation. It was reasonable to assume that *Obergefell* marked a turning point in the acceptance of LGBTQ+ individuals. To understand the current movement targeting LGBTQ+ youth, it is useful to reflect on the failure of *Obergefell* to deliver a more lasting equality for LGBTQ+ individuals.

Two indicia supported the idea that a turning point for LGBTQ+ equality had been reached. First, public support for gay marriage, and gay and lesbian

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273. *Id.* at 1520.

individuals more generally, grew significantly in *Obergefell*'s wake; second, the backlash to *Obergefell* predicted by many of the decisions' critics failed to materialize.<sup>274</sup> Civil disobedience to the issuance of marriage licenses to gay couples was highly circumscribed and entirely ineffectual. At least some religious institutions that once opposed gay marriage now support it.<sup>275</sup> Among the general public, one study found that "there was a significant increase in support for same-sex marriage from 2013 to 2015," indicating that "public opinion shifted to align with the Court's decision."<sup>276</sup> Significantly, these researchers found "no support for the backlash hypothesis."<sup>277</sup>

As recently as 2016, some scholars and lawyers argued, not implausibly, that *Obergefell* had provided something like a template for a wider-ranging push for LGBTQ+ equality.<sup>278</sup> After the significant legal and political successes of the gay rights movement, the transgender rights movement would follow a similar trajectory, ultimately winning its own *Obergefell*; that is, a major Supreme Court case ratifying the dignity and equality of transgender individuals.<sup>279</sup> Perhaps each constituency within the LGBTQ+ community would win its own legal victory. Or perhaps the legal victories for gays, lesbians, and transgender individuals would redound to the benefit of other sex and gender minorities. Either way, legal victories before the Court, the argument ran, would lead to social and political acceptance for the broader LGBTQ+ community.

While overall support for LGBTQ+ rights remains robust, the successes of the recent political movement targeting LGBTQ+ youth suggest that the social consensus concerning LGBTQ+ identity is not as firm as it might have seemed. *Obergefell* itself is something of a bellwether; once deemed an instant classic, some Justices now openly question its soundness as precedent.<sup>280</sup> More worrying still, arguments and rhetoric that the Court rejected in its earlier gay rights jurisprudence have reemerged, modified to account for changing social and political conditions but essentially similar in form.<sup>281</sup> Public rhetoric

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274. See Flores, *supra* note 109, at 5 ("Public support of the rights of lesbians, gay men, bisexuals, and transgender (LGBT) people in the United States has increased significantly and rapidly over the last three decades.").

275. See, e.g., Benjamin E. Park, *The LDS Church's Support for the LGBTQ Marriage Bill Isn't Shocking*, WASH. POST (Nov. 17, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/11/17/lds-church-lgbtq-marriage/>.

276. Emily Kazyak & Mathew Stange, *Backlash or A Positive Response?: Public Opinion of LGB Issues After Obergefell v. Hodges*, 65 J. HOMOSEXUALITY 2028, 2044–45 (2018).

277. *Id.* at 2045.

278. Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 509 (2016).

279. *Id.*

280. Compare Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 147 (2015) ("*Obergefell v. Hodges* achieved canonical status even as Justice Kennedy read the result from the bench."), with *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

281. See *supra* Part I.

depicting LGBTQ+ individuals as disgusting and dangerous has increased dramatically, as have violent attacks on transgender individuals and gay pride parades.<sup>282</sup> While an *Obergefell* for the transgender rights movement cannot be ruled out, neither does it seem imminent.

Moreover, in the past year alone, public support for adult gay and lesbian relationships has noticeably declined.<sup>283</sup> The decrease has been most striking among Republicans, for whom the acceptance of adult gay and lesbian relationships is now a minority position.<sup>284</sup> No doubt, some proponents of laws targeting LGBTQ+ youth oppose gay and lesbian relationships and would like to see *Obergefell* overturned. After all, a declining but significant percentage of the American public—between one-quarter and one-third—continues to reject the social acceptance of homosexuality, the legal recognition of gay marriage, and the decriminalization of same-sex sexuality.<sup>285</sup>

Yet advocates for laws targeting LGBTQ+ youth do not seem primarily concerned with marriage rights for adult gays and lesbians. Rather, their focus is both narrower and broader—narrower in the sense that proponents of these laws overwhelmingly invoke purported threats to minor children; broader in the sense that the stated concern for minor children has spiraled into a much wider-ranging objection to non-traditional gender identities and sexual orientations as such.

To understand the recent resurgence of anti-LGBTQ+ rhetoric, it is important first to appreciate the limits of *Obergefell* as a template for LGBTQ+ acceptance. In important respects, *Obergefell* was a conservative opinion; the equality of gays and lesbians followed from their suitability for joining an “institution [that] has existed for millennia and across civilizations.”<sup>286</sup> Conservative proponents of gay marriage appreciated this, as did queer critics, who cast the movement for gay marriage as fundamentally assimilationist.<sup>287</sup> Both have been proven correct, at least partly. The entry of gays and lesbians into mainstream legal and cultural institutions like traditional marriage surely has played some role in the increased acceptance of non-traditional sexual orientations and gender identities. At the same time, it is hard to deny the prescience of Mattie Udora Richardson’s observation that “marriage is not even

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282. *Id.*

283. See Jeffrey M. Jones, *Fewer in U.S. Say Same-Sex Relations Morally Acceptable*, GALLUP (June 16, 2023), <https://news.gallup.com/poll/507230/fewer-say-sex-relations-morally-acceptable.aspx>.

284. *Id.*

285. See *LGBT Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Nov. 19, 2023).

286. *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015).

287. See, e.g., Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC (Aug. 27, 1989), <https://newrepublic.com/article/79054/here-comes-the-groom>.



a first step” for individuals whose “genders . . . are not recognized by the state at all.”<sup>288</sup>

What the canonization of *Obergefell* obscured is that, for most Americans, the legalization of gay marriage changed little about their ordinary lives or day-to-day social understandings. By contrast, the present debate over LGBTQ+ youth has brought to the fore a deeper conflict over the coherence and legitimacy of the “gender system” itself.<sup>289</sup> Gender norms pervade individual identity and social life in a way that marriage norms simply do not.<sup>290</sup> Challenges to the legitimacy of the gender system call into question a correspondingly much wider range of gender-inflected social practices—dress, language, intimate spaces, athletics, sexual attraction, sexual identity, and much else. Such challenges are expected to generate a certain amount of anxiety and discomfort, given that gender categories are fundamental to how most individuals understand themselves and their social world. Such challenges are also sure to generate hostility from those who stand to benefit from the prevailing gender system.

To be sure, the rejection of traditional gender norms is hardly novel. Two further considerations help to explain the present furor over LGBTQ+ youth. The first is the generational divide over the meaning and legitimacy of the prevailing gender system. Over the past decade, the percentage of Americans who identify as “lesbian, gay, bisexual, transgender or something other than heterosexual” has doubled.<sup>291</sup> The percentage of older adults who identify as LGBTQ+ has remained roughly the same; the increase has been led primarily by individuals born between 1997 and 2003. For this cohort, approximately one in five identifies as ‘LGBT.’<sup>292</sup> Researchers have observed a similarly marked increase in youth who report nonbinary gender identity or expression.<sup>293</sup> But even these statistics likely do not convey the full extent of the transformation underway, for even youth who inhabit traditional sexual orientations or gender

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288. See, e.g., Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, Colloquy, *Is Gay Marriage Racist?*, in *THAT’S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 119 (Matilda Bernstein Sycamore ed., 2004).

289. See Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 *GENDER & SOC’Y* 510, 510 (2004) (describing the “gender system” as the “institutionalized system of social practices for constituting people as two significantly different categories, men and women”).

290. Cecilia L. Ridgeway & Lynn Smith-Lovin, *The Gender System and Interaction*, 25 *ANN. REV. SOCIO.* 191, 192 (1999) (reviewing empirical literature showing that gender categorization as a “simple, fast, habitually used cultural dichotomy” that is “essential to make another sufficiently sensible in relation to self so that interaction can proceed”).

291. Jeffrey M. Jones, *LGBT Identification in U.S. Ticks Up to 7.1%*, *GALLUP* (Feb. 17, 2022), <https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx>.

292. *Id.*

293. See Lisa M. Diamond, *Gender Fluidity and Nonbinary Gender Identities Among Children and Adolescents*, 14 *CHILD DEV. PERSPS.* 110, 110 (2020).

identities are likely to be fluent in, if not supportive of, emerging gender practices.<sup>294</sup>

This relatively recent shift in social norms and beliefs exists uneasily alongside the fact that most American adults were educated and socialized during a time when homosexuality was criminalized and widely condemned, and other forms of gender identity or sexual orientation were broadly ignored or shunned by the general public. Similarly, most American adults were educated and socialized during a time when gays and lesbians were portrayed in the media, in legislation, and in psychiatric studies as psychologically disturbed child predators.<sup>295</sup> Many American adults have been exposed to materials from seemingly authoritative sources characterizing gays and lesbians as child predators, and so may be receptive to this framing device. Additionally, public opinion polling consistently reveals that most Americans vastly overestimate the size of the LGBTQ+ community.<sup>296</sup> For individuals who only tepidly support LGBTQ+ rights, and for those actively opposed, the seemingly exponential increase in individuals, especially young individuals, rejecting traditional gender norms and/or identifying as LGBTQ+ likely appears to threaten whatever is left of the traditional sexual moral order.

Given this generational divide, it is easier to understand why objections to youth gender non-conformity would take shape as a movement for parental rights. As I argued in Part III, parental rights arguments are almost wholly divorced from longstanding legal conceptions of the parent's right to shape the child's upbringing and education. Indeed, despite citing canonical parental rights cases, proponents of laws targeting LGBTQ+ youth have not even bothered to articulate how these cases support their policy preferences. I suspect that the rhetoric of parental rights is ultimately less a legal argument and more an expression of the anxieties of adults flummoxed by the ongoing renegotiation of gender norms. Given the centrality of sex categories and gender expression to most individuals' navigation of the social world, adults raised in the traditional gender system likely struggle to interpret or understand youth who reject this system. Parental rights rhetoric perhaps captures the sense among some parents that their children inhabit a profoundly different social world.

The second consideration necessary for contextualizing the controversy over LGBTQ+ youth is the rise of populist right-wing political movements, which often amplify and channel parental anxiety over increasingly complex

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294. See Brooke Migdon, *Generation Z 'Extremely Concerned' About LGBTQ+ Rights, Survey Says*, THE HILL (June 21, 2022), <https://thehill.com/changing-america/respect/equality/3531837-generation-z-extremely-concerned-about-lgbtq-rights-survey-says/> (citing a study showing that approximately two-thirds of Americans "between the ages of 18 and 25 say they are worried about the state of LGBTQ+ rights in the U.S.").

295. See FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY* 16 (2008) ("In the legal and psychiatric literature, there was frequent overlap between the terms sex criminal, pervert, psychopath, and homosexual. 'Psychopath' served as a code word for homosexual at a time of heightened public awareness of homosexuality.").

296. See Justin McCarthy, *Americans Still Greatly Overestimate U.S. Gay Population*, GALLUP (June 27, 2019), <https://news.gallup.com/poll/259571/americans-greatly-overestimate-gay-population.aspx>.

gender norms. As the political theorist Jan-Werner Müller has argued, populist political movements characteristically claim to represent “a morally pure and fully unified . . . people against elites who are deemed corrupt or in some other way morally inferior.”<sup>297</sup> The point is not that populist discourse is inherently anti-LGBTQ+. Rather, the point is that populist rhetoric is, by definition, anti-pluralistic.<sup>298</sup> According to this rhetoric, populist leaders and their supporters comprise the true body politic; opponents of populists are not simply wrong; they are morally beyond the pale and, thus, not full members of the political community.

Yet populists will always require “some criterion for distinguishing the moral and the immoral, the pure and the corrupt, the people who matter, in [former President] Trump’s parlance, and those ‘who don’t mean anything.’”<sup>299</sup> Populist and authoritarian leaders both in the United States and abroad increasingly target LGBTQ+ individuals, often using child predation rhetoric to draw the line between the morally pure and the morally impure.<sup>300</sup> Child predation rhetoric depicts LGBTQ+ individuals as moral pariahs. To associate LGBTQ+ individuals and their supporters with child predation is to suggest that LGBTQ+ issues are outside the boundaries of normal political discourse and that LGBTQ+ individuals and their allies are worthy targets of hostility, if not outright violence. Associating LGBTQ+ individuals with disgusting, violative medical procedures inflicted upon the bodies of minor children similarly signifies that LGBTQ+ individuals are beyond the pale.

If this analysis is roughly correct, then it is apparent that the rise of political movements targeting LGBTQ+ youth is not, in the first instance, a backlash to *Obergefell*. It is a related but slightly different sort of backlash, driven by the fear that the traditional gender system is collapsing, as evidenced by the increasing numbers of young persons who reject it. Under the guise of parental rights, this new anti-LGBTQ+ backlash is seeking to maintain the traditional gender system by reviving the stigmatization of individuals who inhabit non-traditional gender identities and sexual orientations.

Thus far, there is little evidence to suggest that the traditional gender system can be so rehabilitated. Among minors and young adults, gender norms continue to evolve, and a broad range of beliefs and practices are now being rethought. There can be no denying that this will require careful, sometimes difficult, consideration of how social institutions ordered around a binary gender system can accommodate a gender-diverse population.

This is why the Court’s stigma and animus jurisprudence is especially pertinent in the current climate. Both doctrines arose out of cases in which state

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297. JAN-WERNER MÜLLER, WHAT IS POPULISM? 19–20 (2016).

298. *Id.* at 3.

299. *Id.* at 24.

300. See, e.g., Keno Verseck, *Hungary Has Passed New Anti-LGBTQ+ Legislation*, DEUTSCHE WELLE (June 15, 2021), <https://www.dw.com/en/hungary-approves-law-banning-lgbtq-content-for-minors/a-57909844>.

action targeted groups that were different in ways that sparked fear or condemnation—the cognitively disabled in *Cleburne*; the hippies (gender deviants themselves) in *Moreno*; and, of course, gay and lesbian adults in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. Ultimately, the point of these doctrines is not to cast aspersion on the motives of voters or their representatives. Rather, it is to ensure that state action is not driven by the unthinking hostility of the present moment or by the impulse to create or to re-create outcast groups.

#### CONCLUSION

Throughout its equal protection jurisprudence, the Court has written perceptively of the psychological material and social damage done to those targeted by hostile majorities. Victims of animus and stigmatization come to believe—often, with good reason—that the state does not view them as equal citizens. What is offensive about the recent wave of state legislation targeting LGBTQ+ youth is that such laws seek to impose this same sense of inferiority upon minor children. These laws seek to initiate minor children into adult practices like ostracism, hierarchy, and outcasting. Many children subjected to these laws will be old enough to feel their condemnation but too young to understand its source. LGBTQ+ parents, seeking to explain to their children why they cannot mention their parents at school or why they cannot dress a certain way, will witness their children internalize a sense of their own social rejection—a ritual that, for many minority parents, is all too familiar.<sup>301</sup>

The Court has often protected minor children from animus and stigma precisely because of its harmful effects on the child's ability to achieve a sense of their own equal citizenship. No doubt, some are deeply troubled by the increasingly diverse ways in which other families navigate questions of gender and sexual orientation. Yet, as the Court has often explained, public schools are founts of democracy where minor children from diverse backgrounds associate as equals. Laws that stigmatize and demean LGBTQ+ children betray this worthy ideal.

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301. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 69 (1969) (describing the experience of “explain[ing] to your six-year-old daughter why she cannot go to the public amusement park that has just been advertised on television” and “see[ing] the depressing clouds of inferiority begin to form in her little mental sky”).