PUBLIC DOLLARS, PRIVATE DISCRIMINATION: PROTECTING LGBT STUDENTS FROM SCHOOL VOUCHER DISCRIMINATION

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More than a dozen states operate school voucher programs, which allow parents to apply state tax dollars to their children's private school tuition. Many schools that participate in voucher programs are affiliated with religions that disapprove of homosexuality. As such, voucher-accepting schools across the country have admissions policies that discriminate against LGBT students and students with LGBT parents. Little recourse exists for students who suffer discrimination at the hands of voucher-accepting schools.

This Note considers two ways to provide protection from such discrimination for LGBT students and ultimately argues that the best route is for an LGBT student to bring a lawsuit under the Equal Protection Clause. Such a lawsuit would require a finding of "state action," which U.S. Supreme Court jurisprudence suggests would present a serious challenge for a plaintiff. This Note suggests that plaintiffs should urge courts to take a more relaxed approach to state action due to the unique nature of the discrimination at issue.

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INTRODUCTION

If you live in Indiana, your state government uses your tax dollars to discriminate against vulnerable LGBT[1] youth through its school voucher program.[2] Indiana has the largest statewide school voucher program in the

1. In recent years, discussions of sexual orientation and gender identity have begun to employ more inclusive acronyms, such as LGBTQ. *See* Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html [https://perma.cc/QP2X-6N72]. For ease of reading, this Note uses the most commonly recognized acronym, LGBT, as an umbrella term to encompass the full spectrum of sexual and gender minorities affected by voucher discrimination.

2. School vouchers are state-funded educational scholarships that make public funding available for students to attend private schools. *See infra* Part I.A (discussing the history and mechanics of school voucher programs).

country.[3] Many of the private schools that participate in the voucher program have discriminatory admissions policies. For example, the student handbook for Blackhawk Christian School in Fort Wayne, Indiana, states that the school reserves the right to reject or discontinue the enrollment of any student "living in, condoning, or supporting sexual immorality; practicing homosexual lifestyle or alternative gender identity, promoting such practices, or otherwise having the inability to support the moral principles of the school."[4] This policy allows the school to reject or expel any LGBT student simply because of his or her sexual orientation.

The enrollment policy from Lighthouse Christian Academy in Bloomington, Indiana, is perhaps even more alarming. In its enrollment brochure, the school reserves the right to reject or discontinue the enrollment of any students whose *home* includes "homosexual or bisexual activity" or "practicing alternate gender identity or any other identity or behavior that violates God's ordained distinctions between the two sexes, male and female."[5] Thus, students are not only vulnerable to discrimination as a result of their own sexual orientation or gender identity—students can be, and have been, excluded from private schools due to their parent's sexual orientation and gender identity.[6] These admissions policies are not isolated cases of discrimination. According to one study, approximately 10 percent of voucher schools in Indiana—totaling at least twenty-seven schools—have admissions policies "suggesting or declaring that LGBT students are not welcome."[7] School voucher discrimination is not limited to Indiana; scores

3. Cory Turner & Anya Kamenetz, *School Vouchers Get 2 New Report Cards*, NPR (June 26, 2017, 3:00 AM), http://www.npr.org/sections/ed/2017/06/26/533192616/school-vouchers-get-a-new-report-card [https://perma.cc/SX98-UP79]; Stephanie Wang, *Indiana Still Has the Nation's Largest Voucher Program. But Growth Is Slowing Down.*, CHALKBEAT (Mar. 1, 2018), https://in.chalkbeat.org/posts/in/2018/03/01/indiana-still-has-the-nations-largest-voucher-program-but-growth-is-slowing-down/ [https://perma.cc/TQ75-XK7L]. In the fall of 2016, more than 34,000 Indiana students used vouchers to attend private schools. Julia Donheiser, *Choice for Most: In Nation's Largest Voucher Program, $16 Million Went to Schools with Anti-LGBT Policies*, CHALKBEAT (Aug. 10, 2017), https://www.chalkbeat.org/posts/us/2017/08/10/choice-for-most-in-nations-largest-voucher-program-16-million-went-to-schools-with-anti-lgbt-policies/ [https://perma.cc/26N5-Q3LY].

4. BLACKHAWK CHRISTIAN SCH., PARENT-STUDENT HANDBOOK 2018–2019, at 23 (2018), http://www.blackhawkchristian.org/downloads/Parent-Student-Handbook-SECONDARY.pdf [https://perma.cc/F7LF-VWG5].

5. Brittani Howell, *Lighthouse Christian Academy Responds to Concerns over Its Admissions Policy*, HERALD TIMES (May 26, 2017), http://www.heraldtimesonline.com/news/local/lighthouse-christian-academy-responds-to-concerns-over-its-admissions-policy/article_92d88110-415b-11e7-bfc0-87e27ca51d68.html [https://perma.cc/89SJ-HC4D].

6. This Note focuses on discrimination against children because of their own sexual orientation rather than the sexual orientation of their parents. For a discussion of claims specifically stemming from discrimination against a student because of his or her parents' sexual orientation, see generally Daniel Makofsky, *The New "Illegitimate Child": How Parochial Schools Are Imputing Discrimination Against Homosexuals to Children of Homosexual Parents and Getting Away with It*, 26 J.C.R. & ECON. DEV. 965 (2013).

7. Donheiser, *supra* note 3.

of schools across the country that participate in state-run voucher programs treat LGBT students as second-class citizens.[8]

LGBT youth already face high levels of discrimination in schools even without overtly biased school admissions policies. The data regarding general LGBT discrimination and its effect on mental health is harrowing. According to a recent study by the Centers for Disease Control and Prevention, nearly one-third of lesbian, gay, and bisexual youth had attempted suicide at least once in the last year, compared to 6 percent of heterosexual youth.[9] According to a 2012 Human Rights Campaign report, nearly 20 percent of LGBT youth have experienced physical violence at school.[10] More than 50 percent of LGBT youth report being verbally harassed and called names at school—more than twice the rate at which non-LGBT students experience such harassment.[11] These and other struggles faced by LGBT youth threaten their academic and career success.[12] When states allow voucher-accepting private schools to maintain discriminatory policies and practices, the states are actively contributing to hostile environments that are serious threats to the health and well-being of LGBT youth.

The issue of discrimination in voucher-accepting private schools has recently gained national attention due to the Trump administration's commitment to expanding federal support for school-choice programs,[13] which include voucher programs.[14] As originally proposed, President Trump's 2018 budget redirected nearly $1.5 billion to expand school-choice operations,[15] while eliminating or downsizing more than twenty other

8. *See infra* Part I.B (highlighting instances of voucher-accepting private schools with discriminatory admissions policies).

9. Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12—United States and Selected Sites 2015*, 65 MORBIDITY & MORTALITY WKLY. REPORT, Aug. 12, 2016, at 1, 20, https://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm [https://perma.cc/M2JX-HCEW]. Note that transgender youth were not included in this statistic.

10. HUMAN RIGHTS CAMPAIGN, GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS 16 (2012), https://assets.hrc.org//files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf [https://perma.cc/2ACP-44F6].

11. *Id.* at 7, 11.

12. *See LGBT Youth*, CDC, http://www.cdc.gov/lgbthealth/youth.htm [http://perma.cc/T28D-DFUJ] (last updated June 21, 2017).

13. "School choice" refers to the practice of providing educational options beyond traditional public schooling. *See infra* Part I.A.

14. During his presidential campaign, then-candidate Trump said he would allocate $20 billion to create a federal block grant that would vastly expand the reach of the federal school-choice program. *See* Sean Sullivan & Emma Brown, *Trump Pitches $20 Billion Education Plan at Ohio Charter School That Received Poor Marks from State*, WASH. POST (Sept. 8, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/08/trump-pitches-20-billion-education-plan-at-ohio-charter-school-that-received-poor-marks-from-state/ [https://perma.cc/2RRR-J3MU].

15. Emma Brown, Valerie Strauss & Danielle Douglas-Gabriel, *Trump's First Full Education Budget: Deep Cuts to Public School Programs in Pursuit of School Choice*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/local/education/trumps-first-full-education-budget-deep-cuts-to-public-school-programs-in-pursuit-of-school-choice/2017/05/17/2a25a2cc-3a41-11e7-8854-21f359183e8c_story.html [https://perma.cc/2RSJ-WL5E].

student-centered educational programs, including funding for the Special Olympics.[16] Although Congress rejected this part of the proposal,[17] Trump was undeterred. His 2019 budget proposal once again allocated over $1 billion for school-choice expansion.[18]

The Trump administration's selection of Betsy DeVos as Secretary of Education further illuminated its affection for school-choice expansion, as she is one of the nation's foremost proponents of school choice.[19] Secretary DeVos inadvertently focused the school-choice discussion on discrimination when she indicated that private schools receiving taxpayer dollars in the form of vouchers may discriminate against LGBT students without reproach from the Department of Education. During a May 2017 hearing before a subcommittee of the House Appropriations Committee regarding President Trump's proposed budget, Secretary DeVos testified regarding how she planned to implement her school-choice agenda.[20] The subcommittee specifically asked Secretary DeVos how she would handle a voucher-accepting private school that discriminates against LGBT students and presented her with an example: the Lighthouse Christian Academy in

16. Erica L. Green, *Betsy DeVos Refuses to Rule Out Giving Funds to Schools That Discriminate*, N.Y. TIMES (May 24, 2017), https://www.nytimes.com/2017/05/24/us/politics/betsy-devos-refuses-to-rule-out-giving-funds-to-schools-that-discriminate.html [https://perma.cc/QP63-2RQ7].

17. On September 7, 2017, the Senate Committee on Appropriations approved an appropriations bill that did not include allocations for the proposed school-choice expansion, effectively shutting down the proposal for the 2018 fiscal year. *See* Mercedes Schneider, *Senate Appropriations Has No Funding for Betsy DeVos' Private School Voucher Hopes*, HUFFINGTON POST (Sept. 11, 2017), http://www.huffingtonpost.com/entry/senate-appropriations-has-no-funding-for-betsy-devos_us_59b5ebd4e4b0c50640cd68c8 [https://perma.cc/C6NP-FM92].

18. OFFICE OF MGMT. & BUDGET, EFFICIENT, EFFECTIVE, ACCOUNTABLE: AN AMERICAN BUDGET 40 (2018), https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf [https://perma.cc/X4XG-GYPH]; J. Brian Charles, *Trump Proposes Unprecedented Expansion of School Choice*, GOVERNING (Feb. 12, 2018), http://www.governing.com/topics/education/gov-trump-doe-education-budget-schools-states.html [https://perma.cc/8VSU-7R29]. Congress again rejected these school-choice proposals. *See* Moriah Balingit & Danielle Douglas-Gabriel, *Congress Rejects Much of Betsy DeVos's Agenda in Spending Bill*, WASH. POST (Mar. 24, 2018), https://www.washingtonpost.com/news/education/wp/2018/03/21/congress-rejects-much-of-betsy-devoss-agenda-in-spending-bill/ [https://perma.cc/A2BF-E7TB]. Nonetheless, Trump and Secretary of Education Betsy DeVos have shown no signs of conceding on the issue, so it is still a viable consideration. *See* Emily Richmond, *Does Trump's Education Budget Even Matter?*, ATLANTIC (Feb. 13, 2018), https://www.theatlantic.com/education/archive/2018/02/does-trumps-education-budget-even-matter/553271/ [https://perma.cc/FV9H-SGSW] (noting that, despite the lack of congressional support, Trump and DeVos "remain committed" to their school-choice agenda).

19. *See Background on Betsy DeVos from the ACLU of Michigan*, ACLU, https://www.aclu.org/other/background-betsy-devos-aclu-michigan [https://perma.cc/84K3-7ZEV] (last visited Nov. 15, 2018).

20. *See Hearing Before the Subcomm. on Labor, Health & Human Servs., Educ. & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. 288–91 (2017) [hereinafter *Hearing*]; *see also* Green, *supra* note 16.

Indiana.[21] When pressed, Secretary DeVos refused to indicate that schools with discriminatory admissions policies would be denied public funding.[22]

School-choice programs are the subject of much contentious debate,[23] and there is conflicting evidence regarding their efficacy.[24] However, this Note takes no position on the value or desirability of such programs. Instead, this Note investigates the potential protections for LGBT students who suffer discrimination at the hands of voucher-accepting private schools. Even if federal support for voucher programs does not expand,[25] LGBT students are still vulnerable to discrimination under existing state voucher programs.[26] This Note's proposed equal protection resolution to discrimination would apply to existing state voucher programs, irrespective of federal expansion.[27] The other proposed solution, the Title IX approach, would only apply to schools receiving federal funding.[28] Because existing potential protections are flimsy at best, action is needed to ensure equal treatment of LGBT students.[29]

Part I of this Note provides relevant background information, including a brief history of voucher programs and jurisprudence underpinning the legality of vouchers generally. Part II outlines the current potential remedies available to discrimination victims by describing the potential remedies available at the state level, a potential federal constitutional claim, and potential federal statutory protection—all of which are insufficient protection. Part III contemplates how to best provide protections for LGBT students. First, Part III briefly explains that providing antidiscrimination protections for LGBT students is a necessary and logical extension of the U.S. Supreme Court's jurisprudence in education discrimination and then contemplates two potential routes to protecting LGBT students. Part III ultimately concludes that the best way to protect LGBT students is for a

21. *See Hearing*, *supra* note 20, at 309; *supra* text accompanying notes 5–6; *see also* Peter Balonon-Rosen, *DeVos Grilled over LGBTQ Discrimination at Bloomington Voucher School*, IND. PUB. MEDIA (May 26, 2017), https://indianapublicmedia.org/stateimpact/2017/05/26/devos-grilled-discrimination-bloomington-voucher-school/ [https://perma.cc/9FGB-GSN7].

22. *Hearing*, *supra* note 20, at 309–10.

23. *See infra* Part I.A (briefly explaining the debate).

24. *See School Choice: What the Research Says*, CTR. FOR PUB. EDUC., http://www.centerforpubliceducation.org/research/school-choice-what-research-says [https://perma.cc/87HH-SAXA] (last visited Nov. 15, 2018) ("In general, we find that school choices work for some students sometimes, are worse for some students sometimes . . . ."); *see also* GREG FORSTER, A WIN-WIN SOLUTION: THE EMPIRICAL EVIDENCE ON SCHOOL CHOICE 1 (4th ed. 2016), https://www.edchoice.org/wp-content/uploads/2016/05/2016-5-Win-Win-Solution-WEB.pdf [https://perma.cc/7C3W-XBML] (finding that some empirical studies show that school-choice programs improve student outcomes, such as test scores, whereas other studies show a negative impact on student outcomes).

25. *See supra* notes 14–18 and accompanying text.

26. *See infra* Part II.A (discussing the insufficiency of existing state-level protections).

27. *See infra* Part III.B.2 (discussing the proposed equal protection claim that a student-plaintiff could bring).

28. *See infra* Part III.B.1 (explaining the Title IX solution).

29. *See infra* Part III.B (discussing potential solutions to protect LGBT students).

student-plaintiff[30] to bring a federal equal protection claim and to argue for a relaxed approach to state action.

I. HOW SCHOOL VOUCHERS HAVE BECOME VEHICLES FOR DISCRIMINATION AGAINST LGBT STUDENTS

This Part provides background on the development of school voucher programs as well as concerns about how voucher programs are used to discriminate against LGBT students. Part I.A discusses the history of school choice generally and explains the difference between voucher programs and other school-choice mechanisms. Part I.A also describes the seminal Supreme Court voucher case, *Zelman v. Simmons-Harris*,[31] which solidified the place of vouchers in the school-choice landscape. Part I.B details discrimination concerns associated with voucher programs and describes troubling instances of LGBT discrimination in private schools that accept publicly funded vouchers.

A. School Choice Generally and the History of Voucher Programs

"School choice" refers to the practice of providing educational options beyond traditional public schooling.[32] Although options such as homeschooling or online public schools are sometimes included in conversations about school choice,[33] the more commonly debated options, such as vouchers, entail providing public money to fund attendance at private schools.[34]

The earliest incarnations of state programs that fund private school education developed nearly 140 years ago in Maine and Vermont.[35] Those programs—still in operation today—provided public money for rural students living in areas without local public schools to attend private schools.[36] The modern notion of school choice traces its roots to economist Milton Friedman's 1955 paper, "The Role of Government in Education."[37] Friedman's paper popularized the theory that using public dollars to fund

30. This term is used throughout this Note and encompasses anyone involved in a suit based on discrimination against an LGBT student at the hands of a private school—for example, the parents may sue on behalf of the child.

31. 536 U.S. 639 (2002).

32. *See School Choice: What the Research Says*, *supra* note 24.

33. *See id.*

34. *See, e.g.*, Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 705–06 (2015) (highlighting that vouchers are a "controversial" school-choice mechanism).

35. *School Vouchers*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/education/school-choice-vouchers.aspx [https://perma.cc/B9L7-WG92] (last visited Nov. 15, 2018).

36. *Id.*

37. *See generally* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 1955).

students' attendance at private schools would increase student achievement and competition among schools and would decrease education costs.[38]

It was not until the late 1980s and 1990s that school-choice programs were "seriously debated as educational policy initiatives."[39] In 1989, the first modern voucher program began in Milwaukee, Wisconsin.[40] The Milwaukee Parental Choice Program began operating in 1990 with the goal of "provid[ing] educational freedom and choice to low-income parents in Milwaukee who did not have the financial means to send their children to private schools."[41] Thereafter, the first statewide school voucher program targeting low-income families was born in Indiana in 2011.[42]

School-choice programs typically come in three forms: tax credit scholarship programs, education savings accounts, and vouchers.[43] In tuition tax credit scholarship programs, sometimes called "neo-voucher" programs, individuals or corporations donate to a state fund that then distributes scholarships for eligible students to attend private schools.[44] In return, donors receive a tax credit.[45] Education savings accounts are a mechanism for parents to divert into a savings account all or part of the money the state would normally use to fund their child's public education.[46] Parents may use those funds to pay for "various approved educational expenses, including private school tuition."[47]

In a voucher program, the state offers parents vouchers that they can apply to private school tuition for their children.[48] The vouchers are funded by the tax dollars that would otherwise pay for those students' public education.[49] Voucher programs have been the subject of contentious debate for many years.[50] The debate has created some unlikely bedfellows. For example, liberals decrying the effects of failing public schools on minority youth and conservatives seeking public funding for religious education have banded

38. *See School Vouchers*, *supra* note 35.

39. Suzanne E. Eckes, Julie Mead & Jessica Ulm, *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers*, 91 PEABODY J. EDUC. 537, 539 (2016).

40. *School Vouchers*, *supra* note 35.

41. *The History of School Choice in Wisconsin*, SCH. CHOICE WIS., https://www.chooseyourschoolwi.org/history/ [https://perma.cc/W6NZ-N2C9] (last visited Nov. 15, 2018). Wisconsin expanded to a statewide model in 2013. *Id.*

42. *School Vouchers*, *supra* note 35.

43. *See, e.g.*, Mead, *supra* note 34, at 705–06. Mead's article comprehensively explains which types of school-choice programs operate in each state. *Id.* Charter schools and magnet schools are sometimes included in school-choice discussions, but are outside the scope of this Note as they are both considered public schools. *School Choice and Charters*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/education/school-choice-and-charters.aspx [https://perma.cc/QNV8-L4WC] (last visited Nov. 15, 2018) (noting that both charter schools and magnet schools are public schools).

44. Mead, *supra* note 34, at 705–06.

45. *Id.*

46. *Id.* at 706.

47. *Id.*

48. Michael Kavey, Note, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 745 (2003).

49. *Id.*

50. *See generally* Mead, *supra* note 34.

together to support voucher programs.[51] Proponents of voucher programs highlight three benefits: (1) increasing educational opportunities for low-income students by allowing them to escape their poorly performing public schools;[52] (2) incentivizing failing schools to do better;[53] and (3) recognizing the inherent value of allowing parents to choose a school based on what they feel is best for their children.[54] Opponents claim that voucher programs facilitate racial segregation,[55] threaten the public school system by diverting already-scarce funds[56] and create problematic church-state entanglement by forcing or encouraging taxpayers to fund religious schools.[57] Critics also point to research suggesting that private schools do not provide better educational outcomes than their public counterparts.[58]

Prior to 2002, one of the biggest debates regarding school vouchers was whether permitting public funds to support students' attendance at private, religious schools violated the Establishment Clause.[59] The first major case to address this issue was *Committee for Public Education & Religious Liberty v. Nyquist*.[60] In *Nyquist*, the Supreme Court considered three New York state programs that provided financial aid to private schools.[61] The first was a direct grant program that provided money to private schools to be used for maintenance and repair of facilities and equipment.[62] The second was a tuition-reimbursement plan for low-income parents whose children attended a qualifying private school.[63] The third was a tax deduction for parents who

51. *See* Kavey, *supra* note 48, at 745.

52. *See generally* Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335 (2016).

53. *See School Vouchers*, *supra* note 35.

54. *See* Brad J. Davidson, Comment, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States' School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 449 (2002).

55. Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Under the Lens of Critical Race Theory*, 26 B.U. PUB. INT. L.J. 43, 44 (2017). Nelson also notes that school-choice policies frequently result in predominantly white, unelected boards running schools in minority communities, often without minority-stakeholder representation on the board. *Id.* at 47.

56. *See* Oluwole & Green, *supra* note 52, at 1347.

57. *See id.* at 1347–48.

58. Addressing the question of the effectiveness of voucher programs is outside of the scope of this Note. For a discussion of voucher effectiveness, see, for example, David Trilling, *School Vouchers and Student Achievement: Reviewing the Research*, JOURNALIST'S RESOURCE (Sept. 14, 2016), https://journalistsresource.org/studies/society/education/school-vouchers-choice-student-achievement [https://perma.cc/RE9T-TPQ5], and *School Choice: What the Research Says*, *supra* note 24.

59. The Establishment Clause of the First Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend I. To evaluate whether the Clause has been violated, courts employ the so-called "*Lemon* test," which asks: (1) whether the government's action has a secular or a religious purpose; (2) whether the primary effect of the government's action is to advance or endorse religion; and (3) whether the government's policy or practice fosters an excessive entanglement between government and religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

60. 413 U.S. 756 (1973).

61. *Id.* at 761–62.

62. *Id.* at 762–63.

63. *Id.* at 764–65.

did not qualify for the tuition-reimbursement plan.[64] The participating schools were largely religious schools, primarily members of the Roman Catholic Church.[65] The Court determined that the programs all had the impermissible effect of advancing religion and were therefore unconstitutional.[66] The decision seemed to inhibit the growth of school-choice programs for many years.[67] However, the holding was limited to the specific set of facts in the case[68]: namely, the provision of benefits exclusively to private schools and parents of those schools;[69] a program structure "designed explicitly to . . . 'incentiv[ize] . . . parents to send their children to sectarian schools'";[70] and the programmatic purpose of propping up private religious schools facing "increasingly grave fiscal problems."[71] The Court explicitly left open the question of whether "some form of public assistance (e.g., [vouchers]) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" may be permissible.[72]

That question was settled in *Zelman v. Simmons-Harris*, in which the Court held that state voucher programs that include religious schools do not necessarily violate the Establishment Clause.[73] In *Zelman*, the Court addressed Cleveland's voucher program.[74] The program included two types of financial assistance to parents whose children were in a qualifying school district: (1) a tuition grant for parents to send their children to a participating public or private school of the parent's choosing, and (2) tutorial aid for students who remained in public school.[75] Eighty-two percent of the participating private schools had a religious affiliation, and 96 percent of participating students elected to enroll in religiously affiliated schools.[76] Despite clear evidence that most of the state funding was going toward supporting religious schools, the Court affirmed the constitutionality of the program and emphasized the importance of parental choice as a cleansing mechanism; the indirect nature of the aid, which passed first to parents and

64. *Id.* at 765–66.
65. *Id.* at 768.
66. *Id.* at 798.
67. *See* Eckes et al., *supra* note 39, at 540 ("Voucher programs involving private religious schools were long considered unconstitutional after the U.S. Supreme Court's ruling in *Committee for Public Education & Religious Liberty v. Nyquist*.").
68. *Nyquist*, 413 U.S. at 782 n.38.
69. *Id.* at 783.
70. Zelman v. Simmons-Harris, 536 U.S. 639, 661 (2002) (quoting *Nyquist*, 413 U.S. at 786).
71. *Id.* (quoting *Nyquist*, 413 U.S. at 795).
72. *Nyquist*, 413 U.S. at 782 n.38.
73. *Zelman*, 536 U.S. at 662–63.
74. *Id.* at 643. Schools in the Cleveland City School District were performing so abysmally that "[i]n 1995, a Federal District Court declared a 'crisis of magnitude' and placed the entire Cleveland school district under state control. . . . Only 1 in 10 ninth graders could pass a basic proficiency examination . . . . More than two-thirds of high school students either dropped or failed out before graduation." *Id.* at 644.
75. *Id.* at 645.
76. *Id.* at 647.

then to schools, was key to the Court's decision.[77] The Court held that "where a government aid program is neutral with respect to religion, and provides assistance . . . to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the program does not violate the Establishment Clause.[78] This decision solidified the position of voucher programs as a viable component of the education landscape.[79]

B. Discrimination Concerns Associated with Vouchers

Although *Zelman* settled the Establishment Clause question, controversy persists about voucher programs. One of the primary concerns is that vouchers provide opportunities for state-sponsored discrimination.[80] This concern is justified by the historical relationship between vouchers and discrimination[81]: "In fact, so-called 'choice academies,' private schools that began in resistance to desegregation existed in several southern states, including Alabama, Georgia, Louisiana, Mississippi, and Virginia."[82] Notably, three of those five states currently have voucher programs.[83]

Because private schools have broad discretion to operate as they wish, many fear that the schools have the ability to discriminate against disfavored groups, such as LGBT students or racial and religious minorities.[84] Many organizations have criticized voucher programs as offering the opportunity for government subsidization of such discrimination.[85] A wide array of well-respected civil rights and educational groups have expressed these concerns about vouchers, including the National Education Association, the National Parent Teacher Association, the American Civil Liberties Union, the National Alliance of Black School Educators, and the Leadership Conference on Civil Rights.[86]

The concern about state-sponsored discrimination is not just theoretical. In addition to the discrimination occurring in Indiana,[87] private schools

77. *Id.* at 662–63; *see* Abner S. Greene, *The Apparent Consistency of Religion Clause Doctrine*, 21 WASH. U. J.L. & POL'Y 225, 232–34 (2006) (discussing the importance of the indirect nature of the aid and how this opinion comports with prior Establishment Clause cases).

78. *Zelman*, 536 U.S. at 652.

79. Even though *Zelman* settled the Establishment Clause question, voucher litigation continued at the state level. *See generally* Mead, *supra* note 34 (providing an in-depth analysis of state voucher litigation).

80. *See generally* Eckes et al., *supra* note 39.

81. *Id.* at 538 ("Vouchers have a long history in relation to discrimination, particularly racial segregation and resistance to adhere to the Supreme Court's order to desegregate schools in *Brown v. Board of Education*."); *see also* Norwood v. Harrison, 413 U.S. 455, 457 (1973) (noting that in Mississippi, "the creation and enlargement of [private schools] occurred simultaneously with major events in the desegregation of public schools").

82. Eckes et al., *supra* note 39, at 538–39.

83. *See infra* Part II.A.

84. Kavey, *supra* note 48, at 745–46; *see also* Eckes et al., *supra* note 39, at 539.

85. Kavey, *supra* note 48, at 745–46.

86. *Id.*

87. *See supra* text accompanying notes 5–6.

across the country are discriminating against LGBT people. For example, in 2010 a private elementary school in Greater Boston withdrew an eight-year-old student's admission upon learning that his parents were lesbians.[88] Also in 2010, a Colorado preschooler was denied kindergarten enrollment when the private school learned of his mothers' sexual orientation.[89] Stories like these are disturbingly common.[90] Yet even more disturbing than the discrimination itself is that this discrimination occurs at schools that receive government funding. At least 115 voucher-accepting schools in Georgia have "severe antigay policies."[91] At least four voucher-accepting schools in North Carolina admit to having anti-LGBT policies.[92] Realistically, the number of schools with anti-LGBT policies is likely even higher than existing estimates—reported statistics "are likely an understatement" because many schools do not publicize their admissions policies.[93]

In fact, there is even institutional guidance that encourages Christian schools to adopt discriminatory policies. More than half of the schools in Indiana with discriminatory policies are accredited by the Association of Christian Schools International (ACSI).[94] ACSI encourages discrimination by providing its member schools with a handbook entitled *Steps Your School Can Take When Dealing with Homosexual Issues*, which encourages schools to adopt discriminatory policies by providing a model policy for schools to use:

> _____ Christian School's biblical role is to work in conjunction with the home to mold students to be Christlike. Of necessity, this involves the school's understanding and belief of what qualities or characteristics exemplify a Christlike life. The school reserves the right, within its sole discretion, to refuse admission of an applicant or to discontinue enrollment of a student if the atmosphere or conduct within a particular home or the activities of the student are counter to or are in opposition to the biblical lifestyle the school teaches. This includes, but is not necessarily limited to, participating in, supporting, or condoning sexual immorality, homosexual activity, or bisexual activity; promoting such practices; or being unable to

88. Jay Lindsay, *Mass. Catholic School Won't Admit Lesbians' Son*, BOSTON.COM (May 12, 2010), http://archive.boston.com/news/local/massachusetts/articles/2010/05/12/mass_catholic_school_wont_admit_lesbians_son_1273691291/ [https://perma.cc/6EYE-CGNK].

89. Rosemary Black, *Catholic School in Denver Denies Admission to Kindergartener Because of Lesbian Parents*, N.Y. DAILY NEWS (Mar. 9, 2010), http://www.nydailynews.com/news/national/catholic-school-denver-denies-admission-kindergartener-lesbian-parents-article-1.174272# [https://perma.cc/57PW-WTDS].

90. *See, e.g.*, Rebecca Klein, *These Schools Get Millions of Tax Dollars to Discriminate Against LGBTQ Students*, HUFFINGTON POST (Dec. 16, 2017), https://www.huffingtonpost.com/entry/discrimination-lgbt-private-religious-schools_us_5a32a45de4b00dbbcb5ba0be [https://perma.cc/5KKF-F6J3].

91. Kim Severson, *Backed by State Money, Georgia Scholarships Go to Schools Barring Gays*, N.Y. TIMES (Jan. 20, 2013), http://www.nytimes.com/2013/01/21/education/georgia-backed-scholarships-benefit-schools-barring-gays.html [https://perma.cc/YB6V-25P5].

92. Rachel Stone & Jane Little, *Some Schools Get State Money, Deny Gay Enrollment*, CHARLOTTE OBSERVER (Aug. 12, 2016), http://www.charlotteobserver.com/news/local/article95390197.html [https://perma.cc/9JNZ-72RG].

93. Donheiser, *supra* note 3.

94. *Id.*

> support the moral principles of the school. (See Leviticus 20:13 and Romans 1:27.)[95]

Over 3000 schools in the United States are members of this pro-school-choice group.[96]

One might argue that given the difficulties LGBT students experience in the school setting,[97] they would want to find the most accepting environments possible. In other words, some might say that because there are plenty of schools without anti-LGBT policies, those students will logically seek out and find acceptance at those schools, so there is no reason for discriminatory schools to be forced to change. This conclusion fails for two reasons: First, although LGBT students very well may not want to attend schools with hateful admissions policies, the mere fact that they are prohibited from attending is itself injurious. It signals to the students that they are unequal and unworthy in the eyes of local institutions and community members. Second, schools with anti-LGBT policies pose an especially dangerous threat to currently enrolled students who are not out.[98] Students are confronted with an impossible choice: continue to bear the enormous burden of keeping secret an integral part of their identity[99] or be rejected by their community—forced to interrupt their education, leave their friends, and be treated as a pariah.

II. CURRENT APPROACHES TO REMEDY LGBT DISCRIMINATION ARE INSUFFICIENT

Students and their families who experience discrimination at the hands of private schools may turn to the courts for a remedy in the hope that such unfair treatment is legally prohibited. However, they will be disappointed to find that few protections exist for LGBT students in either state or federal law. Because LGBT students have little legal recourse when they are discriminated against, they continue to occupy second-class-citizen status in the United States.

This Part addresses various legal avenues through which a student-plaintiff might hope to find protection from discrimination. First, this Part considers potential state-level protections in the form of voucher statute provisions,

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95. *Id.*

96. *FAQs*, ASS'N CHRISTIAN SCHOOLS INT'L, https://www.acsi.org/membership/acsi-overview/faqs [https://perma.cc/R5AP-AGAH] (last visited Nov. 15, 2018).

97. *See supra* Introduction; *infra* Part III.A.1.

98. A student who is not "out" has not publicly disclosed his or her minority sexual orientation or gender identity. For an explanation of some terms relating to sexual orientation and gender identity, see *Glossary of Terms*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/glossary-of-terms [https://perma.cc/M3RL-EPQB] (last visited Nov. 15, 2018).

99. Existing in unsupportive school environments can seriously increase mental health risks, such as suicidal ideation, for LGBT students. *See generally, e.g.*, Mark L. Hatzenbuehler, Michelle Birkett, Aimee Van Wagenen & Ilan H. Meyer, *Protective School Climates and Reduced Risk for Suicide Ideation in Sexual Minority Youths*, 104 AM. J. PUB. HEALTH 279 (2014).

state antidiscrimination laws, and state constitutions.[100] Then, this Part considers potential constitutional protections in the form of an equal protection claim that is predicated upon a finding of "state action." Finally, this Part considers potential federal statutory protections. This Part ultimately demonstrates that none of these options provide sufficient protection for LGBT students.

A. State-Level Protections Are Insufficient

Currently, sixteen states have some form of publicly funded voucher program.[101] In these states, student-plaintiffs could look to three state-level sources for potential discrimination remedies: the voucher statute, state antidiscrimination statutes, and the state constitution.

A student-plaintiff searching for protection in a voucher statute will almost uniformly be disappointed. Though some programs include nondiscrimination provisions in their enabling statutes,[102] these provisions are far from comprehensive or sufficient. Only a single state, Maryland, prohibits participating schools from discriminating on the basis of sexual orientation.[103] Although the federal program in Washington, D.C. includes a prohibition on sex discrimination, no state program does.[104] Three programs do not impose any explicit nondiscrimination requirement: Maine,[105] Nevada,[106] and Vermont.[107] In fact, some voucher programs seem to contemplate future imposition of antidiscrimination norms and attempt to preempt it.[108] For example, Arizona's legislature promised that a private school "shall not be required to alter its creed, practices, admissions policy or curriculum" in order to participate in the voucher program.[109]

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100. Even when considering an expanded federal voucher program, the current landscape of state voucher programs is instructive, especially since the structure of a potential future federal expansion is unknown.

101. These states are Arizona, Florida, Georgia, Indiana, Louisiana, Maine, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, Vermont, and Wisconsin, Eckes et al., *supra* note 39, at 544, as well as Maryland, *Boost Scholarship Program: Application Information*, U. MD., http://www.educationmaryland.org/BOOST [https://perma.cc/ZTD6-KHXS] (last visited Nov. 15, 2018).

102. For a comprehensive list of the specifics of each program, see Eckes et al., *supra* note 39, at 547. With the exception of Maine, Nevada, and Vermont, programs generally prohibit discrimination based on race, color, and national origin. *Id.*

103. 2018 Md. Laws 2804–05.

104. Eckes et al., *supra* note 39, at 547. Note that this may be largely due to a desire to protect the validity of single-sex schools; however, this goal can be achieved while also providing for protection from discrimination. *See infra* Part III.B.1.

105. *See* ME. REV. STAT. tit. 20-A, § 2951 (2018).

106. *See* NEV. REV. STAT. §§ 388D.250–.280 (2018).

107. *See* VT. STAT. tit. 16, §§ 821–822 (2018).

108. *See* Eckes et al., *supra* note 39, at 550. Although it is worth noting that such provisions could potentially be preempted by federal legislation or judicial rulings, the important takeaway is what these provisions reveal about the intent of the states' decision makers: a desire to insulate schools with discriminatory policies from attempts to force open their doors—with the exception of racial discrimination, which the legislators knew they could not get away with.

109. ARIZ. REV. STAT. § 15-2404 (2018).

Nor is a student-plaintiff likely to find solace in state antidiscrimination laws. Private acts of discrimination can be prohibited through public accommodations laws. Typically, private landowners have the right to exclude whoever they want from their land.[110] However, most states have laws that designate certain private properties "places of public accommodation," thereby limiting the property owner's or business owner's right to exclude in order to prevent discriminatory practices.[111] In order for a student-plaintiff to bring a claim under a public accommodation law, the law must (1) include sexual orientation in its list of protected classes, and (2) include schools in its definition of places of public accommodation. Three voucher states fail both prongs because they have no public accommodation law at all: Georgia, Mississippi, and North Carolina.[112] Most states with voucher programs fail the first prong. Arizona,[113] Florida,[114] Indiana,[115] Louisiana,[116] Ohio,[117] Oklahoma,[118] Tennessee,[119] and Utah[120] do not include sexual orientation as a protected class in their public accommodation statutes. Maryland[121] and Wisconsin[122] fail the second prong because their statutes do not include schools or educational facilities in their definitions of places of public accommodation. While Vermont does protect sexual orientation,[123] it is unclear whether private schools are covered.[124] Of the sixteen voucher states, only two provide

110. *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

111. Forty-five states have public accommodation laws intended for nondisabled individuals. All states with such a law prohibit discrimination based on race, gender, ancestry, and religion. *State Public Accommodation Law*, NAT'L CONF. ST. LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#1 [https://perma.cc/4C4H-MYCE].

112. *Id.*

113. ARIZ. REV. STAT. § 41-1442 (2018).

114. FLA. STAT. §§ 413.08, 760.08 (2018).

115. IND. CODE § 22-9-1-2 (2018).

116. LA. STAT. ANN. § 51:2247 (2018).

117. OHIO REV. CODE § 4112.02 (2018).

118. OKLA. STAT. tit. 25, § 1402 (2018).

119. TENN. CODE ANN. § 4-21-501 (2018).

120. UTAH CODE § 13-7-3 (2018).

121. MD. CODE ANN., STATE GOV'T §§ 20-301 to -304 (2018).

122. WIS. STAT. § 106.52(1)(e)(1) (2018). Although the Wisconsin statute does not explicitly include schools in its enumerated list of places of public accommodation, there may be an argument that schools should be included due to the open-ended language of the statute: "'Public place of accommodation or amusement' shall be interpreted broadly to include, but not be limited to [enumerated list] and any place where accommodations, amusement, goods, or services are available . . . ." *Id.* Schools arguably provide a "service" in the form of education.

123. VT. STAT. tit. 9, § 4502 (2018).

124. *Id.* § 4501 ("'Place of public accommodation' means any school, restaurant, store, establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public."). Although schools are included on the list, the phrase "offered to the general public" throws a wrench in the works. On the one hand, private schools are arguably not offered to the general public in that they typically have a selective admissions process—somewhat analogous to a private membership club, which is typically exempted from public accommodation laws. On the other hand,

unambiguous protection for LGBT students. Maine's statute[125] and Nevada's statute[126] include sexual orientation as a protected class and include schools as a place of public accommodation. Unless an LGBT student is lucky enough to be discriminated against in Maine or Nevada, he or she will not find protection in state antidiscrimination law.

Finally, a student-plaintiff will find no assistance in state constitutions. No state constitution explicitly provides for protection of LGBT individuals who are the subjects of educational discrimination.[127] Fewer than half of all state constitutions even contain a provision prohibiting sex discrimination.[128] Of the voucher states, only four have constitutional protections for sex: Florida,[129] Louisiana,[130] Maryland,[131] and Utah.[132] Even if a state constitutional provision did provide protection for LGBT people, a student-plaintiff would have to clear the difficult hurdle of demonstrating that the school's action constituted state action.[133]

In sum, a student-plaintiff will find no relief in a state constitution in any state, public accommodation statutory protection in only two states, and voucher program statutory protection in only one state. State-level protections are insufficient to ensure that LGBT students are provided equal access to educational opportunities and protected from invidious discrimination.

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accepting vouchers arguably opens the schoolhouse gate to the subset of the general public that qualifies for the vouchers.

125. ME. REV. STAT. tit. 5, §§ 4552–4553, 4591 (2018).

126. NEV. REV. STAT. §§ 651.050, 651.070 (2018).

127. *See* ALA. CONST.; ALASKA CONST.; ARIZ. CONST.; ARK. CONST.; CAL. CONST.; COLO. CONST.; CONN. CONST.; DEL. CONST.; FLA. CONST.; GA. CONST.; HAW. CONST.; IDAHO CONST.; ILL. CONST.; IND. CONST.; IOWA CONST.; KAN. CONST.; KY. CONST.; LA. CONST.; ME. CONST.; MD. CONST.; MASS. CONST.; MICH. CONST.; MINN. CONST.; MISS. CONST.; MO. CONST.; MONT. CONST.; NEB. CONST.; NEV. CONST.; N.H. CONST.; N.J. CONST.; N.M. CONST.; N.Y. CONST.; N.C. CONST.; N.D. CONST.; OHIO CONST.; OKLA. CONST.; OR. CONST.; PA. CONST.; R.I. CONST.; S.C. CONST.; S.D. CONST.; TENN. CONST.; TEX. CONST.; UTAH CONST.; VT. CONST.; VA. CONST.; WASH. CONST.; W. VA. CONST.; WIS. CONST.; WYO. CONST. Note that a limited number of state constitutions may provide some level of protection via judicial interpretation of their equal protection clauses. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (finding that sexual orientation is a quasi-suspect class for purposes of equal protection analysis under the state constitution). One state constitution does textually provide for sexual orientation protection, but only in the voting context. *See* ILL. CONST. art. III, § 8 ("No person shall be denied the right to register to vote or to cast a ballot in an election based on . . . sexual orientation . . . .").

128. *See* LESLIE W. GLADSTONE, CONG. RESEARCH SERV., RS20217, EQUAL RIGHTS AMENDMENTS: STATE PROVISIONS 1 (2004), https://www.everycrsreport.com/files/20040823_RS20217_ca058473694533d5becfe0493fcf17b79fe637bf.pdf [https://perma.cc/5LRN-CLVW].

129. FLA. CONST. art. I, § 2.

130. LA. CONST. art. I, § 3.

131. MD. CONST. DECLARATION OF RIGHTS art. 46.

132. UTAH CONST. art. IV, § 1.

133. *See infra* Part II.B (discussing state action).

B. Constitutional Protections Are Insufficient

To bring a federal constitutional claim, a plaintiff must demonstrate: (1) the violation of a constitutional right (here, Fourteenth Amendment equal protection), and (2) that the right was violated by a state actor.[134] An LGBT student-plaintiff faces significant challenges under both prongs.

1. The Equal Protection Prong

The Constitution as originally ratified did not provide for equal protection under the law.[135] After more than a century of discrimination and subjugation of racial minorities,[136] the Fourteenth Amendment was passed in the wake of the Civil War.[137] The Equal Protection Clause of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[138] The Equal Protection Clause has become a vital tool for combating state discrimination,[139] but it was largely unused prior to the 1950s.[140] The Supreme Court's hesitation to find that a state or local action violated the Equal Protection Clause may have stemmed from the notion that virtually every law classifies people or treats some people differently in some way.[141] Equal protection as an antidiscrimination tool gained prominence[142] with *Brown v. Board of Education*,[143] where the Court struck down the "separate but equal" justification for educational segregation. Although the text of the Fourteenth Amendment only guarantees equal protection by the states,[144] the Court incorporated this protection against the federal government in *Bolling v. Sharpe*.[145]

Courts address three central questions when evaluating an equal protection claim[146]: (1) What is the classification created by the government's action?[147] (2) What is the appropriate level of judicial scrutiny, given the

134. *See infra* Parts II.B.1–2.
135. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 684 (4th ed. 2011).
136. *Id.*
137. *Id.*
138. U.S. CONST. amend. XIV, § 1.
139. *See, e.g.*, LENORA M. LAPIDUS, EMILY J. MARTIN & NAMITHA LUTHRA, THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN'S RIGHTS 2 (4th ed. 2009) ("[T]he Equal Protection Clause has been invoked often to invalidate policies such as racial segregation in public schools, the denial of voting rights to African-Americans, and racially exclusive public accommodations. It also extends to protect the rights of other groups, such as immigrants, ethnic minorities, and women.").
140. *But see, e.g.*, Sweatt v. Painter, 339 U.S. 629, 636 (1950) (finding that segregation in Texas law schools violated the Equal Protection Clause).
141. CHEMERINSKY, *supra* note 135, at 684.
142. *Id.*
143. 347 U.S. 483 (1954).
144. CHEMERINSKY, *supra* note 135, at 684.
145. 347 U.S. 497 (1954).
146. CHEMERINSKY, *supra* note 135, at 685–90.
147. *Id.* at 686–87.

type of discrimination at issue?[148] (3) Does the government action meet the level of scrutiny?[149] In other words, does the government have a sufficiently strong reason for the classification, and is the action appropriately tailored to furthering that interest? This section will first discuss the three different types of scrutiny used by reviewing courts and will then consider how courts have treated sexual orientation in the equal protection context.

a. Three Levels of Scrutiny

The lowest level of scrutiny is rational-basis review.[150] To survive an equal protection challenge, a government action must simply be rationally related to a legitimate government purpose.[151] Because this standard is extremely deferential,[152] the vast majority of actions are upheld under rational-basis review.[153] Rational-basis review is used for all challenges that do not involve one of a limited set of suspect classes, as discussed below. The Supreme Court has applied rational-basis review to laws that create classifications on the basis of, among other categories, socioeconomic status,[154] disability,[155] and age.[156]

The next-highest level of scrutiny is intermediate scrutiny.[157] After years of grappling with what level of scrutiny to apply to gender classifications,[158] the Court finally announced a standard in *Craig v. Boren*[159]: intermediate scrutiny.[160] The Court held that to pass constitutional muster, gender classifications must serve "important governmental objectives and must be substantially related to achievement of those objectives."[161] The Court seemed to alter the standard in *United States v. Virginia*[162]—Justice Ginsburg's opinion held that the government must demonstrate "an exceedingly persuasive justification" for that action,[163] which many scholars

148. *Id.* at 687–89.
149. *Id.* at 689–90.
150. *Id.* at 688.
151. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955).
152. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) ("The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").
153. LAPIDUS ET AL., *supra* note 139, at 4.
154. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).
155. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).
156. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976).
157. *See* CHEMERINSKY, *supra* note 135, at 687.
158. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76–77 (1971). *But see, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973).
159. 429 U.S. 190 (1976).
160. *Id.* at 197.
161. *Id.*
162. 518 U.S. 515 (1996).
163. *Id.* at 531 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

interpret as raising the bar even higher for gender classifications.[164] Intermediate scrutiny is used primarily in the gender context.[165]

The highest level of scrutiny is strict scrutiny.[166] Under strict scrutiny, a government classification will be allowed only if it is narrowly tailored to further a compelling government interest.[167] In this unforgiving analysis, the government must demonstrate that its compelling goal cannot be accomplished through any less discriminatory method.[168] Strict scrutiny applies to all racial classifications[169]—even if they are intended to benefit minorities, such as affirmative action programs[170]—as well as alienage classifications.[171]

b. Sexual Orientation in the Equal Protection Context

The Court has discussed disparate treatment of people based on their sexual orientation on a handful of occasions. Although the Court has not explicitly treated sexual orientation as a suspect class meriting a higher level of scrutiny than rational basis review, the arc of the cases suggests application of some heightened scrutiny. This section offers a brief review of these cases to illustrate how a court might treat a student-plaintiff's equal protection claim based on sexual-orientation discrimination.

In *Romer v. Evans*,[172] the Court considered a challenge to a Colorado state constitutional amendment.[173] The amendment, adopted in a 1992 statewide referendum, prohibited any form of government action—legislative, executive, or judicial—intended to protect lesbian, gay, or bisexual people from discrimination.[174] The Colorado Supreme Court relied on federal voting-rights cases to find that the amendment infringed on the fundamental

164. *See* LAPIDUS ET AL., *supra* note 139, at 7.
165. *Id.* at 6.
166. *See* CHEMERINSKY, *supra* note 135, at 687.
167. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986).
168. *Id.*
169. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).
170. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214 (2016) (upholding an affirmative action program while acknowledging that strict scrutiny is the proper standard of review and that not all affirmative action programs will withstand muster under that exacting standard).
171. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).
172. 517 U.S. 620 (1996).
173. *Id.* at 623.
174. The amendment read:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 624.

right of LGB[175] people to participate in the political process.[176] Because the amendment infringed on a fundamental right, the Colorado Supreme Court applied strict scrutiny and invalidated the amendment.[177] The U.S. Supreme Court granted certiorari and affirmed the judgment, but on different grounds.[178] The Supreme Court agreed with the Colorado court's rejection of the petitioners' argument that rather than "put[ting] gays and lesbians in the same position as all other persons," the amendment actually did "no more than deny homosexuals special rights."[179] Rather than focusing on fundamental rights, though, the Supreme Court invalidated the amendment using the Equal Protection Clause of the Fourteenth Amendment.[180] The Court did not specifically address whether heightened scrutiny should apply to sexual orientation as a class; the Court seemed to skirt the question by holding that "even in the ordinary equal protection case calling for the most deferential of standards"—rational-basis review—the amendment fails because it lacks a rational relationship to legitimate state interests.[181] Even if the decision is viewed as nominally applying rational-basis review, some commentators see "rational basis with bite" or "rational basis plus"—a heightened level of scrutiny that suggests the Court may view sexual orientation as a suspect class meriting additional protection.[182] However, the magnitude of the discrimination in *Romer* may have been the deciding factor: "lower courts have consistently distinguished *Romer* on the basis of the distinctive breadth of the harm inflicted by [the amendment at issue]."[183] In any case, *Romer* was the first time the Court used equal protection to protect people from discrimination on the basis of sexual orientation.[184] Additionally, "*Romer* establishe[d] that animus against gays and lesbians, even when presented as a purported 'moral' basis for a law, is not sufficient to meet the rational basis test."[185]

The Court next addressed sexual orientation in *Lawrence v. Texas*.[186] When Houston police responded to a reported weapons disturbance, they saw petitioner John Lawrence engaged in a consensual sexual act with another

175. The acronym LGB is used here because the amendment did not refer to transgender individuals. *See id*.

176. *Id.* at 625.

177. *Id.*

178. *Id.*

179. *Id.* at 626. Note that such an argument could be advanced in the context of private school admissions. The precedent set in *Romer* would likely quash such an attempt.

180. *Id.* at 631–36.

181. *Id.* at 632.

182. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 778 (2011) ("*Romer* has been read as a 'rational basis with bite' case."); *see also* CHEMERINSKY, *supra* note 135, at 808 ("[T]he decision indicates at least some judicial willingness to protect gays, lesbians, and bisexuals from discrimination."); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005).

183. Yoshino, *supra* note 182, at 778.

184. *See* CHEMERINSKY, *supra* note 135, at 808.

185. *Id.*

186. 539 U.S. 558 (2003).

man.[187] Both men were arrested and convicted of violating a Texas statute prohibiting "deviate sexual intercourse with another individual of the same sex."[188] The trial court rejected the petitioners' equal protection challenge.[189] The Court of Appeals for the Texas Fourteenth District also rejected the challenge after considering arguments under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[190] The court of appeals relied on *Bowers v. Hardwick*,[191] a Supreme Court case that upheld a Georgia statute criminalizing sodomy altogether.[192] However, on appeal, the Supreme Court rejected the reliance on *Bowers*.[193] Noting that both the Texas and Georgia sodomy laws implicated the fundamental right to privacy,[194] the Court held that a state cannot prohibit private, consensual homosexual activity, overturning *Bowers* in the process.[195] Because the Court felt compelled to address *Bowers*, it chose to render its decision under the Due Process Clause and not the Equal Protection Clause.[196] Nevertheless, the Court emphasized that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects"[197] and again signaled an intention to prevent sexual-orientation discrimination.[198]

In *United States v. Windsor*,[199] the Court considered a provision of the Defense of Marriage Act (DOMA).[200] Section 3 of DOMA, enacted in 1996, defines marriage, for the purposes of federal law, as a union between one man and one woman.[201] Edie Windsor wed her wife, Thea Spyer, in Canada in 2007, and their marriage was recognized by their home state of New

187. *Id.* at 562–63.
188. *Id.* at 563 (quoting the Texas statute).
189. *See id.* at 563.
190. *Id.*
191. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).
192. *See Lawrence*, 539 U.S. at 563, 566.
193. *See id.* at 578.
194. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972) (considering the fundamental right to privacy).
195. *Lawrence*, 539 U.S. at 577–79.
196. *Id.* at 574–75 ("As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."). Kenji Yoshino argues that, although deciding the case on equal protection grounds would have allowed the Court to avoid the admission of error required by overturning *Bowers*, the Court declined to do so partially in order to avoid declaring the level of scrutiny that should apply to a sexual orientation equal protection challenge. *See* Yoshino, *supra* note 182, at 777–78.
197. *Lawrence*, 539 U.S. at 575.
198. *See, e.g.*, Yoshino, *supra* note 182, at 779 ("Indeed, *Lawrence* arguably more resoundingly endorses the equality of gay and straight individuals than does *Romer*.").
199. 133 S. Ct. 2675 (2013).
200. *Id.* at 2682.
201. *Id.* at 2683.

York.[202] However, because federal law did not recognize same-sex marriage under DOMA, the federal government imposed over $363,000 in taxes when Spyer died and left her estate to Windsor.[203] The district court held that section 3 of DOMA was unconstitutional, and the Second Circuit affirmed after applying heightened scrutiny based on the sexual-orientation classification.[204] The Supreme Court affirmed the Second Circuit on the grounds that defining marriage was the purview of state governments and that DOMA "violate[d] basic due process and equal protection principles."[205] Once again, the Court avoided the question of what level of scrutiny should apply to a sexual-orientation equal protection challenge by stating that the statute had "no legitimate purpose" because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[206] Nonetheless, Justice Anthony Kennedy's repeated talk of dignity[207] and sweeping language about equality[208] further supplemented the trend toward treating sexual orientation as a suspect classification under the Fourteenth Amendment.

Finally, the Court interpreted the Constitution as guaranteeing marriage equality in *Obergefell v. Hodges*.[209] The *Obergefell* appeal came from fourteen same-sex couples and two men whose same-sex partners were deceased.[210] The petitioners challenged the Kentucky, Michigan, Ohio, and Tennessee laws restricting marriage to a union between one man and one woman.[211] Each of the petitioners originally won the right to marry in their respective district courts, but the states appealed the decisions.[212] The Sixth Circuit consolidated the various cases during the appeals process and overturned the judgments in favor of permitting gay marriage.[213] The Supreme Court reversed the Sixth Circuit's decision and held that same-sex marriage bans violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[214] Justice Kennedy did not explicitly ground his decision exclusively in either a due process or equal protection rationale;

202. *Id.*
203. *Id.*
204. *Id.* at 2684.
205. *Id.* at 2693.
206. *Id.* at 2696.
207. *See, e.g.*, *id.* at 2688, 2692–93.
208. *See, e.g.*, *id.* at 2694 ("DOMA writes inequality into the entire United States Code.").
209. 135 S. Ct. 2584 (2015).
210. *Id.* at 2593.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 2604–05. ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.").

rather, he treated the two as necessarily intertwined.[215] Like the three preceding decisions, the *Obergefell* opinion "did not use the magic words of 'heightened scrutiny.'"[216] Nonetheless, the substance of the opinion clearly indicates some level of scrutiny beyond rational basis.[217] For example, the Court goes to great lengths to detail the history of discrimination against LGBT people,[218] the immutable nature of sexual orientation,[219] and the lack of political power of LGBT people,[220] all of which are factors utilized by the Court when performing a heightened-scrutiny analysis, but not a rational-basis review.[221]

c. A Student-Plaintiff's Equal Protection Claim

The *Romer-Obergefell* line of cases suggests that a reviewing court would apply some level of heightened scrutiny to a student-plaintiff's equal protection claim. None of the cases appear to apply true rational-basis review, under which virtually any government action can survive as long as some conceivable government interest is at play. If heightened scrutiny is applied, a student-plaintiff may well prevail—the weight of his or her interest in being free from discrimination could tip the scales in his or her favor.

Nonetheless, success is far from certain for a student-plaintiff. Even though the *Romer-Obergefell* line of cases suggests application of heightened scrutiny, the outcome may depend on the context; notably, none of the *Romer-Obergefell* cases dealt with a private, religious organization such as a parochial school, which has a significant free-exercise interest. Furthermore, the Court still has not explicitly designated sexual orientation as a suspect class that would merit heightened scrutiny in an equal protection analysis. This ambiguity leaves room for an interpreting court to apply back-to-basics, heavily deferential rational-basis review. Given the extreme deference of that standard, a student-plaintiff's claim would likely fail under that analysis. Even under a fuzzy "rational basis plus" review, there is no guarantee that a student-plaintiff would prevail, given the unclear boundaries of such a review.

2. The State Action Prong

Even assuming a student-plaintiff does have a viable equal protection claim against a school, the student-plaintiff must jump over the state action

215. *See* Jack B. Harrison, *At Long Last Marriage*, 24 AM. U. J. GENDER, SOC. POL'Y & L. 1, 53 (2015) (interpreting Justice Anthony Kennedy's opinion to mean "that no choice between due process and equal protection analysis need be made, because as [Justice Kennedy] sees the Constitution, these two constitutional clauses are inextricably tied together under the umbrella of personal dignity").

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

217. *See id.*

218. *See Obergefell*, 135 S. Ct. at 2596; Bernhardt, *supra* note 216, at 23–24.

219. *See Obergefell*, 135 S. Ct. at 2594; Bernhardt, *supra* note 216, at 28–29.

220. *See Obergefell*, 135 S. Ct. at 2605–06; Bernhardt, *supra* note 216, at 37–38.

221. *See* Bernhardt, *supra* note 216, at 22–41.

hurdle in order to make a viable claim. As a general rule, the constitutional obligation of equal protection only applies to the government.[222] In other words, the Constitution in isolation does not generally prohibit discrimination by private actors, like private schools.[223] Thus, in order for a student-plaintiff to succeed on an equal protection claim, the student-plaintiff must be able to demonstrate that the private school's action implicated the state such that the action of the school can fairly be treated as the action of the state.[224] This concept is known as the "state action" doctrine—constitutional protections apply only where the state[225] is acting. This section outlines the Supreme Court's treatment of the state action doctrine, both in general and in contexts particularly relevant to, or similar to, voucher schools.

a. History and Development of the Doctrine

The state action doctrine has a long history—its roots are typically traced back to the *Civil Rights Cases*.[226] Since then, state action jurisprudence has developed to become notoriously convoluted and inconsistent.[227] Historically, the Court has found state action in only two circumstances: (1) where a private actor is providing a public function that is "traditionally [and] exclusively reserved to the State,"[228] or (2) where there is significant

222. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); CHEMERINSKY, *supra* note 135, at 519.

223. CHEMERINSKY, *supra* note 135, at 519. There are exceptions. For example, the Thirteenth Amendment regulates private conduct by forbidding slavery. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ."). Of course, Congress or state legislatures can enact statutes that subject private conduct to the same constitutional norms that apply to the government. CHEMERINSKY, *supra* note 135, at 519.

224. The analysis of whether the school's action was "under color of law" per 42 U.S.C. § 1983 merges with the search for state action. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.").

225. In this context, "state" is a general term referring to all levels of government—federal, state, and local. CHEMERINSKY, *supra* note 135, at 519.

226. 109 U.S. 3 (1883) (invalidating the Civil Rights Act of 1875, which prohibited racial discrimination in certain places of public accommodation or amusement). However, the doctrine was actually referenced in two earlier cases: *United States v. Cruikshank*, 92 U.S. 542 (1875), and *Virginia v. Rives*, 100 U.S. 313 (1879). *See* Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273, 275–76 (2010); *see also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507–508 (1985). For further discussion of the history of the state action doctrine, which highlights the ways in which the modern doctrine does not comport with historical legal thinking, see CHEMERINSKY, *supra* note 135, at 524, which explains that when the Constitution was written, it did not apply to private conduct because "it was thought that the common law completely safeguarded personal liberties from private infringements."

227. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting) ("[O]ur cases deciding when private action might be deemed that of the state have not been a model of consistency."); Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (calling state action a "conceptual disaster area").

228. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

state entanglement in the private action, that is, where the state itself actively encouraged or compelled the specific conduct in question[229] or where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[230] The entanglement approach essentially evaluates whether the government directly exerted control over the action in question.

The public-function approach has very rarely been successful.[231] Providing utilities,[232] providing education services,[233] managing intercollegiate athletics,[234] and coordinating U.S. involvement in the Olympics[235] have all been rejected by the Supreme Court as not sufficiently traditional or exclusive functions of the state to qualify as a public function.[236] The entanglement approach has also found limited success.[237] In general, successful entanglement cases tend to fall into four areas[238]: judicial and law enforcement actions,[239] government licensing,[240] direct government subsidies,[241] and voter initiatives permitting discrimination.[242] However, the Court has made clear that entanglement does not exist solely

229. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) ("Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' in order for the discriminatory action to fall within the ambit of the constitutional prohibition." (quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967))); Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970) ("[A] State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.").

230. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (quoting *Jackson*, 419 U.S. at 351).

231. *See* Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1176 (1995) (describing "significant curtailment of the public function theory"); Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. C.R.L.J. 203, 211 (2001) (noting that the original public-function case, *Marsh v. Alabama*, 326 U.S. 501 (1946), "has been so strictly limited as to suggest a very narrow scope indeed for the public function test").

232. *Jackson*, 419 U.S. at 358.

233. Rendell-Baker v. Kohn, 457 U.S. 830, 836–37 (1982).

234. NCAA v. Tarkanian, 488 U.S. 179, 197–99 (1988).

235. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 547 (1987).

236. Maren Hulden, Note, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244, 1259 (2011). *But see, e.g.*, West v. Atkins, 487 U.S. 42, 57 (1988) (finding that the provision of medical services in a state prison is a public function, which renders the treating physician a state actor).

237. Hulden, *supra* note 236, at 1260.

238. CHEMERINSKY, *supra* note 135, at 539.

239. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 18–19 (1948) (holding that courts cannot enforce racially restrictive covenants).

240. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (finding that, where the city operated a parking facility that leased space to a private, discriminatory restaurant, the discrimination constituted state action due to the government's involvement).

241. *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556, 574 (1974) (finding that state action may exist where the city gave racially segregated private schools exclusive use of public recreational facilities); *see also* Norwood v. Harrison, 413 U.S. 455, 470–71 (1973).

242. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (finding that the government's encouragement of a ballot initiative repealing open housing laws was unconstitutional).

on the basis of public funding[243] or extensive state regulation.[244] There must be additional factors suggesting government encouragement or direct facilitation of unconstitutional conduct.[245]

b. State Action Cases in the School Context

The Supreme Court has not ruled directly on the question of how a typical voucher program affects the private character of a school in a student's discrimination suit. However, three recent cases provide relevant insight into how the Court may consider such a case.

The Court considered the public funding of a discriminatory private school in *Norwood v. Harrison*.[246] In *Norwood*, parents of four black children challenged a state-run textbook-lending program in Mississippi that provided free textbooks to public and private schools across the state, including private schools with racially discriminatory admissions policies.[247] Here, there was clear state action: the state provided direct financial support in the form of free textbooks. Even though there was no indication that the state encouraged the schools to discriminate or that there was other government entanglement, the Court found that providing financial support via textbooks was enough to constitute a violation of the students' equal protection rights.[248] The Court noted that it has "consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools"[249] and found no meaningful distinction between tuition grants and textbooks.[250] The Court highlighted that "discriminatory treatment exerts a pervasive influence on the entire educational process" and that although "private bias is not barred by the Constitution . . . neither can it call on the Constitution for material aid from the State."[251] Furthermore, the Court rejected the argument that the intention of fostering quality education for all students (by ensuring that students whose parents chose to send them to a discriminatory school would not miss out on the benefits of the free textbooks) did not overcome the discriminatory effect of the program.[252] However, the Court was careful to note that not all government support of discriminatory private schools was

243. Rendell-Baker v. Kohn, 457 U.S. 830, 840–42 (1982) (finding that, in an employment discrimination suit where the state had no power to regulate personnel, near-complete reliance on state funding did not amount to a close enough nexus to constitute state action).

244. Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1974).

245. CHEMERINSKY, *supra* note 135, at 544–51.

246. 413 U.S. 455 (1973).

247. *Id.* at 457.

248. *See id.* at 463–64.

249. *Id.* at 463 (listing cases).

250. *Id.* at 463–64.

251. *Id.* at 469.

252. *Id.* at 466–67 ("[G]ood intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty."). This clear statement should preclude a discriminatory voucher-accepting private school from successfully using an identical argument.

prohibited.[253] Notably, the Court did not address how much it weighed the direct nature of the state aid in the Mississippi textbook program, leaving open the question of whether indirect state aid, such as vouchers, may be treated differently.

The Court next considered public funding in the private school context in *Rendell-Baker v. Kohn*.[254] New Perspectives School was a private, not-for-profit institution that specialized in educating students who had trouble completing a public high school degree, often due to drug or alcohol problems or other special needs.[255] When students were referred to the school by city or state officials, the municipalities funded the students' tuition at New Perspectives.[256] In the years leading up to the litigation, virtually all students at New Perspectives were referrals, so state funding accounted for between 90 and 99 percent of the school's operating budget.[257] Several teachers and the petitioner, a guidance counselor, voiced opposition to a school policy.[258] When they were subsequently fired, they brought suit under 42 U.S.C. § 1983, alleging violation of their due process and First Amendment rights.[259] Relying on *Blum v. Yaretsky*,[260] the Court held that receipt of public funds alone was not enough to find state action.[261] Using the framework from *Blum*, the Court was looking for "coercive power"[262] from the state with regards to the particular issue at hand—in this case, the personnel decision. The Court also analogized a private school to an infrastructure or defense contractor:

> The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.[263]

Furthermore, the Court rejected the public-function argument, finding that while "the education of maladjusted high school students is a public function," it is not the "exclusive province of the State."[264] The Court further noted that "the State had not undertaken to provide education for students who could not be served by traditional public schools."[265]

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253. *Id.* at 465 ("We do not suggest that a State violates its constitutional duty merely because it has provided any form of state service that benefits private schools said to be racially discriminatory." (emphasis omitted)).

254. 457 U.S. 830 (1982).

255. *Id.* at 832.

256. *Id.*

257. *Id.*

258. *Id.* at 833–35.

259. *Id.* at 834–35.

260. 457 U.S. 991 (1982) (finding no state action where staff at a nursing facility that received state Medicaid funds recommended the discharge or transfer of patients without control or regulation by the state).

261. *See Rendell-Baker*, 457 U.S. at 840.

262. *Id.* (quoting *Blum*, 457 U.S. at 1004).

263. *Id.* at 840–41.

264. *Id.* at 842.

265. *Id.*

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,[266] the Court did not address public funding of a private school, but the case provides useful insight because it seemed to signal a slightly new approach to state action generally.[267] Brentwood Academy ("Brentwood"), a private school outside Nashville, was a voluntary member of the Tennessee Secondary School Athletic Association (TSSAA), a not-for-profit organization that coordinated sports competitions among public and private high schools in Tennessee.[268] In 1997, the TSSAA placed Brentwood on probation for violating a rule against "undue influence" in recruiting athletes.[269] Brentwood sued the TSSAA, claiming that the TSSAA was a state actor and that its enforcement of the rule was a violation of the First and Fourteenth Amendments.[270] The district court ruled in favor of Brentwood, and the Sixth Circuit reversed after finding no state action under any of the traditional frameworks.[271] On appeal, the Supreme Court overturned the Sixth Circuit by eschewing the rationale that state action could be found only under the traditional, structured approach of past cases.[272] The Court noted the long-standing precedent that "the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies."[273] The Court went on to emphasize that a state action analysis is a "necessarily fact-bound inquiry"[274] and morphed the nexus-entanglement approach into a flexible, fact-based inquiry that Justice David Souter referred to as "entwinement."[275] Furthermore, the Court noted that, although the public-function and nexus-entanglement precedents may be a helpful guide, the Court is not limited to finding state action only in those narrow circumstances.[276] The Court found significant that the TSSAA was staffed and operated almost entirely by public school officials,[277] state board of education members served ex officio on the board of the TSSAA,[278] and TSSAA employees were eligible for state retirement benefits.[279]

266. 531 U.S. 288 (2001).
267. *See* Hulden, *supra* note 236, at 1263.
268. *Brentwood*, 531 U.S. at 291.
269. *Id.* at 293.
270. *Id.*
271. *Id.* at 293–94.
272. *Id.* 294–302.
273. *Id.* at 296 (citing Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995)).
274. *Id.* at 298 (quoting Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982)).
275. *See id.* at 291; Hulden, *supra* note 236, at 1262–64.
276. *Brentwood*, 531 U.S. at 301–04 ("Facts that address any of [the] criteria [of the public function or coercion tests] are significant, but no one criterion must necessarily be applied. . . . [T]he implication of state action is not affected by pointing out that the facts might not loom large under a different test.").
277. *Id.* at 300 ("There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.").
278. *Id.*
279. *Id.*

c. Private Schools as State Actors Under Current Jurisprudence

The Supreme Court's state action jurisprudence is not promising for a student-plaintiff because a public-function argument is almost certain to fail as a matter of course. Public function applies only in very rare scenarios because, although the government performs many functions, few have been *exclusively* the purview of the state.[280] There is a long history of private schooling in the United States, so the public-function argument has found little success in court.[281] Nor is there much hope for the traditional entanglement argument. Nothing suggests that states compel or encourage private schools to maintain discriminatory admissions policies.

Even using *Brentwood*'s flexible, fact-based approach, direct application of recent state action precedent suggests that a court would not find state action in a student-plaintiff's claim. *Rendell-Baker* made clear that public funding alone is not sufficient to render a private entity's action state action, even when the public funding is responsible for virtually the entire operating budget of the private entity.[282] Nor is a private entity's governance by state regulations in and of itself enough to establish state action,[283] so a state's limited regulatory oversight of private schools would not suffice. The regulations that do govern private schools tend to relate to educational standards, not admissions policies, and courts primarily consider whether regulation exists in the specific area at issue.[284] By analogizing a private school to any other business that contracts with the government, *Rendell-Baker* suggests that the Court will not treat the educational context as a unique one that merits special treatment.[285] Further, a student-plaintiff's claim would be distinguishable from the facts of *Brentwood*—by nature, most private schools lack public-official involvement, which is a factor the *Brentwood* Court weighed heavily.[286]

Finally, although the Court prohibited direct federal aid to a racially discriminatory private school in *Norwood v. Harrison*, the indirect nature of voucher funding could prove problematic for a student-plaintiff. The Court has not clarified whether the funding is "cleansed" for equal protection purposes by passing through the hands of parents before going to schools,

280. *See, e.g.*, Hulden, *supra* note 236, at 1259, 1266.

281. *See* Cory A. DeCresenza, Note, *Rethinking the Effect of Public Funding on the State-Actor Status of Private Schools in First Amendment Freedom of Speech Actions*, 59 SYRACUSE L. REV. 471, 498–99 (2009); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Makofsky, *supra* note 6, at 970 (noting that the Court has declined to find education to be an exclusively public function "because private schools have long existed alongside public education").

282. *Rendell-Baker*, 457 U.S. at 840; *see also* Hulden, *supra* note 236, at 1260 n.89.

283. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."); *see also* Hulden, *supra* note 236, at 1260 n.90.

284. *See, e.g.*, *Rendell-Baker*, 457 U.S. at 841–42.

285. *Id.* at 840–41.

286. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001); *see supra* notes 277–79 and accompanying text.

but the precedent set in *Zelman v. Simmons-Harris* in the Establishment Clause context suggests that it could be.

In summary, chances are slim that a court would find state action in a student-plaintiff's equal protection claim against a private school. Courts are hesitant to find state action in the first place, and precedent suggests that they would be especially hesitant to find state action in this context. Because a student-plaintiff would need to show a violation of equal protection and establish that the private school is a state actor, it is unlikely that a student-plaintiff would have a successful case under the U.S. Constitution.

C. Federal Antidiscrimination Law Does Not Sufficiently Protect LGBT Students

Finally, a student-plaintiff may turn to federal antidiscrimination law in an attempt to find vindication. Unlike constitutional law, federal legislation typically does apply to private actors.[287] Federal antidiscrimination law covers a range of contexts, from employment to voting rights.[288] The contexts relevant to a rejected LGBT student are (1) education, and (2) the making and enforcement of contracts, since private school admission is simply a contract between the parents and the school. Title IX of the Education Amendments of 1972 ("Title IX") governs discrimination in education.[289] Title IX contains no provision prohibiting discrimination based on sexual orientation.[290] Additionally, Title IX directs that the statutory protections do not apply to primary or secondary school admissions.[291]

Discrimination in the making and enforcement of contracts is governed by 42 U.S.C. § 1981.[292] It contains no provision prohibiting discrimination based on sexual orientation.[293] In short, Congress has enacted no relevant law that prohibits discrimination on the basis of sexual orientation, so a student-plaintiff would find no protection in federal antidiscrimination law.[294]

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287. Makofsky, *supra* note 6, at 978–79. Of course, the federal legislative power is not unlimited. Congress must act according to an enumerated power. *See* CHEMERINSKY, *supra* note 135, at 238.

288. Makofsky, *supra* note 6, at 978 ("The forums that federal antidiscrimination laws cover include: voting rights, access to public facilities and accommodations, discrimination in education, discrimination within federally assisted programs, discrimination in employment, and discrimination in the making and enforcement of contracts.").

289. 20 U.S.C § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

290. *See* Makofsky, *supra* note 6, at 978–79.

291. *See* 20 U.S.C. § 1681(a); *infra* Part IV.B.

292. 42 U.S.C. § 1981 (2012) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

293. *See id.*; *see also* Makofsky, *supra* note 6, at 978–79.

294. *See* Makofsky, *supra* note 6, at 978–79.

III. PROVIDING PROTECTION FOR LGBT STUDENTS

As it stands, LGBT students are vulnerable to being victims of discrimination at the hands of private schools. Despite the fact that taxpayer dollars fund students' vouchers, private schools have an unchecked license to deny admission to or expel LGBT students solely based on their sexual orientation or gender identity. No state law, constitutional provision, or federal law prevents this brutal discrimination.[295] Action is needed to ensure that LGBT students are treated with the same dignity as their heterosexual peers. Part III.A describes why protections are necessary and logical. Part III.B explains two potential ways students could obtain protection: (1) Congress could mold Title IX to cover sexual orientation; or (2) a student-plaintiff could bring an equal protection claim and argue for a relaxed application of the state action doctrine.

A. Why Preventing Discrimination Is Logical and Necessary

Preventing school-admissions discrimination is essential to protecting the health and success of LGBT children[296] and is a natural extension of the Supreme Court's jurisprudence.[297]

1. Protections Are Necessary

Discrimination against LGBT people is highly problematic in general,[298] but it is especially despicable in the context of school voucher programs. Courts have long recognized the virtually unmatched societal importance of education.[299] School is where children learn a vast range of skills necessary to survive in modern society, from social skills and empathy to creative thinking and problem-solving.[300] The unique instructional nature of a school demonstrates the inaccuracy of the *Rendell-Baker* Court's attempt to analogize private school admission to any other business contract.[301] Unequal access to education can fundamentally handicap a child in a way that no regular business contract can.

Courts should consider the unique importance of the educational environment in any analysis involving a school, but especially in the context of school voucher programs. In the voucher context, allowing sexual-orientation discrimination to persist may be tantamount to relegating LGBT students to an inferior education given that many voucher programs develop

295. *See supra* Part II.
296. *See infra* Part III.A.1.
297. *See infra* Part III.A.2.
298. *See supra* Part I.B.
299. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").
300. *See* Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503, 513–14 (2002); *see also Brown*, 347 U.S. at 493.
301. *See supra* note 263 and accompanying text.

in response to failing public schools.[302] It is not difficult to imagine a rural setting in which a voucher program developed in response to an inadequate public school system and where few private schools exist. If the one or two participating private schools in the area have discriminatory policies, LGBT students will be forced to accept an education that the government itself has acknowledged is inadequate by establishing a voucher program to provide alternative options to public schooling.

In addition to the destructive educational consequences of discrimination, prohibiting LGBT students from having equal access to schooling opportunities may have traumatic sociopsychological effects.[303] The school environment plays a formative role in a child's sociopsychological development.[304] Rejection in the school environment is uniquely damaging.[305] The Supreme Court has long acknowledged that allowing schools to discriminate gives the disfavored population the degrading mark of institutionalized inferiority.[306] Being rejected from a school because of sexual orientation, or even the knowledge that one *could* be rejected based on sexual orientation, may contribute to a vast range of negative outcomes for LGBT children, including higher risk of drug use, higher risk of suicidal ideation, and lower rates of academic success.[307]

2. Protections Are Logical

The Supreme Court has already laid the groundwork for instituting protections for LGBT students, and doing so in this context would not be a major departure from the Court's jurisprudence. First, the Court has repeatedly acknowledged that discrimination has no place in education. In *Norwood v. Harrison*, the Court explicitly acknowledged that "[f]ree textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves" and held it unconstitutional for the government to provide financial support to racially discriminatory schools.[308] Vouchers are exactly the kind of tuition grant the Court referred to when stating that government aid that goes to discriminatory schools is constitutionally problematic. Although the facts of the case involved racial discrimination, *Norwood* makes several broadly disapproving statements about discrimination generally and suggests that the reasoning in the opinion could apply to other

302. *See, e.g.*, Oluwole & Green, *supra* note 52, at 1337 ("Given many Americans' dissatisfaction with their local public schools, some municipalities have looked to vouchers . . . to help fund their children's education at private schools."). *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

303. *See supra* notes 9–12 and accompanying text.

304. *See generally* Orly Rachmilovitz, *No Queer Child Left Behind*, 51 U.S.F. L. REV. 203 (2017).

305. *See id.* at 220–24.

306. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). Although the scope and vitriol of racial school segregation is unmatched, the principle still holds when applied to the exclusion of LGBT students from private schools.

307. *See* Rachmilovitz, *supra* note 304, at 204–05.

308. 413 U.S. 455, 463–64 (1973).

forms of discrimination.[309] Preventing state-sponsored discrimination against LGBT students—even if the state aid at issue is provided indirectly via parental choice—is a logical outgrowth of *Norwood*.

Another seminal school discrimination case, *Runyon v. McCrary*,[310] also supports this conclusion. In *Runyon*, parents of two African American students challenged a private school's policy against admitting black students.[311] The Supreme Court resoundingly rejected the school's freedom of association,[312] parental rights,[313] and privacy[314] defenses and held that the admissions policy was a violation of the students' constitutional rights.[315] *Runyon* makes clear that imposing antidiscrimination requirements on private schools is constitutional. Thus, the Court has shown a willingness to curtail private schools' discriminatory policies and block public funding of discriminatory schools. Extending these holdings to prevent schools from discriminating against LGBT students, or at least to prevent public dollars from going to such schools, is a natural next step.

Furthermore, instituting protections for LGBT students would promote important government interests. First, as evidenced in *Runyon* and *Norwood*, eliminating discrimination is itself an important state interest.[316] Second, the government has a vested interest in instilling children with certain universal values; in fact, this is one of the primary purposes of public education.[317] Preventing sexual-orientation discrimination would communicate to children the importance of empathy, respect, tolerance, equality, and diversity, which at least one scholar argues are central to the purpose of publicly funded education.[318]

B. How LGBT Students Could Obtain Protection

This section considers two potential options for providing LGBT students with much-needed protection from discrimination. First, Title IX could be molded to include protection against discrimination on the basis of sexual orientation. Second, a student-plaintiff could bring a federal constitutional claim and argue for a relaxed approach to the state action doctrine, such that a private school would be treated as a state actor and a student-plaintiff could

309. *See, e.g.*, *id.* at 469 ("[D]iscriminatory treatment exerts a pervasive influence on the entire educational process."); *see also id.* at 463 ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

310. 427 U.S. 160 (1976).

311. *Id.* at 163–64.

312. *Id.* at 175–76.

313. *Id.* at 176–77.

314. *Id.* at 178 ("The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.").

315. *Id.* at 186.

316. *See* Kavey, *supra* note 48, at 766.

317. *See* Shiffrin, *supra* note 300, at 513.

318. *Id.*

proceed with an equal protection claim. This Note ultimately argues that an equal protection claim is the most viable option.

1. Mold Title IX to Cover Sexual Orientation

One potential way to protect LGBT students would be for Congress to alter existing antidiscrimination legislation. Title IX would be a logical place to locate protections for LGBT students, since it already outlaws discrimination in education based on sex.[319] If federal support for voucher programs were to increase, participating schools would likely be subject to Title IX since federal grant money is considered an applicable form of "federal financial assistance" for the purposes of Title IX.[320] Establishing LGBT protections under Title IX could occur in one of two ways, both of which require two steps: (1) amend § 1681(a)(1) within Title IX and judicially interpret "sex" to include "sexual orientation," as has been done in the employment context,[321] or (2) amend § 1681(a)(1) and also amend the body of Title IX to explicitly, textually prohibit sexual-orientation discrimination.

To utilize Title IX to protect LGBT students in elementary schools and high schools, § 1681(a)(1) would need to be amended. The provision currently states: "in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."[322] Primary and secondary schools are notably absent from the list. The exclusion of primary and secondary schools was intended to ensure that single-sex schools could continue to operate.[323] Amending § 1681(a)(1) to protect LGBT students need not disturb that goal. The amendment could provide for universal application of Title IX regulations to primary and secondary schools, both public and private, with a built-in exception stating that nothing in the legislation should be

319. 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

320. The Supreme Court addressed the question of whether indirect federal aid could trigger Title IX in *Grove City College v. Bell*, 465 U.S. 555 (1984). In *Grove*, federal grant money was disbursed to qualifying students, who then chose to spend their grant money at Grove City College, a private institution—similar to the way in which voucher money is first disbursed to parents, who then choose where to spend the money. *Id.* at 559–62. In a sex discrimination suit, the Court found that the language of Title IX suggests no distinction between indirect and direct funding and held that indirect aid does trigger Title IX, though only for the specific program receiving aid. *Id.* at 564, 573.

321. *See infra* notes 325–32 and accompanying text.

322. 20 U.S.C. § 1681(a)(1).

323. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,532 (Oct. 25, 2006) ("Title IX has always permitted single-sex schools under conditions that ensure nondiscrimination. Existing educational research suggests that single-sex education may provide benefits to some students under certain circumstances."); Elizabeth S. Kisthardt, Comment, *Singling Them Out: The Influence of the "Boy Crisis" on the New Title IX Regulations*, 22 WIS. WOMEN'S L.J. 313, 313 (2007) (highlighting that the original intent of Title IX was to allow for single-sex education).

interpreted to prohibit single-sex schools.[324] If § 1681(a)(1) was amended to cover primary and secondary schools, protection for LGBT students could be pursued in two ways: judicial interpretation or another statutory amendment.

One resolution would be for courts to interpret Title IX's ban on "sex discrimination" to also prohibit sexual-orientation discrimination. Many scholars argue that, by definition, the prohibition of "sex discrimination" includes discrimination based on sexual orientation.[325] Their logic is founded in the concept of sex stereotyping, which the Supreme Court acknowledged in *Price Waterhouse v. Hopkins*.[326] Simply put, the argument is that the variable underlying sexual-orientation discrimination *is* sex: discrimination against a gay man is premised on the fact that he is a man, and men are stereotypically attracted to women. If the sex of the target individual were changed, the perpetrator would have no reason to discriminate; a woman attracted to men does not break a sex stereotype, and therefore would not be the target of sexual-orientation discrimination. No court of appeals has ruled on whether this logic is valid in the Title IX context, and district courts have come down on both sides of the issue.[327] However, the same logic is being used successfully in Title VII cases. Title VII of the Civil Rights Act of 1964 regulates sex discrimination in employment,[328] and Title VII jurisprudence is regularly used to inform Title IX interpretation.[329] Most notably, the Seventh Circuit resoundingly approved the argument in *Hively v. Ivy Tech Community College of Indiana*,[330] as did the Second Circuit in *Zarda v. Altitude Express, Inc.*[331] However, the predictive value of *Hively*

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324. The exception could look something like 20 U.S.C. § 1686, which states: "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."

325. *See, e.g.*, Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 193 (2005) ("[S]exual orientation discrimination is a form of sex/gender discrimination.").

326. 490 U.S. 228 (1989) (holding that treating someone differently because he or she does not comport with the stereotypes associated with his or her gender is a form of sex discrimination under Title VII).

327. *See, e.g.*, Hoffman v. Saginaw Pub. Schs., No. 12-10354, 2012 WL 2450805, at *8, *11 (E.D. Mich. June 27, 2012) (holding that "while discrimination based on noncompliance with sexual stereotypes may be actionable under federal law, discrimination based on sexual orientation is not"). *But cf.* Estate of Brown v. Ogletree, No. 11-cv-1491, 2012 WL 591190, at *17 (S.D. Tex. Feb. 21, 2012) ("[H]arassment due to a victim's *perceived* homosexuality is sufficient to constitute 'sexual harassment,' regardless of whether the victim is in fact gay."), *rev'd in part on other grounds sub nom.* Brown v. Cypress Fairbanks Indep. Sch. Dist., 863 F. Supp. 2d 632 (S.D. Tex. 2012).

328. 42 U.S.C. § 2000e-2(a) (2012) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex.").

329. *See, e.g.*, Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2016 (2016) ("When interpreting Title IX's prohibition against sex discrimination in education, courts often rely on Title VII precedent on sex discrimination in employment.").

330. 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that sexual-orientation discrimination is a form of sex discrimination and therefore prohibited under Title VII).

331. 883 F.3d 100 (2d Cir. 2018) (en banc).

and *Zarda* is questionable, given that the only other court of appeals to rule on the matter, the Eleventh Circuit, ruled the other way in *Evans v. Georgia Regional Hospital*.[332]

Another resolution would be to simply amend Title IX to include an explicit ban on discrimination based on sexual orientation. Given the current political climate, such an amendment is unlikely.[333] Besides, any resolution attempted through Title IX faces several challenges. First, the text of Title IX allows for religious exemptions.[334] By applying for an exemption, private elementary and high schools could participate in a voucher program and yet avoid compliance with Title IX's antidiscrimination norms.[335] Second, even without an official exemption, schools have a simple workaround that frees them from the burden of Title IX: do not accept federal aid. In fact, many colleges currently take this approach.[336] Thus, although a Title IX approach may provide some benefit to LGBT students, it would not entirely eliminate discrimination against LGBT students in the private school admissions process.

2. The Equal Protection Claim

The option that is most likely to successfully provide protections for an LGBT student is to bring an equal protection claim. As discussed in Part II.B, a court faced with a student-plaintiff's equal protection challenge would be unlikely to find that the voucher-receiving private school's discrimination

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332. 850 F.3d 1248 (11th Cir. 2017) (holding that sexual-orientation discrimination is not prohibited under Title VII), *cert. denied*, 138 S. Ct. 557 (2017). Additionally, the Trump Department of Justice has signaled that it will not support the Seventh and Second Circuits' interpretation of Title VII. *See* Joseph Goldstein, *Discrimination Based on Sex Is Debated in Case of Gay Sky Diver*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/nyregion/discrimination-based-on-sex-sky-diver-donald-zarda.html [https://perma.cc/RNZ6-NX6N] (noting that the Department of Justice filed a brief in *Zarda*, which stated that it opposed finding sex discrimination to include sexual-orientation discrimination).

333. At the time of writing, Republicans had majorities in both houses of Congress and a Republican president in the White House. *See* Russell Berman, *The Republican Majority in Congress Is an Illusion*, ATLANTIC (Mar. 31, 2017), https://www.theatlantic.com/politics/archive/2017/03/the-republican-majority-in-congress-is-an-illusion/521403/ [https://perma.cc/4DEZ-AFEW]. For the same reason, passing new legislation outlawing sexual-orientation discrimination (whether in education or across the board) is a highly unrealistic option.

334. 20 U.S.C. § 1681(a)(3) (2012) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."); 34 C.F.R. § 106.12 (2018).

335. *See* Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 327 n.1 (2016). As of September 2016, 245 colleges and universities had been granted Title IX religious exemptions. *See id.*

336. *See* Ibby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/ [https://perma.cc/KYT2-5NAT].

qualifies as state action.[337] Thus, a student-plaintiff would need to argue for a relaxed approach to the state action doctrine.

a. Arguing for Relaxed State Action

As a general matter, courts have historically been reluctant to find that the action of a private actor is state action.[338] However, in at least one context, the Supreme Court arguably relaxed the state action doctrine in order to make headway regarding particularly invidious discrimination: race discrimination.[339] Scholars have observed that the Court has been more likely to find state action in claims of race discrimination.[340] This trend is evidenced by the Court's track record:

> [T]he Court found state action in all of the leading cases from 1940 to 1969, [and] all but four of [the fourteen] cases contained a race discrimination claim. In contrast, nearly three-quarters of the state action cases in the 1970s and 1980s did not involve race, and the Court found state action in only one of them (*Lugar*) and by only a one-vote margin. Additionally, of the four major state action cases involving race from 1970 to 1989, the Court ruled in favor of the state action claim in three.[341]

In addition, at least one court of appeals has explicitly held that the type of discrimination at issue should affect whether a court finds state action.[342]

Sexual-orientation discrimination in voucher programs merits a relaxed state-action approach for three reasons. First, sexual orientation shares some of the categorical traits that justify heightened scrutiny of racial classifications. Second, in many voucher programs, private schools have become agents of the state. Finally, *Brentwood*'s flexible approach constitutes a doctrinal shift and supports finding state action even outside the strictures of traditional approaches.

i. Sexual Orientation Shares Traits with Race

The Court has identified a number of traits that warrant heightened scrutiny in an equal protection analysis.[343] These same traits justify relaxing the state action doctrine to protect vulnerable groups. Three of the primary traits that courts have considered are: immutability, political powerlessness, and history of discrimination.[344] Claims based on race have received a

337. *See supra* Part II.B.2.

338. *See* Hulden, *supra* note 236, at 1258–61.

339. *See id.* at 1259 ("The Court has been more likely to find state action . . . where the constitutional violation is discrimination based on race.").

340. *See, e.g.*, *id.*

341. Peretti, *supra* note 226, at 300–01. Race discrimination state action claims decreased dramatically after 1970, largely as a result of legislative efforts to combat discrimination. *Id.* at 274–75.

342. Lebron v. Nat'l R.R. Passenger Corp., 12 F.3d 388, 392 (2d Cir. 1993) ("[A] less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . ."), *rev'd on other grounds*, 513 U.S. 374 (1995).

343. *See* Bernhardt, *supra* note 216, at 22–23.

344. *See id.*

relaxed state-action approach on the basis of these traits, which also apply to LGBT people.[345]

First, sexual orientation is immutable. In this context, immutability refers to whether an individual can change the characteristic in question. For example, race is considered immutable because an individual will always be the same race as he or she was at birth. Logically, an immutable characteristic merits special protection from discrimination because an individual has no control over whether he or she is born with the trait. Opponents of gay rights claim that sexual orientation is not out of an individual's control and argue that sexual orientation is a behavioral "choice."[346] Although sexual orientation may be considered more dynamic than race, it is nonetheless an inherent personal characteristic that an individual cannot choose. Nuances aside, the immutability of sexual orientation for the purposes of the law was heartily affirmed in *Obergefell v. Hodges*.[347] The *Obergefell* opinion repeatedly acknowledges the immutability of sexual orientation, both explicitly, by referring to the amicus curiae brief of the American Psychological Association that stated as much,[348] and implicitly, through numerous comparisons to the bans on interracial marriage that were struck down in *Loving v. Virginia*.[349]

Second, sexual-orientation minorities are significantly lacking in political power. As with immutability, not everyone agrees that LGBT people lack political power. Critics, such as the late Justice Antonin Scalia,[350] like to portray LGBT people as "a sinister elite, pulling marionette strings behind the scenes of Hollywood and Washington, hell-bent on the destruction of good and normal society."[351] Given that politicians have not deigned to legislatively protect LGBT people in basically any context or at any level,[352] this characterization is obviously wrong. As scholars have explained, "The

345. Note that this analysis is not intended to inappropriately equate the experiences of racial minorities and sexual-orientation minorities. Michael Kavey aptly explains that "[w]hile nobody denies that African Americans have endured especially horrific forms of discrimination throughout history, other groups have also experienced and continue to experience the injustice of discriminatory laws and social practices." Kavey, *supra* note 48, at 773.

346. *See* Bernhardt, *supra* note 216, at 30 (noting that "the immutability of sexual orientation has been the subject of significant social, religious, and legal debate").

347. *See supra* notes 209–21 and accompanying text.

348. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

349. Bernhardt, *supra* note 216, at 29–31; *see also Obergefell*, 135 S. Ct. at 2598. *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

350. In *Romer v. Evans*, Justice Scalia called the discriminatory amendment simply an "effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it." 517 U.S. 620, 648 (1996) (Scalia, J., dissenting). He reiterated this sentiment in his dissent in *Lawrence v. Texas*, where he called the majority opinion "the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

351. Bernhardt, *supra* note 216, at 38.

352. *See supra* Part II.

legislative and judicial victories achieved by gay people, largely aimed at dismantling oppressive and focused discrimination, do not represent 'spoils of war won by a politically powerful class. Instead, they are merely kernels of dignity accomplished by decades of political struggle.'"[353]

Finally, it is undeniable that LGBT people have been subjected to centuries of discrimination and moral and legal condemnation.[354] In its pre-*Obergefell* decision overturning same-sex marriage bans, the Seventh Circuit Court of Appeals declared that "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world."[355] For decades, homosexuality was treated as a mental illness, and "[i]ndividuals with same-sex attraction were in fact routinely prescribed shock therapy, punishing methods of aversion therapy, and lobotomies as medical and psychological treatments designed to supposedly cure them of same-sex attraction."[356] There is a vast and vivid history of discrimination against LGBT people. Therefore, LGBT people should be granted heightened protection.

ii. Voucher Schools Are Acting as Agents of the State

One of the core components of a judicial search for state action is identifying scenarios in which a private actor can be said to be acting in the government's stead. This is by definition what occurs in a voucher program because the private school has essentially become an agent of the state. The state has said: "We have tried to provide adequate public education, but we have failed. We are asking some other actors to step in and do our job for us." Of course, critics would counter that this is just an example of delegation of a public function that the Court has acknowledged is not exclusive to the state and therefore not sufficient for a finding of state action. However, the delegation at issue in voucher programs is unique in that it is typically a result of the state's failure to carry out a mandatory duty. Although education is not a federally guaranteed fundamental right,[357] every state has constitutionally adopted an affirmative duty to provide its citizens with an education.[358] When states institute voucher programs in acknowledgment of the fact that the public schools are failing to provide an adequate education, they are shifting a constitutional burden to private actors. This unique quality

353. Bernhardt, *supra* note 216, at 37 (quoting Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1032 (2014)).

354. *See id.* at 23 ("Throughout history, homosexuals have been regarded by law and by society as criminals, sexual predators, pedophiles, unfit parents, deserving targets of violent hate crimes, disposable and compromised employees, crazies, pariahs, and the living embodiment of all that is bad.").

355. Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014).

356. Bernhardt, *supra* note 216, at 24.

357. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17–18 (1973).

358. EMILY PARKER, EDUC. COMM'N OF THE STATES., 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1 (2016), http://www.ecs.org/ec-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/N62R-MZLD].

of voucher programs justifies breaking with the requirement of exclusivity in a traditional public-function approach.

iii. *Brentwood* Signaled a Doctrinal Shift Toward Increased Flexibility in State Action Analyses

Finally, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*'s entwinement approach constituted a doctrinal shift toward a flexible, fact-based analysis of state action and signaled that the Court may be more inclined to find state action in nontraditional scenarios.[359] For years, the Court grappled with an unwieldy set of case law in an attempt to distill clear rules for finding state action, without much success. In *Brentwood*, Justice Souter seems to avoid that mess altogether and focuses on considering the totality of the circumstances to determine whether state action exists.[360] In the case of a student-plaintiff, although any single factor might not individually be sufficient under traditional approaches to the state action doctrine, *Brentwood* cracks open the door to weighing all those factors together. The various factors in a student-plaintiff's case—the unique nature of the school environment, the strong government interest in eradicating discrimination in education, public funding, and state regulatory oversight—combine to create a weighty case for a finding of state action.

b. Responding to Likely Challenges from Schools

Private schools will likely fight back against student-plaintiffs' attempts to curtail the schools' ability to discriminate. The rights of LGBT people is one of the most contentious topics in the ongoing culture war between religious conservatives and liberal civil rights activists.[361] A discussion of how to protect LGBT students requires briefly contemplating how opposing parties might attempt to defeat those protections. This section considers two First Amendment defenses a private school is likely to raise when faced with a claim of discrimination from an LGBT student-plaintiff: free exercise and freedom of association.[362]

The First Amendment promises that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[363] A private school is likely to claim that being forced to accept

359. *See supra* notes 266–76 and accompanying text (discussing *Brentwood*).

360. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001); *supra* notes 272–75.

361. *See* Makofsky, *supra* note 6, at 982 ("There is a tension between the expanding definition of equality on the basis of . . . sexual orientation under constitutional and statutory law on one hand and a religious institution's First Amendment rights that include the right to free exercise and the right to freedom of association on the other hand.").

362. This section assumes that the private school at issue is affiliated with a religion that has anti-LGBT tenets.

363. U.S. CONST. amend. I. Because the Bill of Rights as originally written only applies to the federal government, the Supreme Court has incorporated many of the elements of the Bill of Rights as protecting against infringement by state governments as well, including the guarantee against the establishment of religion. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15

LGBT students burdens its to freely exercise religion. This claim will likely fail for two reasons. First, requiring schools to admit LGBT students does not mean that the schools are required to support LGBT rights. The right of an LGBT student to attend an anti-LGBT school can coexist with the school's right to espouse anti-LGBT views.[364] Second, Supreme Court precedent militates in favor of a student-plaintiff. The Court has explicitly recognized that the government's heightened interests in the area of education renders regulation of religious schools less constitutionally problematic than interference with churches.[365] Additionally, the Court's decision in *Employment Division v. Smith*[366] suggests that antidiscrimination laws do not, as a general rule, violate the First Amendment's Free Exercise Clause as long as they are neutral laws of general applicability.[367] The Court has granted religious organizations a "ministerial exception" to employment discrimination laws, allowing them to hire and fire religious leaders without government oversight.[368] However, such an exception applies only to employees whose job it is to teach the faith or otherwise preach the religious mission of the organization and therefore would not apply to student admissions.[369] These two factors suggest that a school's free exercise challenge will likely fail.

The freedom to associate stems from the Free Speech Clause of the First Amendment.[370] The expressive value of association has been used as a foundation for organizations that wish to deny membership to certain groups of people.[371] There is some uncertainty in Supreme Court jurisprudence regarding the interplay of discrimination and freedom of association. The Court noted in *Norwood v. Harrison* that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections," which seems to suggest that a freedom-of-association defense would not defeat a discrimination claim.[372] However, approximately twenty-five years after *Norwood*, such a defense did prevail

(1947) (noting that "[n]either a state nor the Federal Government" may prefer one religion over another).

364. *See* Runyon v. McCrary, 427 U.S. 160, 176 (1976) ("[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.").

365. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.29 (1983); Makofsky, *supra* note 6, at 983.

366. 494 U.S. 872 (1990).

367. Makofsky, *supra* note 6, at 983–84; *see also* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (holding that because a ban on peyote use was not targeted at banning religious practices, but rather was neutral and universally applicable, the right of free exercise did not excuse religious peyote users from complying with the ban).

368. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012); Makofksy, *supra* note 6, at 984.

369. *See Hosanna-Tabor*, 565 U.S. at 188–89; Makofksy, *supra* note 6, at 984.

370. Makofsky, *supra* note 6, at 985.

371. *Id.*

372. 413 U.S. 455, 470 (1973).

in *Boy Scouts of America v. Dale*.[373] In *Dale*, an openly gay scoutmaster challenged his expulsion from the group under a New Jersey antidiscrimination law.[374] The Supreme Court found that the Boy Scouts's membership decisions were a form of expressive association and therefore protected by the First Amendment.[375] A private school would likely argue that *Dale* should apply to the school's admissions policy and that being forced to accept LGBT students would violate the school's freedom of association. However, this argument is likely to fail given the unique nature of the educational environment:

> The *Dale* Court . . . did not reject the possibility that sufficiently compelling state interests could override free speech associational rights in some contexts. On the contrary, the Court reaffirmed the longstanding principle that the right of expressive association "is not absolute" and can be overridden by regulations that are narrowly tailored "to serve compelling state interests."[376]

The government has a significant interest in eliminating discrimination in education.[377] This interest may be strong enough to outweigh the minimal burden that antidiscrimination requirements would impose on private schools' expressive association rights.[378]

CONCLUSION

The United States has made much progress toward assuring that, as promised in the Fourteenth Amendment, all citizens receive the dignity of equal protection of the laws. There is still, however, a long way to go to fully achieving that laudable goal. Along with many other minority groups, LGBT people are still discriminated against in many facets of everyday life. Given the unique importance of the educational context and the involvement of public tax dollars, discrimination against LGBT students in voucher programs is especially heinous.

LGBT students have virtually no legal recourse if they are rejected by a discriminatory private school. Neither state nor federal law provides sufficient protection. Whether via judicial interpretation or federal legislation, something must be done to end the state-sponsored discrimination that occurs when voucher-accepting private schools are allowed to expel or reject vulnerable LGBT youth. Action is needed to ensure equality.

373. 530 U.S. 640 (2000).
374. *Id.* at 644.
375. *Id.* at 661.
376. Kavey, *supra* note 48, at 765 (quoting *Dale*, 530 U.S. at 648).
377. *See supra* notes 316–18 and accompanying text.
378. *See* Kavey, *supra* note 48, at 765–69.