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CREATING A ROADMAP TO A LGBTQ AFFIRMATIVE ACTION SCHEME:
An Article on Parallel Histories, the Diversity Rationale, and Escaping Strict Scrutiny

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Introduction

Johnathan, the fictional adolescent, is a high school senior. As he begins his last year of high school and contemplates where he will apply to college, he has to make a few tough decisions. He always dreamed of going to Big Private University on the coast, but suspects that Local State University would be easier to attend. At Big Private, he could experience the cosmopolitan college town, unlike the unremarkable setting of Local State. He knows—or suspects—that the people and institutions at Big Private will offer him a chance to explore himself, his interests, and meet new people with different ideas and perspectives, and these possibilities will not exist locally. As an out—and proud—gay student,[1] Jonathan needs the freedom of anonymity and the security of the college environment. He wants Big Private University.

As determined as Jonathan is about going to Big Private and not Local State, he knows that his chances for admission at the private school are slim.[2] Mostly because of bullying from other students, Jonathan missed a lot of school last year and his GPA is good, but not great.[3]

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[1] Although Jonathan identifies as gay, this Article uses the term LGBTQ (lesbians, gays, bisexuals, transgender persons, and queer persons) to refer to non-heterosexual persons. As well, throughout this Article, I will use the terms "LGBTQ" and "sexual and gender minority" interchangeably. I recognize that the term "sexual and gender minority" includes more expressions of sexuality and gender than the initialism LGBTQ. The term LGBTQ is a close and convenient approximation to the latter, however, and I use them identically here.

[2] Of the eleven colleges and universities that accept less than 10 percent of their applicants, only one—University of Chicago—is not located on or near the Coast (Illinois). *See Top 100 – Lowest Acceptance Ratings*, U.S. News, http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/lowest-acceptance-rate?src=stats (last visited May 22, 2017).

[3] Sexuality—or gender performance—based harassment leads to greater school absenteeism for LGBTQ youth. *See* Joseph G. Kosclw et al., GLSEN, The 2011 Nat'l School Climate Survey: The Experience of Lesbian, Gay, Bisexual, and Transgender Youth in Our Nation's Schools 40–41 (2012), https://www.glsen.org/sites/default/files/2011%20

He also has limited support from the faculty and administration, and almost no one from whom he can ask for a letter of recommendation.[4] Jonathan's parents and community are of little help as well. Since Jonathan came out to them two years prior, his parents have rarely talked to him about his schoolwork or college plans.[5] Moreover, Jonathan's parents are solidly working-class, and Jonathan knows that the tuition bill from Local State would be easier for them to accept than Big Private's heavy price tag.[6]

Dejected, Jonathan goes to his college counselor at school and explains his ambivalence about his college admissions expectations. The meeting is short, but the counselor tells Jonathan that he should give Local State a chance. She gives Jonathan a stack of pamphlets and a copy of Local State's application. Although the majority of pamphlets feature bland information about majors, athletic events, and campus life at Local State, Jonathan discovers a pamphlet highlighting Local State's new LGBTQ center.[7] One of the first in the multi-state area, the LGBTQ center offered a unique space for lesbian, gay, bisexual, transgender, and queer students to interact, socialize, bring in speakers, plan programming for themselves and the greater university, and otherwise commune.[8]

National%20School%20Climate%20Survey%20Full%20Report.pdf (noting a threefold increase in the likelihood of missing school for sexual and gender minority students who experienced high versus low levels of victimization versus low).

[4] LGBTQ youth report unease with reporting victimization going to school staff with reports of victimization, fearing that teachers and administrators will ignore them or blame them for their own victimizations. *Id.* at 33–34. A twelfth grade student in Indiana reported that school administrators told him that he should "drop out and get [his] GED or 'be less gay,'" when he complained of harassment. *Id.* at 34.

[5] Parents often have a difficult time accepting a child coming out. For more on the importance of parental support, see generally, Marvin R. Goldfried & Anita P. Goldfried, *The Importance of Parental Support in the Lives of Gay, Lesbian, and Bisexual Individuals*, 57 J. of Clinical Psychol. 681 (2001).

[6] Of the ten most expensive colleges in the country, only three, Harvey Mudd College in California, University of Chicago in Illinois, and University of Southern California, are located outside the American Northeast. *See* Farran Powell, *10 Most, Least Expensive Private Colleges and Universities*, U.S. News (Sept. 13, 2016, 9:00AM), http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2013/09/10/10-most-least-expensive-private-colleges-and-universities.

[7] Colleges and Universities often use application materials to call for diversity. For more on this subject, see Markus P. Bidell, Joseph A. Turner & J. Manuel Casas, *First Impressions Count: Ethnic/Racial and Lesbian/Gay/Bisexual Content of Professional Psychology Application Materials*, 33 Prof. Psych.: Res. & Prac. 97 (2002). This resource is often underutilized, however. *Id.* at 100.

[8] The Consortium of Higher Education LGBTQ Resource Professionals includes

Learning of the LGBTQ center spurs Jonathan's interest, and he begins the application in earnest.

On the second page of the application, Jonathan finds a section asking for his demographic information. Among the questions asked about his race/ethnicity and sex, as well as his parents' income level, education, and legacy status, there is a section of the application boxed off on the page. The following heads the section:

> **LGBTQ Information**. We use the following questions for demographic and affirmative action purposes only. We will not disclose this information to any third party without the express written consent of the applicant and we will not adversely review an applicant's chance for admission in any way from these responses.

Intrigued, Jonathan looks below and sees the following "Yes or No" questions: "Do you identity as lesbian, gay, bisexual, queer, or otherwise non-heterosexual?" and, "Would you consider yourself transgender, or otherwise identity as a different gender than the one assigned at birth?" After checking "Yes" for the first question and "No" for the second, Jonathan completes and submits the application to Local State. In his personal statement, he writes about his experience as a gay student at his school and its effect on his academic performance and social development.

By way of conclusion, Local State University accepts Jonathan and he attends. There, he becomes a leader in the LGBTQ Center and flourishes in college, finding academic, social, and political fulfillment. A truly happy ending: looking back, Jonathan's position and journey applying to college is a scenario in which a college wholly understands him. The university improved on the traditional application process by choosing to both a) invest institutional resources and infrastructure to recruit and retain LGBTQ students and b) explicitly use a sexual and gender minority-conscious admission process that identifies LGBTQ students and understands their application materials from that perspective and ultimately provides a boost to those applicants. Because of this, our fictional Jonathan attends a college that is receptive and welcoming of the diversity he brings, and the university retains the intellectual and

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members representing 230 such LGBTQ centers around the country. For more information, including a map of the locations, *see* Find a LGBTQ Center, Consortium of Higher Education LGBTQ Resource Professionals, http://www.lgbtcampus.org/find-a-lgbt-center (last accessed May 22, 2017).

community resources of a student the state spent 12 or 13 years elucidating. Because of its affirmative action program, the experience of applying to Local State let him know that he would be welcomed and respected, making the appeal of Big Private pale in comparison.

This Article advocates for a serious and formal policy of affirmative action for LGBTQ applicants at American colleges and universities.[9] In higher education, colleges and universities make decisions for admissions based on multiple criteria, including test scores, prior academic performance, extracurricular activities, recommendations, and personal statements.[10] Over the past 50 years, colleges and universities have also engaged in affirmative action programs to admit and retain students from underserved backgrounds initially as a form of social remediation for general inequalities, but currently (through *Bakke* and *Grutter*) solely for adding to the diversity of student bodies.[11] In this Article, I argue that colleges and universities can and should incorporate LGBTQ students into their affirmative action admissions programs. This incorporation makes sense both as a form of social remediation for past and current injustices done to LGBTQ youth and adults, as a form of diversity, and as an important tool of recruitment and public relations for colleges and universities not traditionally associated with LGBTQ communities.

This Article proceeds in three parts. In Part I, I outline the current legal landscape around affirmative action in the United States. I begin by discussing the Equal Protection Clause of the Fourteenth Amendment and the developments that led to tiered scrutiny, the unusual degree of litigation over laws that discriminate based on sexual orientation, and the consistency mandate of *Adarand*.[12] Next, I overview the opinions that

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[9] This phenomenon has already started. *See* Amanda Young, *Gay Students: The Latest Outreach Target at Many Colleges*, J. C. Admissions 39–40 (2011) (discussing schools, such as Dartmouth and Emory, which have begun actively recruiting LGBTQ applicants).

[10] Measures of merit in higher education admissions vary across universities and have expanded over time. *See* William G. Tierney, *The Parameters of Affirmative Action: Equity and Excellence in the Academy*, 67 Rev. Ed. Res. 165, 174 (1997) (citing legacy status, athletic prowess, and military service as examples of merit considered at different times by some colleges and universities beginning in the 1960s).

[11] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978) (opinion of Powell, J.) (allowing colleges to use race in a good faith effort to increase diversity); Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) (allowing colleges to use race in a good faith effort to increase diversity).

[12] *See* Adarand Constructors v. Peña, 515 U.S. 200, 224 (1995) (requiring consistent application of strict scrutiny in all governmental racial classifications).

dictate the appropriate uses of affirmative action in admissions: *Bakke*,[13] *Grutter*,[14] *Gratz*,[15] and *Fisher*.[16] These decisions highlight the Supreme Court's interwoven views on governmental discrimination, race relations and racial remediation, diversity, and the First Amendment rights of colleges.[17] In the conclusion of Part I, I explore the political and legal consequences of creating programs outside this context.

In Part II, I build on the previous part and outline what an LGBTQ affirmative action scheme would look like and when the court finds it suspect. Here, I disaggregate the Supreme Court's approval of diversity as a legitimate pursuit of colleges and universities from its use of strict scrutiny over explicit uses of race. Because government acts that implicate sexual and gender minorities receive only rational-basis review, [18] colleges and universities would have wider options in implementing affirmative action programs for LGBTQ applicants and could constitutionally use more justifications for such programs.[19] Outside the scope of strict scrutiny review, colleges and universities enacting affirmative action programs would not need to pass the often-fatal "compelling governmental interest" or "narrow tailoring" tests. Therefore, colleges and universities that wanted to implement affirmative action programs that favor sexual and gender minorities could conceivably use any reasonable rationale to support their programs, including the justifications discarded by Justice Powell in *Bakke*.[20]

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[13] *Bakke*, 438 U.S. at 265.

[14] *Grutter*, 539 U.S. at 306.

[15] Gratz v. Bollinger, 539 U.S. 244 (2003).

[16] Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016) (Fisher II); Fisher v. Univ. of Tex. at Austin (Fisher I), 133 S. Ct. 2411 (2013).

[17] *See*, *infra* Part I.A.

[18] *See* Susan Austin Blazier, Note, *The Irrational Use of Rational Basis Review in* Lawrence v. Texas*: Implications for Our Society*, 26 Campbell L. Rev. 21, 31 (2004) (describing the development rational basis review for government acts that implicate sexual and gender minorities in *Lawrence v. Texas,* 539 U.S. 558 (2003)); Shoshana Zimmerman, Note, *Pushing the Boundaries?: Equal Protection, Rational Basis, and Rational Decision Making by District Courts in Cases Challenging Legislative Classifications on the Basis of Sexual Orientation*, 21 S. Cal. Interdis. L.J. 727, 729 (2012) (describing the development of this standard since *Lawrence*).

[19] *See* Angelo Guisado, *Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications*, 92 Neb. L. Rev. 1, 3 (2013) ("The import of the jurisprudential consistency [in tiered scrutiny under the Equal Protection Clause] is a system through which it is theoretically easier to pass affirmative action policies for the LGBT community and women than for ethnic minorities under the Fourteenth Amendment.").

[20] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–11 (1978) (opinion of Powell, J.) (dismissing the amelioration of societal subordination and the specific targeting of racial

Colleges and universities looking to have affirmative action for these applicants would be fully justified in doing so, both socially and legally. I make this case in Part III, reviewing the multiple benefits and discussing the potential dangers of the inclusion of LGBTQ applicants into affirmative action.[21] This is particularly salient considering the history of LGBTQ subordination in the United States, the unique contributions LGBTQ students can make in a classroom or on a campus, and the positive public relations that come from allegiance with the LGBTQ community.

The benefits of an LGBTQ affirmative action program in the recruitment, admission, and retention of college and university students are multifaceted and education administrators should explore them fully. This Article begins the conversation by exploring the legal and policy considerations of such as shift. Throughout, I will promote affirmative action as a worthy policy pursuit both as a mechanism of diversity and as a form of social justice.

I. Higher Education Affirmative Action and the Bounds of the Courts

In the past 35 years, the Supreme Court has argued over the constitutionality of affirmative action programs in higher education on six different occasions.[22] Beginning with *Bakke*, the Court has etched out only a few circumstances where affirmative action in admissions passes Constitutional muster.[23] The Court, however, has discussed and decided on issues of affirmative action—as well as race and colorblindness generally—at many occasions and in multiple contexts.[24] Race-conscious

communities as possible compelling interests for affirmative action).

[21] *See infra* Part IV.

[22] *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016); Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014); Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of the University of California v. Bakke, 438 U.S. 265 (1978). For a more thorough history of higher education affirmative action and its politics in the United States, see generally Terry H. Anderson, The Pursuit of Fairness: A History of Affirmative Action (2004) (examining the transition of affirmative action implementation throughout the presidencies of Kennedy, Johnson, Nixon, Reagan, Bush I, and Clinton).

[23] See Bakke, 438 U.S. at 307 (describing remediation of direct racial discrimination as a valid justification); id. at 313 (describing diversity as a valid justification).

[24] See, e.g., Ricci v. DeStefano, 557 U.S. 557 (2009) (ruling against a city for throwing out the results of a firefighter promotion test that would have promoted only White and Hispanic firefighters); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701

affirmative action in higher education and its efficacy under the Equal Protection Clause seem to take a special role in this jurisprudence, and the rulings on the subject differ somewhat with other uses of race-consciousness by the state.[25] Laws classifying people based on sexual orientation, however, are reviewed under different standards and with less clear metrics for what a proper classification is.[26]

A. *The Supreme Court and Race-Based Affirmative Action*

In the past, the Court has only considered affirmative action programs when colleges and universities wish to use race in their admissions decisions.[27] The Supreme Court is at best hesitant when it comes to discussing and using race or otherwise integrating the state into the goals of racial harmony and justice.[28]

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[29] Justice Harlan said these words over 115 years ago, initiating a Constitutional mandate for states requiring equal treatment regardless of color.[30] Although Justice Harlan's dissent in *Plessy v. Ferguson*—from which these words come—has been the subject of much dispute as to meaning, one cannot deny that Constitutional scholars and

(2007) (ruling against a school district's voluntary school assignment plan that used race as a factor to ensure diversity); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that actions of the federal government laws must withstand strict scrutiny).

[25] See Grutter, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership [via higher education] be visibly open to talented and qualified individuals of every race and ethnicity.").

[26] *See* Guisado, *supra* note 19, at 21.

[27] This makes sense because those against affirmative action have access to the often-fatal strict scrutiny standard and a hostile court system to undermine or outlaw race-conscious admissions policies across the nation. *See* Peter Nicolas, *[G]a[y]ffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 Wash. U. L. Rev. 733, 763 (2015) ("Between the Court's 1978 decision in *Bakke* and its 2013 decision in *Fisher*, the Court has in two different ways made it increasingly difficult for public entities to engage in race-based affirmative action.").

[28] Some justices on the Supreme Court abhor this hesitancy and wish to reverse it. *See, e.g.* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.").

[29] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[30] *See* John V. Wintermute, Note, *Remedying Race-Based Decision-Making: Reclaiming the Remedial Focus of Affirmative Action After* Fisher v. University of Texas at Austin, 44 Seton Hall L. Rev. 557, 564 (2014).

Supreme Court Justices who wish to advance a completely race-blind constitutionalism reach back to these words frequently.[31] In considering such programs such as race-conscious admission policies, the Court has praised colorblindness as the optimal goal, beginning with *Regents of the University of California v. Bakke*.[32]

Overall, the Court is increasingly hostile to governmental uses of race, particularly in regards to state action in education.[33] Other fields—like criminal law—allow for the use of race-consciousness as a factor in government work,[34] but in areas like public schooling, the Court treats racial classification and differential treatment with scorn.[35] This is highly potent in the Roberts Court. In cases such as *Parents Involved in Community Schools v. Seattle School District No. 1*,[36] the Chief Justice shows distaste for racial categorization: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[37]

Thus, the Court has increasingly limited the use of race-conscious remedies by the state.[38] The only general exception to this project is when the government is giving remediation for direct, explicit, and odious racial discrimination from a prior state act.[39] The Court established this

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[31] *See, e.g.*, *Schuette*, 134 S. Ct. at 1648 (Scalia., J., concurring in the judgment) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

[32] 438 U.S. 265 (1978).

[33] *Id.* at 294 (quoting *Loving v. Virginia*, 388 U.S. 1,11 (1967)) ("It suffices to say that over the years, this Court has consistently repudiated distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.").

[34] *See, e.g.*, Brown v. City of Oneonta, 221 F. 3d 329, 337 (2d Cir. 1999), *amending and vacating* 195 F. 3d 111 (2d Cir. 1999) (dismissing claims that a city-wide sweep attempting to question all Black male citizens on the sole bases of race and sex was an unconstitutional abuse under either the Equal Protection clause or the prohibition on unreasonable searches and seizures under the Fourth Amendment).

[35] *See* Anita Bernstein, *Diversity May Be Justified*, 64 Hastings L.J. 201, 223 (2012) ("Judicial suspicion of discrimination, no matter how benign, will remain in place even if diversity really does generate happy results.").

[36] 551 U.S. 701 (2007).

[37] *Id.* at 748.

[38] *See* Guisado, *supra* note 19, at 3–4 (referring to surmounting strict scrutiny as "fac[ing] a near-impossible battle."); Ronald J. Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling "Diversity" and "Remediation" as Justifications for Race-Conscious Government Action*, 87 Wash. U. L. Rev. 907, 915 (2010) ("The Supreme Court has essentially created a framework that precludes accurately described race-conscious government action . . . .").

[39] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."); *see also*, Krotoszynski, Jr.,

precedent in *Adarand v. Pena*, where it required the promotion of Black workers as remedy for a policy of keeping Black workers out of management.[40] Although the Court's mandate is helpful in rectifying past specific harms, this stance stifles both efforts of the state to remedy past societal discrimination and to benefit groups often underrepresented across the political and economic spectra.[41]

Race-based affirmative action in higher education is of special concern to the Supreme Court. The Court has repeatedly tried to walk a fine line over the use of race-conscious admissions policies, continuously narrowing the justifications for such programs among strong social movements both for and against it.[42] For race-conscious admissions policies, the Court has repeatedly and resolutely said, however, that affirmative action cannot exist as a benign social justice project of individual colleges and universities.[43]

To the Court, colleges and universities going out of their way to benefit minorities through procedural advantages that majority members do not get is tantamount to reverse discrimination.[44] A common—though elementary—view of college admissions is that it is a zero-sum game; there are only so many admissions spots and always too many applicants.[45] For those against race-conscious admission policies, it is

supra note 38, at 912 (identifying the remediation of past racial wrongs as one of only two compelling governmental interests justifying race-conscious government action).

[40] Adarand Constructors., Inc. v. Pena, 515 U.S. 200, 237 (1995).

[41] Indeed, in the higher education context, the need to provide societal access is great and strikes at the core of the mission of most colleges and universities. *See* Grutter v. Bollinger, 539 U.S. 306, 332 (2003) ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."); *see also* Tierney, *supra* note 9, at 173 ("We have not defined public higher education in this century in terms of merit—that is, who deserves to attend—but in terms of access; that is, how to enable the broad public to attend.").

[42] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420–21 (2013) (interpreting the *Grutter* decision to give colleges and universities no deference on the finding that an affirmative action plan meets strict scrutiny); *see also* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2208 (2016) (reaffirming this point).

[43] *See Bakke*, 438 U.S. at 310 (opinion of Powell, J.) (dismissing societal discrimination as a rationale for governmental action).

[44] *See id.* ("Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.").

[45] There are many problems with this narrative. *See* Sylvia Hurtado & Christine Navia, *Reconciling College Access and the Affirmative Action Debate*, *in* Affirmative Action's

imperative that the admissions procedure reviews students as individuals (and not members of groups), but also uses the same metrics for all applicants regardless of race.[46]

This understanding of minority-majority relations in admissions comes largely from Justice Powell's opinion in *Bakke*.[47] Deciding the fate of UC Davis's medical school's affirmative action set-aside program, the disjointed Court ultimately rejected Davis's quota system for minority spots, and narrowly approved of some race-conscious admissions criteria.[48]

In rejecting the very idea of an empowered majority race, Justice Powell noted that, to him, the "majority" merely spoke to the political menagerie of the disparate and discrete groups called "White," of whom no individual group consisted of the majority. Because we were a "nation of minorities,"[49] Powell could not see a Constitution which understood members of the non-White minority as different from the members of the groups that so happened to make up the White majority: "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."[50]

Justice Harlan's declaration of colorblindness in *Plessy*, Justice Powell's support of a non-majority American race, and Chief Justice Roberts'

Testament of Hope: Strategies for a New Era in Higher Education 105, 122–23 (Mildred Garcia, ed., 1997) ("[A] zero-sum game is . . . not conductive to the discussion of larger, more important issues like institutional mission and purpose. . . . [T]he zero-sum game approach to evaluating higher education policy is also limited because if fails to take into account history or the notion of restitution for injustices committed in the past.").

[46] This is also the constitutional requirement, as any use of race must be part of an individualized review. *See* Gratz v. Bollinger, 539 U.S. 244, 271 (2003) ("Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education.").

[47] *Bakke*, 438 U.S. at 272.

[48] *Id.* at 320 ("In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed."); *see also* Bernstein, *supra* note 35 at 210 (2012) ("Two sentences that Powell composed were acceptable to Blackmun, Brennan, Marshall, and White. They formed Part V-C of his opinion, the only passage in *Bakke* to win a majority of votes . . . .").

[49] *Bakke*, 438 U.S. at 292.

[50] *Id.* at 295 (emphasis in original).

support of a non-racialized Constitution all exist outside of, and in defiance to, the historical context of the Fourteenth Amendment. Although the explicit purpose of the Fourteenth Amendment was to support the freed American slaves and guarantee the civil and procedural rights of the politically suppressed,[51] the Court reads the text of the Fourteenth Amendment, and the Equal Protection Clause in particular, to require equal treatment to all citizens, regardless of relative social position or historical oppression between groups.[52] For the state to treat people differently because of race, the Court has rejected rationales such as countering past discrimination by society in specific areas of life or as a whole, as well as increasing representation in the professional class by minority groups.[53] Indeed, the Court has found just one reason outside of direct remediation for prior discrimination: the goal of institutional diversity.[54]

B. *Equal Protection, Levels of Scrutiny, and the Consistency Principle of* Adarand

Even outside the contexts of race and gender, under the Fourteenth Amendment, the government cannot "deny to any person within its jurisdiction the equal protection of the laws."[55] Although the Fourteenth Amendment applies to state action, the Supreme Court has equalized the guarantee of equal protection from the state and the federal government, so that all acts that discriminate between classes of persons fit within the same constitutional doctrine.[56]

Since the government necessarily discriminates persons into classes to do even the most basic of functions (levying and collecting taxes, e.g.), the Constitution does not invalidate every act of governmental differentiation. Courts see most governmental discriminations—including between adults and minors, the licensed and non-licensed, the tall and

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[51] *Id.* at 293 ("Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the 'white majority,' the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.").

[52] *Id.* at 293–94 ("Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons 'the protection of equal laws' in a Nation confronting a legacy of slavery and racial discrimination.").

[53] *Id.* at 307–11.

[54] *Id.* at 318–19.

[55] U.S. Const. amend. XIV § 1.

[56] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

the short—as perfectly in line with the legislative prerogative.[57] In order to survive under the Equal Protection Clause, statutes that differentiate along these types of groups must meet the "rational basis" inquiry, a deferential standard that only asks for the government to provide a rationally legitimate reason for enacting the law (even *post hoc*) and that the law is related to addressing that issue.[58]

Under most cases, rational basis review yields victory for the government, even when subjecting a class as large and vulnerable as the poor to worse conditions than the wealthy.[59] Sometimes, however, the Court can and will strike down legislation as violating Equal Protection when the legislation indicates "a bare congressional desire to harm a politically unpopular group."[60] Such 'bare harm' cases, often called rational basis with bite or rational basis plus, usually rely on the facts of the case to strike down the challenged governmental acts as simply an abuse of majoritarian or legislative power meant to punish a relatively powerless group.[61] In knocking down these laws, the Court, however, does not go further to protect the targeted group or classification as constitutionally suspect.[62] For the state to prevail, the Court puts the onus on the government to prove the rationality and proper fit of the law, and eschews the deference of the government shown in traditional rational basis cases.

For example, in *Cleburne v. Cleburne Living Center*,[63] Justice Marshall's concurrence in part identified three distinctions that differentiate a classification of rational basis scrutiny from scrutiny having more bite.[64]

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[57] *See* U.S. v. Carolene Prods. Co., 304 U.S. 144, 151–52 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

[58] *Id.*; *see also* Nicolas, *supra* note 27 at 769 (2015) ("[Under rational basis review, there] need not even be the real motivations behind the law; hypothetical rationales created *post hoc* suffice to uphold the constitutionality of such laws. In addition, because the fit requirement is quite loose, such laws can paint with a broad brush and thus can be overinclusive, underinclusive, or both.").

[59] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (refusing to use heightened scrutiny in evaluating a public school funding scheme that gave more resources to richer school districts than poorer ones).

[60] U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[61] *See* Nicolas, *supra* note 27, at 756 (describing *Moreno* as such as case).

[62] *Id.*

[63] 473 U.S. 432 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

[64] *Id.* at 459 n.4.

When reviewing a governmental classification, courts using rational basis plus look for evidence of under-inclusiveness (the law or action targets a population much smaller than the one that engages in the purportedly-targeted behavior), identify a clear record of a biased rationale in creating the act, and ultimately put the onus on the government to prove that act is not solely meant to harm an unpopular group.[65]

Thus far, the Supreme Court has viewed laws that target or differently treat LGBTQ persons with this rational basis plus standard. In three cases, *Romer v. Evans*,[66] *Lawrence v. Texas*,[67] and *United States v. Windsor*[68], the Court invalidated laws that harmed LGBTQ communities all without subjecting these laws to a higher level of review.[69] To date, only the Ninth Circuit has a standing opinion[70] applying something more critical than rational basis plus scrutiny to Equal Protection claims targeting sexual minorities,[71] although the case is too recent to know of all its consequences or if the Supreme Court will follow it.[72]

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[65] *Id.*

[66] 517 U.S. 620 (1996) (invalidating Colorado's Amendment 2, which would have invalidated any current and prohibited any future state or local laws providing anti-discrimination protections to gays and lesbians).

[67] 539 U.S. 558 (2003) (invalidating a Texas sodomy law under the Due Process Clause of the Fourteenth Amendment).

[68] 133 S. Ct. 2675 (2013) (invalidating § 3 of the Defense of Marriage Act, which prohibited federal recognition of any marriage between parties of the same sex).

[69] *See* Romer, 517 U.S. at 634-36 (relying on the "harm to a politically unpopular group" language of *Moreno* to invalidate Proposition 2); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (citing *Moreno* and *Romer* and calling for "a more searching form of rational basis review" in the case where the majority made no claim under the Equal Protection Clause); *Windsor*, 133 S. Ct. at 2692–93 (citing the *Moreno* language). *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (applying strict scrutiny in protecting the fundamental right to marry under the Fourteenth Amendment's Due Process Clause and extending that right though the Equal Protection Clause to same-sex couples).

[70] *See, e.g.*, *Windsor*, 133 S. Ct. at 2693, *aff'd on other grounds* 699 F. 3d 169, 181 (2d Cir. 2012) (finding that § 3 of the Defense of Marriage Act, 110 Stat. 2419, violated the Equal Protection Clause under rational basis scrutiny through *Moreno* and overlooking the Second Circuit's determination that discrimination on the basis of sexual orientation required heightened scrutiny).

[71] *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014), *reh'g en banc denied*, 2014 U.S. App. LEXIS 11868 (9th Cir. June 24, 2014) (remanding for retrial a pharmaceutical antitrust cases where counsel dismissed a potential juror solely for being a sexual minority) ("[W]e are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.").

[72] *See* Dan Levine, *UPDATE: 1-U.S. Court Refuses to Undo Gay Rights Ruling in Pharma Case*, Reuters (June 24, 2014, 1:55 PM), http://www.reuters.com/article/2014/06/24/glaxo-abbvie-ruling-idUSL2N0P511G20140624 (quoting an Abby Laboratories spokesman as still

On the basis of some classifications, the Supreme Court reviews laws with more suspicion and scrutiny than the rational basis plus standard.[73] Under the Constitution, laws discriminating because of sex receive intermediate scrutiny.[74] This review requires the government to show that the questioned law advanced an important interest in a manner substantially related to that interest.[75] As mentioned above, some courts have applied intermediate scrutiny to cases involving LGBTQ litigants,[76] and multiple writers have advocated for the same.[77]

Further, courts treat governmental classification based on race—including race-conscious admission policies—with strict scrutiny.[78] Strict scrutiny demands that the government provide a "compelling" interest in committing the act and that the government narrowly tailors that act to fit the interest.[79] For the purposes of this Article, one must note that scrutiny coincides with the type of classification—rational basis plus for sexual orientation and strict scrutiny for race—and not the type of governmental action.[80] Thus, a college or university affirmative action plan for LGBTQ applicants would not receive strict scrutiny despite the fact

"studying the latest decision" and a SmithKline spokesman as preparing for a new trial).

[73] *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–45 (1985) (discussing the factors that lead to a finding of heighted scrutiny for a group or classification).

[74] *See* Nicolas, *supra* note 27, at 756.

[75] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[76] *See SmithKline Beecham Corp.*, 740 F.3d at 484; *see also*, United States v. Windsor, 699 F. 3d 169, 181 (2d Cir. 2012), *aff'd on other grounds* 133 S. Ct. 2675, 2693 (2013).

[77] *See, e.g.*, Roberta A. Kaplan & Julie E. Fink, *The Defense of Marriage Act: The Application of Heightened Scrutiny to Discrimination on the Basis of Sexual Orientation*, 2012 Cardozo L. Rev. De Novo 203, 205; Nicolas, *supra* note 27, at 791–92 (contriving hypothetical facts patterns for the Court to apply heighted scrutiny to sexual minorities).

[78] *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978). In addition, the Constitution regards laws that discriminate against most aliens with strict scrutiny. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). *But see* Plyer v. Doe, 457 U.S. 202, 218–230 (1982) (sustaining strict scrutiny review for the children of undocumented aliens but refusing the standard for adults who illegally entered the United States).

[79] *See* Grutter v. Bollinger, 539 U.S. 306, 308 (2003) ("Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest.").

[80] *See* Nicolas, *supra* note 27, at 39–40 ("[T]he overwhelming majority of federal courts have held that it is not the nature of the government conduct at issue—*i.e.*, the fact that they are enacting an affirmative action policy—but rather the nature of the classification employed therein that determines the level of scrutiny to be applied to it.").

that the Supreme Court has only considered affirmative action programs under this standard in the past.[81]

There are two other notes about levels of scrutiny of some importance to this discussion. First, the Supreme Court is reticent about incorporating new groups into intermediate or strict scrutiny review, and has not done so since 1988.[82] For LGBTQ communities, this has proven true, as the Court refused to apply heightened levels of scrutiny in each of *Romer*, *Lawrence*, and *Windsor*.[83] I venture that this level of scrutiny for sexual minorities will not change soon, as the Court has had three chances in the past quarter-century to do so and refused each time. After finding that same-sex couples had a fundamental right to marry without also finding the need to subject laws based on sexual orientation to a heightened level of scrutiny, it seems unlikely the Court ever will.[84] If, however, that happens and the Court applies heightened scrutiny to LGBTQ-biased programs, it would spell trouble for the affirmative action programs I advocate.

The second note, and the source of the aforementioned trouble, is the *Adarand* "consistency" rule.[85] Under *Adarand Contractors, Inc. v. Peña*, the Court found that strict scrutiny must apply to federal and state laws that discriminate based on race even when the laws benefit racial minorities or else develop from the goal of remediating previous racial oppression and subordination.[86] This rule keeps the level of scrutiny for

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[81] *See* Guisado, *supra* note 19, at 37 (noting that colleges would have a much easier time justifying affirmative action programs for women or LGBT groups than a race-conscious program under the Equal Protection Clause's tiered levels of scrutiny); *see also* Ensley Branch, NAACP v. Seibels, 31 F. 3d 1548, 1579–80 (11th Cir. 1994) ("While it may seem odd that it is now easier to uphold affirmative action programs for women than for racial minorities, Supreme Court precedent compels that result.").

[82] *See* Nicolas, *supra* note 27, at 19 (citing Clark v. Jeter, 486 U.S. 456, 461 (1988) (announcing intermediate scrutiny review for legal discriminations based on illegitimacy)). *Cf. Bakke*, 438 U.S. at 296–97 ("There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups.").

[83] *See supra*, note 67.

[84] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (applying strict scrutiny in protecting the fundamental right to marry under the Fourteenth Amendment's Due Process Clause and extending that right though the Equal Protection Clause to same-sex couples).

[85] *See* Adarand Constructors v. Peña, 515 U.S. 200, 224 (1995) (requiring consistency in all governmental racial classifications).

[86] *Id.* at 227 (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) to the extent

race-based classifications consistent, effectively shifting the constitutional inquiry from whether the law targets a group needing the courts' protection to a question of whether the law relies on an irrelevant and pernicious classification such as race.[87]

Although *Adarand* ingrained this rule in equal protection jurisprudence, an early discussion of this standard occurred in *Bakke*, the first affirmative action case.[88] There, Justice Powell's opinion outlined the necessity of applying the same equal protection framework to minority as well as majority members: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[89] Under this virtue, laws that favor racial groups with a history of oppression and subordination are equally suspect as laws that further that group's oppression and subordination.[90]

Just as courts used strict scrutiny to invalidate race-conscious programs that were meant to be remedial, rather than invidious, a presiding court may use the rational basis plus standard to protect a heterosexual plaintiff's rights against an LGBTQ affirmative action program.[91] Currently, the legal status of sexual minorities (protected under rational basis plus scrutiny) allows for a much more lenient affirmative action

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it subjected race-conscious federal laws to intermediate scrutiny, thereafter requiring all governmental race-conscious acts to survive strict scrutiny).

[87] *See* Krotoszynski, *supra* note 38, at 947 (describing the mandate for race neutrality under *Adarand*); Nicolas, *supra* note 27, at 26 ("[B]y 1995, the [*Adarand*] consistency principle was firmly rooted in equal protection jurisprudence, at least with respect to sex and race discrimination.").

[88] *See*, *Bakke*, 438 U.S. at 287–91 (describing the requirement for a singular articulation of equal protection to majority and minority alike).

[89] *Id.* at 289–90.

[90] There are several detractors to this understanding of equal protection, despite it being the law of the land. *See, e.g.*, Guisado, *supra* note 19, at 11 (viewing this principle as against the intents of the Drafters of the Fourteenth Amendment); Krotoszynski, Jr., *supra* note 38, at 915 (lamenting that this framework requires government actors to be disingenuous in defending race-conscious acts); Tierney, *supra* note 10, at 191 ("The more complex response, however, is to consider the implications of such a history and, in turn, the implications of slavery, racism, and sexism in the United States. From this perspective, the point is not simply to redress past wrongs as if we are in a courtroom, but to confront the legacy that such discrimination has created.").

[91] *See* Nicolas, *supra* note 27, at 53, 64 ("If homosexuality is immutable, visible, and unrelated to ability to perform or contribute to society as those terms have been defined in the case law, then heterosexuality is likewise immutable, visible, and unrelated to ability to perform or contribute to society. The same holds for other types of suspect or quasi-suspect classifications, such as sex and race.").

program than the Constitution would allow under intermediate or strict scrutiny. As I describe in the next Part, many justifications for affirmative action expressly disallowed within race-conscious admissions are acceptable under an LGBTQ affirmative action program.[92]

II. Higher Education Affirmative Action Outside the Historical Context of Racial Subordination in the United States

In this discussion of affirmative action, I must elucidate how the Court feels about affirmative action outside the context of race-based decision-making. This is a tricky project; since the courts consider race-based decision-making and affirmative action so often in tandem, it is easy to conclude that the Constitution is antithetical to any admissions strategy not based on grades and test scores. Delving deeper into the language of the Court, however, allows us to understand that affirmative action, and administrative freedom in general, are respected aspects of the collegiate mission.

A. *The Importance of a History of Societal Oppression in Gaining the Benefits of Affirmative Action*

Race-conscious admission policies began in earnest after the *Bakke* decision, as many schools took to heart Justice Powell's description of an acceptable affirmative action program when creating their own programs to recruit, admit, and retain more racially diverse candidates.[93] The impetus for public institutions to begin these programs, however, goes back to the Kennedy administration.[94] Nondiscrimination orders, limiting the government's ability to consider race, nationality, and other factors adversely in employment, combined with the successes of the

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[92] *See infra*, Part II.A.

[93] *See* Grutter v. Bollinger, 539 U.S. 306, 323 (2003) ("Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race conscious policies [in *Bakke*].").

[94] *See* Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961) (Requiring government contractors to "take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.") (emphasis added); *see also* Daniel N. Lipson, *Where's the Justice? Affirmative Action's Severed Civil Rights Roots in the Age of Diversity*, 6 Persp. on Pol. 691, 693 (2008) ("The emergence of affirmative action in the U.S. dates back to Presidents Kennedy (via Executive Order 10925), Johnson (via Executive Order 11246), and Nixon (via the Department of Labor's institution of the Revised Philadelphia Plan).").

Civil Rights Movement to begin programs designed to provide greater access to previously marginalized groups.[95]

In contrast to the colorblind-as-best philosophy we hold today, affirmative action has its roots firmly in the realm of civil rights and racial remediation.[96] President Johnson, Kennedy's successor, found affirmative action necessary and clearly connected to the history of racial subordination.[97] In 1966, he remarked on the inherent wrongness of "tak[ing] a man who for years has been hobbled by chains, liberat[ing] him, bring[ing] him to the starting line of a race, saying, 'you are free to compete with all the others,' and still justly believe you have been completely fair."[98] Thus, the pernicious history of racial subordination and White supremacy has always inspired the need for affirmative action—particularly in colleges and universities where opportunity for social mobility is most accessible and palpable.[99]

Although Professor Daniel Lipson may be correct in claiming that, "[t]he early and enduring extension of race-based affirmative action to Hispanics, Native Americans, Aleuts, Asian Americans, and other racial and ethnic minorities in employment, contracting, and university admissions occurred with little deliberation or guidance,"[100] that does not mean the inclusion of these groups is unprincipled or unwise.[101] The inclusion of non-Black (but also non-White) groups into affirmative action schemes

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[95] *See* Lipson, *supra* note 94, at 693 ("In [affirmative action's] inception, proponents supported a policy that was rooted in a group-based vision of equality.").

[96] *Id.* at 692 ("The civil rights framework remains the prevailing framework employed by scholars, journalists, lawmakers, and ordinary citizens to understand affirmative action.").

[97] For more on President Johnson's role in defining and beginning affirmative action, *see generally*, David Zarefsky, *Lyndon Johnson Redefines "Equal Opportunity:" The Beginnings of Affirmative Action*, 31 Ctr. St. Speech J. 85 (1980).

[98] President Lyndon B. Johnson, Commencement Address to Howard University: To Fulfill These Rights (June 4, 1965), https://online.hillsdale.edu/document.doc?id=286 (last visited Mar. 29, 2017).

[99] *See* Lipson, *supra* note 94, at 692.

[100] *Id.* at 694.

[101] Contrary to popular myth, many Asian American subgroups receive affirmative action in school admissions at least partially because of the nation's history of subordinate treatment towards these groups and a historic underrepresentation in higher education and the elite professions. Many Asian American advocates renounce the inclusion of Asian Americans into the anti-affirmative action camp. For more detailed analysis of these points, *see generally* Julie J. Park & Amy Liu, *Interest Convergence or Divergence? A Critical Race Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debate*, 85 J. Higher Ed. 36 (2014).

still makes sense, even if the impetus for these programs was centered on the subordinate experience of African Americans during Jim Crow.[102]

Indeed, each of these groups have received undue and harsh treatment by the state, including land seizures,[103] military aggressions,[104] colonization,[105] immigration and naturalization impasses,[106] and general segregation and disregard.[107] One can make similar claims to justify the inclusion of women into affirmative action schemes, particularly in areas of public life (e.g., medicine, law enforcement, or business) where these institutions traditionally and legally marginalized or excluded women.[108]

It would seem, then, that a history of legal and societal oppression is an important—if not necessary—condition to receiving the benefits of affirmative action. Importantly, this condition has not seemed to dissipate with the narrative dominance of "diversity" in defending affirmative action.[109] Fortunately, for this discussion, LGBTQ communities

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[102] *But see* Lipson, *supra* note 94, at 694 ("The inclusion of these other [non-Black racial minority] groups comprising America's "official minorities" has provided further grounds for criticizing affirmative action, for opponents argue that the policy has become a patronage system awarding benefits to people of color without rooting the race-targeting in coherent, consistent civil rights justifications.").

[103] *See, e.g.*, Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 Okla. City U. L. Rev. 379 (1998).

[104] *See, e.g.* Laura E. Gómez, Manifest Destinies: The Making of the Mexican American Race 15–47 (2007) (detailing the military occupations and takeover of the American Southwest—formally Mexico—and its effects on the Mexicans that lived in those parts).

[105] *See generally,* Ronald E. Hall, *Entitlement Disorder: The Colonial Traditions of Power as White Male Resistance to Affirmative Action*, 34 J. Black Stds. 562 (2004) (describing how the history of American colonial rule informs affirmative action and the societal regard given to formerly colonized peoples).

[106] *See, e.g.*, Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 UCLA Pac. Am. L.J. 129, 143–44 (1996) (detailing the ways in which early and contemporary American law discriminated against Asian immigrants and their naturalized children).

[107] *See* Lipson, *supra* note 94, at 694 (arguing that "the definitional distinction [of affirmative action that] still holds that racial inclusion policies are not affirmative action policies unless they are implicitly or explicitly rooted in a civil rights rationale of seeking to achieve equality by actively including members of historically excluded racial groups.").

[108] *See, e.g.*, Susan E. Martin, *The Effectiveness of Affirmative Action: The Case of Women in Policing*, 8 Just. Q. 489 (1991) (studying this history and success of affirmative action policies for women in policing).

[109] *See* Krotoszynski, Jr., *supra* note 38, at 918 ("Although Justice O'Connor's opinion in *Grutter* purported to consider the University of Michigan Law School admissions program's use of race solely as a means of securing a diverse class, much of her opinion cleverly elides the rhetoric of remediation of the present-day effects of past discrimination, even as its internal logic evinces strong remedial motivations and concerns.").

and individuals have had a long—if underreported—history of legal and societal discrimination, and I argue that this status makes them proper candidates for the benefits of affirmative action.[110]

1. Legal and Social History of LGBTQ Oppression in the United States

Although the last decade has seen a string of victories in LGBTQ civil rights (from the *Lawrence v. Texas*[111] decision in 2003 until the ruling granting marriage rights to same-sex couples throughout the country),[112] the tide has only recently turned in favor of sexual minorities. From the 1950s until the 1970s, the McCarthy-era government hunted down and removed sexual minorities from jobs and esteemed posts, a period known as the "Lavender Scare."[113] During this time, the national medical community decried non-heterosexuality as both devious and dangerous, classifying homosexuality as a mental disorder until May 1974.[114]

For much of the twentieth century (and almost all of the centuries before that), contemporary Western society was at best disgusted by and at worse violently opposed to displays of sexuality not steeped in the heteronormative (man and woman, preferably within marriage and only for procreation) and shame-based ideal.[115] After the Stonewall riots of June 1969, sexual minorities burst into the public eye and with that came several decades of increasing anti-homosexual laws, lobbying groups,

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[110] *See infra* Part II.B.

[111] 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986) and finding unconstitutional anti-sodomy laws under the Due Process Clause of the Fourteenth Amendment).

[112] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (extending a fundamental Due Process right to marriage to all couples regardless of gender composition).

[113] This hunt entered into colleges and universities as well as government offices. *See* F. Lee Casson, Sexuality Demographics and the College Admissions Process: Implications of Asking Applicants to Reveal Their Sexual Orientation at 27 (May 2014), *scholar.utc.edu/cgi/viewcontent.cgi?article=1103&context=theses* (unpublished Ed. D. dissertation, University of Tennessee at Chattanooga). For more on the Lavender Scare, see generally David K. Johnson, The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government (2009) (connecting strict sexual morality with the hysteria of the Cold War through Senator Joseph McCarthy's mid-century investigations).

[114] *See* Robert L. Spitzer, *The Diagnostic Status of Homosexuality in* DSM-III*: A Reformation of the Issues*, 138 Am. J. Psychiatry 210 (1981). For more on the circumstances of this change, *see generally* Charles Silverstein, Letter to the Editor, *The Implications of Removing Homosexuality from the* DSM *as a Mental Disorder*, 38 Achieves of Sexual Behav. 161 (2009).

[115] Sexual orientation as an identity outside a behavioral practice is itself a fairly recent invention. *See generally* Jonathan Katz, The Invention of Heterosexuality 1 (2007) (revealing that heterosexuality was not a popular or normalized term until the 1920s).

and state acts.[116] Many of these acts have been slow moving and only recently changed, from the ban of openly LGBTQ soldiers in the military[117] to the refusal to grant citizenship or visa stays for sexual minority immigrants who have married same-sex citizen partners.[118] In 28 states at the time of this writing, a company can fire an employee for simply being non-heterosexual,[119] and data suggests that sexual orientation and gender identity workplace discrimination occurs at rates comparable to discrimination based on race or sex.[120] Most incredibly, it was not until *Lawrence v. Texas*[121] that sexual minorities gained a liberty interest in sexual privacy, and even that decision applies only to the behavior of adults within the home.[122]

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[116] *See* Don Gorton, *Why Stonewall Matters after Forty Years*, Gay & Lesbian Rev. Worldwide (July 1, 2009), http://www.glreview.org/article/article-525/ ("Second, Stonewall brought mass GLBT visibility. Previously there had been no such thing as 'coming out.' Gays and lesbians lived in the closet, unseen. Stonewall marked the beginning of a decisive shift in consciousness, when gays and lesbians in ever increasing numbers affirmed their sexuality as healthy and natural.").

[117] Don't Ask, Don't Tell, the military-wide ban on openly LGBTQ soldiers, lasted for nearly 20 years. After a repeal effort from President Obama, a certification that lifting the ban would have no ill effects, and a 60-day waiting period, the government fully repealed the law on Sept. 20, 2011. *See* Jim Garamone, *"Don't Ask, Don't Tell" Repeal Certified by President Obama*, U.S. Dep't of Def.: Am. Forces Press Serv. (July 22, 2011), http://archive.defense.gov/news/newsarticle.aspx?id=64780.

[118] Immediately after the repudiation of § 3 of the Defense of Marriage Act in *Windsor v. United States*, 133 S. Ct. 2675 (2013), lower courts halted deportation orders for alien persons legally married to same-sex citizen partners and who were not otherwise deportable. *See* Charlene Obernauer, *The Best Part of DOMA's Repeal: Its Impact on Immigration Reform*, Huffington Post (June 29, 2013, 4:50 PM), http://www.huffingtonpost.com/charlene-obernauer/the-best-part-of-domas-re_b_3521577.html.

[119] LGBTQ people in these states represent 50 percent of the nation's LGBTQ population. *See Non-Discrimination Laws*, Movement Advancement Project: Equality Maps, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last updated Mar. 9, 2017); *see also*, Joseph Sartorelli, *Gay Rights and Affirmative Action*, 27 J. Homosexuality 179, 187 (1994) ("Today in the United States, gay people suffer job discrimination, discrimination in child custody and adoption, and economic and legal discrimination in their domestic partnership arrangements.").

[120] *See* Christy Mallory & Brad Sears, Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2009, Williams Inst. 1 (Oct. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf.

[121] 539 U.S. 558, 578 (2005) (Stevens, J. dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186 (1986).

[122] *Id.* ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").

At least some colleges and universities were explicitly involved in the persecution and social disapproval of LGBTQ students. For example, Harvard University expunged itself of LGBTQ students beginning in the 1920s and expelling sexual minority students was common practice through the mid-twentieth century.[123] Supported by a belief that homosexuality was a deviant proclivity that easily spread to unassuming students, many colleges actively investigated students, looking to purge its registrars.[124]

With the relatively recent advent of LGBTQ centers and sexual orientation-inclusive anti-discrimination policies at major U.S. colleges,[125] many of these practices died away.[126] This lack of formal policy against LGBTQ students does not mean, however, that sexual minority students enter college communities fully accepted or free from harassment and possible scorn by the fellow students, faculty, or administration. A recent study of more than 5,000 undergraduates[127] coordinated by non-profit Campus Pride found that more than one-in-three LGBTQ students at institutions of higher education throughout the country report negative experiences on their campuses, including being the targets of derogatory remarks, being stared at, and experiencing harassment.[128] These experiences include significantly higher chances than heterosexual students of facing harassment, derogatory remarks, and social exclusion.[129] For LGBQ students of color or transgender students in general, earlier

[123] *See* Casson, *supra* note 113, at 24–25 (recounting Harvard University's 1920 search for and subsequent expulsion of students believed to be gay).

[124] *Id.*at 25. For further research and data on LGBT students' interactions with the higher education system in the United States, see generally Susan B. Marine, *Stonewall's Legacy: Bisexual, Gay, Lesbian, and Transgender Students in Higher Education*, *in* 37 ASHE High. Educ. Rep., no. 4 (2011).

[125] Most LGBTQ centers began to develop after 1990s and have continued to flourish until the present. *Id.* at 39.

[126] *Id.* at 38 ("[A]lthough institutions were quick to realize that gay-and-lesbian students held particular educational and psychosocial needs [during the 1970s and 80s], they (the institutions) were not so quick to provide crucial services through specialized offices and outreach programs.").

[127] Susan R. Rankin et al., Campus Pride, State of Higher Education for Lesbian, Gay, Bisexual & Transgender People: 2010 National College Climate Survey 8 (2010) (using a sample size of n = 5,149).

[128] *See id.*

[129] *See id.* at 10 ("LGBQ respondents (23%) were significantly more likely to experience harassment when compared with their heterosexual counterparts (12%) and . . . [r]espondents who identified as gay or similar were most often targets of derogatory remarks (66%), while lesbians or similar were most likely ignored deliberately or excluded (53%).").

studies have reported that these experiences of exclusion and harassment can be more severe.[130]

This history, both within society in general and specifically at colleges and universities, makes a strong claim that LGBTQ applicants have a claim to a history of societal oppression. To the extent that such history is necessary to earn the benefit of affirmative action policies in admissions, LGBTQ students have a similar claim to racial minorities and women.[131] As I will explore in Parts II and III, LGBTQ students have met their burden to show past discrimination, and colleges and universities should open their admissions policies to the active recruitment of sexual minority applicants.[132]

B. *The Importance of a Strong Social Justice Movement in Gaining the Benefits of Affirmative Action*

If a group needs to have experienced strong social opposition to benefit from the inclusion into current affirmative action schemes, then we may also say that those groups need to fight for it. Indeed, commentators often categorize affirmative action as a "fight," depicting the university-controlled policy as a battle between those selected to benefit and those not selected. [133] For African Americans, other racial minorities, and women, the decades of the 1950s through 1970s provide ample evidence of strong social justice movements by these groups.[134] From the landmark decision of *Brown v. Board of Education*[135] to the advancement

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[130] *See* Rankin, *supra* note 127, at 27 ("A slightly higher proportion of people of color (32 percent) reported being the victims of harassment due to their sexual orientation/gender identity compared to white people (28 percent) . . . . While the same proportion of non-transgender men and women (28 percent) reported experiencing harassment, a significantly higher proportion of transgender respondents (41 percent) reported experiences of harassment.").

[131] This argument is not new, and scholars have repeated it for at least the past 20 years. *See, e.g.*, Sartorelli, *supra* note 119, at 174.

[132] *See*, *infra* Parts III and IV.

[133] *See, e.g.* Ronald Roach, *Renewing the Fight against Affirmative Action*, Diverse: Iss. Higher Ed. 17 (2009), http://www.diverseeducation.com/article/12249/ (noting "anti-affirmative action activist," Ward Connerly, Jr.'s conclusion that former President Barack Obama's 2008 presidential election win was merit-based and thus strengthens the case for the inevitable elimination of "race-conscious affirmative action" policy measures).

[134] *See generally* Robert Weisbrot, Freedom Bound: A History of America's Civil Rights Movement (1989) (chronicling the movement for African-American's civil rights from the 1950s through the late 1970s).

[135] 347 U.S. 483, 496 (1954) (finding "separate but equal" schools to be a violation of the Equal Protection Clause and consequently requiring the racial integration of America's public schools).

(and sober defeat) of the Equal Rights Amendment,[136] social movement groups have worked tirelessly to incorporate members of subordinated groups into spaces of greater economic and social opportunity.[137]

This is also true of education. Many of the racial inclusion cases that pre-date *Brown* involve constitutional claims that Black and other racial minority applicants deserved admission and inclusion in state universities.[138] In these cases, the NAACP and other social justice groups fought battles in the courts and greater society to ensure policies like affirmative action.[139] As William Tierney stated, "[a]ffirmative action came about because our campuses were White, male centers of learning. The faculty, administration, and students were overwhelmingly White men. When women or students of color entered an institution they often did not participate to as full an extent as their White, male counterpart . . . "[140] Thus, it seems that a strong social justice movement and the benefits of affirmative action are related, if not one flowing from the other.

Again, the LGBTQ community has engaged in a lengthy and public fight for social justice and fair laws for the past several decades.[141] Although the goals of the LGBTQ rights movement have not centered on education, many LGBTQ educational groups have made major strides within colleges and universities over the past 25 years.[142] From the proliferation of LGBTQ centers in the 1990s to the greater numbers

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[136] *See* Donald T. Critchlow & Cynthia L. Stachecki, *The Equal Rights Amendment Reconsidered: Politics, Policy, and Social Mobilization in a Democracy*, 20 J. Pol'y Hist. 157, 170 (2008) (describing the history of the ERA, including the National Organization for Women's modeling their campaign on the 1960s Civil Rights Movement).

[137] *See* Bernstein, *supra* note 35, at 232 ("[A] subordinated group might have in the past been excluded unjustly from the opportunity to join decisionmaking bodies. Here, affirmative action would make seats at the table of authority available to members of the group.").

[138] *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (requiring Texas to admit the plaintiff, a Black applicant, to the state's law school in Austin because, when the plaintiff filed a writ of mandamus to compel the school to admit him, there was no law school which would admit Black applicants in the state of Texas).

[139] *See* Mark Johnston, *From Exclusion to Integration: The N.A.A.C.P.'s Legal Campaign Against Educational Segregation*, 3 Voces Novae: Chapman U. Hist. Rev. 203 (2011).

[140] Tierney, *supra* note 10, at 169.

[141] For more on the history of this movement, see generally Carlos A. Ball & Michael Bronski, From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation (2010) (chronicling five lawsuits, their litigants, and subsequent impacts on LGBT rights).

[142] *See, e.g.*, *About Campus Pride*, Campus Pride, https://www.campuspride.org/about/ (last visited Mar. 10, 2017) (detailing the twelve year history of Campus Pride as an LGBTQ education advocacy group).

of LGBTQ professionals in student services, the past two decades have shown a strong social justice movement centered around LGBTQ students and applicants.[143] Campus Pride, the national LGBTQ higher education non-profit mentioned above, has pushed this social justice initiative for some time and it welcomes more LGBTQ inclusion from collegiate processes from matriculation to graduation.[144] With this history in mind, it is difficult to deny affirmative action to LGBTQ applicants.

III. Higher Education Affirmative Action outside the Context of Strict Scrutiny

If we acknowledge that LGBTQ applicants belong to a group deserving of the benefits of affirmative action, we must also examine the legal and constitutional bounds of the practice. As mentioned above, state actions that give a benefit to sexual minorities exist outside of the harsh mandates of strict scrutiny.[145] These mandates—namely a compelling governmental interest and narrow tailoring to ensure that the college or university does least harm and gives the most benefit—often cobble attempts to provide race-conscious remediation or to "even the playing field," so that racial minorities can have full access to the opportunities that their forbearers did not.[146] These barriers to remediation are a burden LGBTQ people do not have to meet because sexual orientation is not currently subject to strict scrutiny.

For LGBTQ affirmative action, this is not yet a concern, but it is necessary to look for and advocate governmental interests in providing affirmative action for sexual minorities at every level of judicial scrutiny. This is so if and when judicial scrutiny for acts based on sexual orientation increases, LGBTQ affirmative action can still exist.[147] In this Part,

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[143] *See* Casson, *supra* note 113, at 38–40 (discussing the trajectory of LGBTQ outreach program and initiative development on college campuses from the 1970s to present day).

[144] *See* Tammy Webber, *Most Colleges Not Ready to Ask about LGBT Status*, CNS News (Oct. 13, 2011 at 8:35 AM), http://www.cnsnews.com/news/article/most-colleges-not-ready-ask-about-lgbt-status-0 (quoting Campus Pride Executive Director Shane Windmeyer as saying that asking applicants about sexual orientation should be as common as questions about race and ethnicity).

[145] *See supra* notes 79–93 and accompanying text.

[146] *See* Guisado, *supra* note 19, at 3–4 ("[S]hould [a state] seek to implement an employment or educational [race-conscious] affirmative action plan, under the current and historically fatal strict scrutiny standard, legislators would face a near-impossible battle.").

[147] The fight for heightened scrutiny to protect LGBTQ citizens rages on despite the argument that these levels of review would impede efforts to benefit people and groups based on sexual orientation. *See* Brian Moulton, *Sexual Orientation, Political Power and Heightened*

I begin examining the compelling governmental interests for LGBTQ affirmative action—its contribution to campus diversity—and move on to present justifications for the more lenient levels of scrutiny.

Contrary to many of the controversial affirmative action programs today, programs that assist LGBTQ applicants would exist outside the context of the history of oppression and *de jure* subordination based on race and sex in the United States.[148] In justifying these programs, colleges and universities need to look outside arguments used to defend race-conscious admission processes and onto the unique, yet related arguments that connect the need for LGBTQ affirmative action to the history of anti-LGBTQ subordination in the U.S.[149] Fortunately—for this argument—arguments favoring affirmative action already exist that are separated from the history of racial and gender oppression. This helps advance the dialogue on the use and need for affirmative action, as many resist the association between affirmative action and societal discrimination.[150]

A. *Diversity as the Main Compelling Interest in LGBTQ-Conscious Admissions Policies*

Justice Powell's solo opinion in *Bakke* established diversity as a compelling governmental interest powerful enough to legitimate the use of race-conscious admission policies in higher education.[151] After finding that minority-benefitting programs like race-conscious affirmative

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Scrutiny, Am. Const. Soc'y Blog (Mar. 19, 2013), http://www.acslaw.org/acsblog/sexual-orientation-political-power-and-heightened-scrutiny (detailing the effort to reach heighted scrutiny).

[148] Since *Bakke*, almost none of the discussion about affirmative action in admissions has centered on the claim that the affirmed groups deserve the benefit due to a history of oppression and de jure segregation. *See* Wintermute, *supra* note 30 at 558 (conceding that remedial legislation can only best serve cases of contemporary discrimination by the state). Moreover, the diversity rationale for affirmative action seems custom designed to avoid any relationship to historical discrimination. *See* Bernstein, *supra* note 35, at 216. LGBTQ affirmative action furthers this line by divorcing affirmative action from race and gender discrimination entirely. *See supra* Part II.B.

[149] For a discussion of historical LGBTQ subordination in U.S. colleges and universities, see generally Susan R. Rankin, Commentary, *LGBTQA Students on Campus: Is Higher Education Making the Grade?*, 3 J. Gay & Lesbian Iss. in Educ. 111, 111–17 (2006).

[150] *See, e.g.*, Kenneth L. Karst, *The Revival of Forward-Thinking Affirmative Action*, 104 Colum. L. Rev. 60, 61 (2004) (discussing the distaste with these arguments, particularly after *Grutter*).

[151] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978).

action required strict scrutiny review,[152] Justice Powell found that attaining diversity was "clearly" constitutionally permissible in the higher academic setting.[153]

Justice Powell justified diversity as a compelling governmental interest under a set of concerns. First, colleges and universities have a constitutional First Amendment right under principles of academic freedom to select the student body it wants.[154] Second, diversity in education increases individual exposure to different perspectives and ideas, a conception that benefits innovation.[155] Last, graduates of many colleges and universities (particularly the medical, legal, and social sciences) serve heterogeneous communities, meaning that exposure to multiple cultures and perspectives is important to effective practice.[156]

Justice Powell also stressed that ethnic and racial diversity was only one form of this concept.[157] Schools could recruit for a number of factors in the pursuit of heterogeneity.[158] "Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[159] These factors could presumably include sexual- and gender-minority status.[160] In practice however, these other factors have included legacy status, athletic and other non-academic talents and abilities, rural residence, urban residence, and low socioeconomic status.[161]

In *Grutter v. Bollinger*, the Court strongly reinforced Justice Powell's conclusions from *Bakke*, and finds a majority supporting for the first time a compelling governmental interest in diversity in educational

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[152] *Id.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

[153] *Id.* at 311–12.

[154] *Id.* at 311–12 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)) ("It is the business of the university to provide that atmosphere which is most conductive to speculation, experiment and creation . . . . to determine for itself . . . who may be admitted to study.").

[155] *Id.* at 312 (citing Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues . . . ").

[156] *Id.* at 313–14.

[157] *Id.* at 314–15.

[158] *Id.*

[159] *Id.* at 314.

[160] *See* Guisado, *supra* note 19, at 35–36 ("The Supreme Court has not addressed a sexual-orientation affirmative action case, though it is certainly plausible that, under *Grutter* or *Bakke*, a school could consider sexual orientation as a 'diversity boost.'").

[161] These admissions' preferences receive relatively little scrutiny. *See* Tierney, *supra* note 10, at 174.

settings.[162] Therein, the Court, led by Justice O'Connor picking up the "diversity baton"[163], referenced diversity as being a social good and central to the operation of government and organizations.[164] In the educational context, diversity among the student body is a part of a school's "proper institutional mission."[165]

Thus, any time the Court reviews an affirmative action plan under strict scrutiny, the only compelling governmental interests available to the state are a) remediation for direct group-based harm done to the group benefitted by the program, or b) an interest in diversity.[166] Although the Court has not foreclosed any other interests as rising to the compelling interest standard, it has dismissed most other justifications as not reaching this standard, as I discuss below.[167] Accordingly, if the Court ever assigns strict scrutiny review to laws affecting sexual minorities, any LGBTQ affirmative action plan would need to satisfy one of these two interests.

Notwithstanding the fact that the Court is unlikely to scrutinize laws affecting sexual minorities under a strict standard,[168] I argue that LGBTQ affirmative action plans could survive even this often-fatal degree of rigor. Simply, LGBTQ applicants contribute to the diversity of the collegiate setting for many of the same reasons that racial minorities do as expressed in *Grutter*.[169] In *Grutter*, the majority claimed that:

> The benefits [of a diversity-driven affirmative action policy] are substantial. . . . [It] promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand

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[162] Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (declining to call Justice Powell's *Bakke* opinion for the plurality binding precedent but nonetheless "endors[ing] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

[163] Bernstein, *supra* note 35, at 212.

[164] *See*, *Grutter*, 539 U.S. at 331.

[165] *Id.* at 329.

[166] *Id.* at 328–29 (referring to these two rationales as "compelling").

[167] *See infra* Parts III.B and III.C.

[168] The political direction of the past fifteen years seems to align sexual orientation with intermediate scrutiny akin to discrimination based on gender. *See, e.g.* Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights*, 35 Cal. W. L. Rev. 271, 272 (1999) (arguing that discrimination based on sexual orientation is a form of gender discrimination and therefore requires intermediate scrutiny).

[169] *See* Guisado, *supra* note 19, at 35–36 "(The Supreme Court has not addressed a sexual-orientation affirmative action case, though it is certainly plausible that, under *Grutter* or *Bakke*, a school could consider sexual orientation as a "diversity boost.").

> persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.[170]

These benefits also extend to sexual minorities in the classroom and on campus.[171] Data show that direct contact with LGBTQ persons and relationships increases societal acceptance.[172] On college campuses, this effect is greater when the administration supports its LGBTQ students and encourages intergroup dialogue and communication.[173] Moreover, a critical mass of LGBTQ students on campus fosters "enlightening" student conversations by addressing identity and the ways in which it influences behavior: "[S]tudents' interactions with LGB peers in college . . . indirectly foster positive growth by attenuating student's level of anxiety about LGB persons and fostering an increased awareness of one's multiple social identities."[174]

From here, it is clear that if the courts required a compelling governmental interest in creating or maintaining LGBTQ affirmative action programs at colleges and universities, those colleges could make a successful argument in pointing to the contribution LGBTQ students make to the diversity of the campus and the classroom. This is an important note; even if the Supreme Court decided in the next term to apply strict scrutiny to laws that discriminate because of sexual orientation, LGBTQ affirmative action could still exist, if only for the contribution to diversity sexual minorities provide to collegiate spaces.[175]

1. LGBTQ Diversity and Narrow Tailoring

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[170] *Grutter*, 539 U.S. at 330 (internal quotations omitted).

[171] *See* Sartorelli, *supra* note 119, at 196 (arguing that a LGBTQ affirmative action fits a utilitarian motive based because "the social fabric itself will be strengthened by the expanded inclusiveness because social friction will be reduced; and even heterosexuals will benefit personally from the reduction of bigotry, since it will make them less prone to irrational behavior that may well be against their own interests.").

[172] *See* Mark E. Engberg, Sylvia Hurtado & Gilia C. Smith, *Developing Attitudes of Acceptance Toward Lesbian, Gay, and Bisexual Peers: Enlightenment, Contact, and the College Experience*, 4 J. Gay & Lesbian Iss. Educ. 49, 54 (2007).

[173] *Id.* ("The surrounding social and group norms play an essential role in this process, and campuses that value LGB diversity, as evidenced through programming and student services, provide a stronger catalyst for promoting positive attitudinal change.").

[174] *Id.* at 69.

[175] This articulation thus resolves the "open question" of the constitutionality of LGBT affirmative action plans under the current paradigm. *See* Nicolas, *supra* note 27, at 791–92.

Before moving on to other levels of scrutiny, it is important to note that strict scrutiny analysis not only requires the government to have a compelling interest, but that in practice the use of the suspect criterion be narrowly tailored to fit the compelling interest.[176] In *Grutter*, the Court expounded on what narrow tailoring meant in the affirmative action context.[177] Narrowly tailored affirmative action schemes cannot include quota systems, where colleges hold seats especially for members of protected groups.[178] Instead, all admissions decisions must be case-by-case and a suspect classification like ethnicity must be solely a "plus" factor, adding to the overall portrait of the applicant.[179] Overall, narrow tailoring requires that an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[180]

In the first *Fisher* case, the Court took an opportunity to clarify this standard.[181] After the Fifth Circuit ruled, under *Grutter*, that the Constitution allowed the University of Texas at Austin's system of race-conscious holistic review for candidates who were not admitted under the race-neutral Top Ten-Percent Plan (a plan that produced a sizable but insufficient number of minority entrants for Austin's diversity goals), the Supreme Court vacated and remanded that decision.[182] In clarifying the mandates of narrow tailoring under *Grutter*, the *Fisher I* Court made two important notes about the burden on the government. First, although the Court gives deference to schools as to the need of diversity at the campus, program, or classroom level, it gives no deference to

[176] *See* Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citing Shaw v. Hunt, 517 U.S. 899, 908 (1996)).

[177] *Id.* at 333–34.

[178] *Id.* at 334.

[179] *Id.* (internal quotations omitted) ("[A] university may consider race or ethnicity only as a plus in a particular applicant's file, without insulating the individual from comparison with all other candidates for the available seats.").

[180] *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)).

[181] *See* Fisher v. Univ. of Tex. at Austin, (Fisher I), 133 S. Ct. 2411, 2420 (2013) (explaining the strict scrutiny standard in careful detail).

[182] *Id.* at 2416.

schools as to whether or not they narrowly tailored those affirmative action schemes.[183]

Second, the Court discussed at length the degree to which courts must be satisfied before finding narrow tailoring in an affirmative action scheme.[184] "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race."[185] This statement places a high (and as some have claimed, vague)[186] burden on colleges to show that race-neutral plans do not suffice to create racial diversity under strict scrutiny.[187]

Thus, if a court were to review an LGBTQ affirmative action scheme under strict scrutiny, the college or university would have the burden of showing that a sexual minority-conscious admissions plan was "necessary" to bringing about the benefits of sexual orientation diversity in the classroom and on campus.[188] The ease or difficulty of overcoming this burden is likely in line with the relative difficulty of proving a race-conscious admissions policy as necessary, a test in which the University of Texas recently passed in *Fisher II*.[189] The burden for LGBTQ affirmative action may be lower, however, since there is a rarity of openly LGBTQ people generally, and it may be therefore inherently difficult to

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[183] *Id.* at 2419–20 ("Once the University has established that its goal of diversity is consistent with strict scrutiny, however . . . [t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.").

[184] *Id.* at 2420.

[185] *Id.* (internal quotations and citation omitted).

[186] *See, e.g.*, Jonathan R. Alger, Commentary, *A Supreme Challenge: Achieving the Educational and Societal Benefits of Diversity After the Supreme Court's* Fisher *Decision*, 6 J. Diversity Higher Educ. 147, 154 (2013) ("The Supreme Court in *Fisher* and prior cases has provided some basic rules of the road, but hardly a detailed map on how to get to the ultimate destination.").

[187] *Fisher I*, 133 S. Ct. at 2420.

[188] *Id.* ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use [a suspect classification such as] race to achieve the educational benefits of diversity.").

[189] *See* Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 657 (5th Cir. 2014), *on remand from* 133 S. Ct. 2411 (2013), *aff'd by*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2204 (2016) ("We are satisfied that UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission—as described by *Bakke* and *Grutter*.").

pull a critical mass of LGBTQ persons at a campus without relying on LGBTQ affirmative action.[190] This is good news for colleges advocating for LGBTQ affirmative action, as the great diversity benefits and relative rarity of sexual minority students makes for a straight forward claim for its acceptability even under strict scrutiny standard.[191]

B. *Important Governmental Interests in LGBTQ-Conscious Admissions Policies*

If a court were to review government acts—like an affirmative action scheme—that affected applicants based on sexual orientation under intermediate scrutiny, the college or university defending the act would need to show that they fulfilled an important governmental interest through means substantially related to that interest.[192] Although the Court has not had the occasion to evaluate specific rationales for affirmative action under this standard, it is certainly possible to review other proffered rationales for their possible permissiveness under intermediate scrutiny. Among these rationales are those offered (and rejected under strict scrutiny review) in *Bakke*.[193]

1. Interests that Make Up for Historical Disadvantages

The first two rationales the University of California Davis' Medical School used to defend its special admission set-aside program were "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession [and] (ii) countering the effects of societal discrimination."[194] These rationales roughly come from the same moral imperative: to make up for historical marginalization of a group by setting aside admission seats for members of that group. In

[190] *See* Patricia Illingworth & Timothy Murphy, *In Our Best Interest: Meeting Moral Duties to Lesbian, Gay, and Bisexual Adolescent Students*, 35 J. Soc. Phil. 198, 198–99, 202 (2004), http://www.onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.2004.00225.x/epdf (estimating 2.8 percent of the LGBTQ student population is comprised of men compared to 1.4 percent LGBTQ women); Jake New, *The 'Invisible' One in Four*, Inside Higher Ed. (Sept. 25, 2015), https://www.insidehighered.com/news/2015/09/25/1-4-transgender-students-say-they-have-been-sexually-assaulted-survey-finds (estimating the transgender student population at 1.5 percent of all students).

[191] *See* Sartorelli, *supra* note 119, at 191 ("I think that if, in general, affirmative action can be justified for the traditional groups for which such policy is presently in force in this country, then it can be justified for gay people.").

[192] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (setting forth the requirements for intermediate scrutiny).

[193] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–306 (1978).

[194] *Id.* at 306.

his opinion, Justice Powell rejects these rationales as being insufficient for strict scrutiny.[195]

Justice Powell's *Bakke* opinion does note, however, that, "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."[196] Strict scrutiny, to Justice Powell, required a showing of specific constitutional or statutory injury from the issuer of the affirmative action scheme to those aggrieved or, if not feasible, members of their group.[197] Moreover, such programs required consistent judicial oversight and an explicitly defined time limit.[198] These high standards are markers of proving a compelling interest and narrow tailoring, however, and are not necessary in an intermediate scrutiny review.[199]

As case in point, lower federal courts that have reviewed gender-based affirmative action plans under intermediate scrutiny have found that past societal discrimination can fulfill the important interest standard. In *Ensley Branch, NAACP v. Seibels*,[200] the Eleventh Circuit, reviewing such a program by a municipal fire department, relied on language from the Supreme Court to show that economic disparity caused by historical discrimination within society was enough to overcome the important interest standard.[201] With the example of what the *Ensley Branch* court did in mind, a court reviewing the constitutionality of a LGBTQ affirmative action plan under intermediate scrutiny would likely look at the historical discrimination against sexual minorities, particularly in the context of college campuses, and find that the plan achieved important governmental interests.

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[195] *Id.* at 310 (opinion of Powell, J.) ("[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.").

[196] *Id.* at 307.

[197] *Id.*

[198] *Id.*

[199] *See id.* at 308–09 (opinion of Powell, J.) (emphasis added) ("Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no *compelling* justification for inflicting such harm.").

[200] 31 F.3d 1548 (11th Cir. 1994).

[201] *Id.* at 1580 (citing Califano v. Webster, 430 U.S. 313, 317 (1977)) (applying intermediate scrutiny to a challenge to a gender-biased social security calculation for a retired federal worker).

2. Interests that Increase Societal Opportunities

Likewise, an interest in providing societal opportunities for members of oppressed groups and marginalized communities would likely pass a test of intermediate scrutiny. In *Bakke*, Justice Powell reviewed and later dismissed as a rationale for race-based affirmative action the need to provide important role models to minority communities and people willing to work within those communities.[202] Again, Justice Powell lauds the important interest in these goals, but declares that Davis has made no effort to prove that its set-aside policy fit that interest at all.[203] By acknowledging the importance of the interest in providing professionals to service underserved communities, *Bakke* implies that this goal would satisfy intermediate scrutiny.

Accordingly, these goals, when used to justify LGBTQ affirmative action, would likely pass intermediate scrutiny. This is true for two reasons. First, intermediate scrutiny uses the more lenient substantially related test instead of narrow tailoring, placing a lesser burden on the state to show that its LGBTQ affirmative action scheme is necessary to providing professionals willing to work with LGBTQ populations and communities.[204] Second, the idea that LGBTQ college graduates are more likely to work with LGBTQ communities than the general population has some empirical support, and this is especially compelling given the aforementioned small size of the LGBTQ population.[205] This evidence supports LGBTQ affirmative action as acceptable under intermediate scrutiny.

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[202] *Bakke*, 438 U.S. at 310 (opinion of Powell, J.) (concluding that the instant affirmative action did not pass strict scrutiny, in part, due to the injury that it inflicted upon individuals who had not perpetuated harms against the benefitting group).

[203] *Id.* (opinion of Powell, J.) ("[T]here is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.").

[204] *See* Sartorelli, *supra* note 119, at 213 ("Since there are so very few openly gay people in most types of employment, there should be no dearth of highly qualified candidates to draw upon in order to make moves in this direction. But although qualifications may be no problem, incentives may be needed to get gay people to be open, beyond the mere symbolic show of support contained in such gestures of recruitment . . . ").

[205] Moreover, largely heterosexual professionals often show bias against LGBTQ persons and communities when they do work with them. *See, e.g.*, Kelly A. Knochel et al., *Are Old Lesbian and Gay People Well Served? Understanding the Perceptions, Preparation, and Experiences of Aging Services Providers*, 30 J. App. Gerontology 370, 372 (detailing similar anti-LGBTQ bias on the part of many geriatric service providers); Carmen Logie et al., *Evaluating the Phobias, Attitudes, and Cultural Competence of Master of Social Work Students Toward the LGBT Populations*, 53 J. Homosexuality 201, 202–03 (2007) (detailing anti-LGBTQ bias from social workers as a class).

C. *Rational Governmental Interests in LGBTQ Affirmative Action*

If a rationale for a governmental act is acceptable under strict scrutiny, then it is also acceptable under intermediate scrutiny and rational bias review. This must be true, as a compelling governmental interest must also be *important*, and *rational*. Hence, since the interest in advancing diversity and its benefits justifies affirmative action under strict scrutiny, it must also satisfy intermediate and rational basis scrutiny.[206] In this discussion, each of the above justifications for LGBTQ programs must also satisfy rational basis scrutiny. This is important, as acts based on sexual orientation currently face rational basis review in the federal courts.[207]

What's more, rational basis review allows any legitimate rationale to defend a governmental act treating individuals differently based on a trait like sexual orientation.[208] This means that nearly any legitimate basis can support a program of LGBTQ affirmative action.[209] Luckily, there are many legitimate reasons a college would want to adopt an LGBTQ affirmative action plan, including: a) making up for test or grade disparities that may exist between LGBTQ applicants and sexual majority candidates, b) a desire to prop up a new gender and sexuality studies department with possible students, or c) to recruit more of a "blue chip" status category than a neighboring school.[210]

While these possibilities are endless and greatly help this discussion, they also raise a red flag to the possibility of schools having superficial motives for enacting a LGBTQ affirmative action program.[211] It is

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[206] *See Bakke*, 438 U.S. at 291 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

[207] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (invalidating § 3 of the Defense of Marriage Act for failure to pass rational basis review).

[208] *See* U.S. v. Carolene Products Co., 304 U.S. 144, 151–52 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

[209] *See* Guisado, *supra* note 19, at 39–40 (foretelling that such legislation would pass "easily" under rational basis review).

[210] *The Ivy League's Big Gay Admission: News + Politics: Details*, FASHIONMR (Sept. 29, 2010), https://fashionmr.wordpress.com/2010/09/29/the-ivy-leagues-big-gay-admission-news-politics-details/ ("Gays are the new blue-chip recruits, and . . . elite colleges have begun to target and woo gay students to their ivory towers.").

[211] *See* David Luc Nguyen, *Talking Affirmative Action*, THE ADVOCATE (Jan. 16, 2007), advocate.com/politics/commentary/2007/01/16/taking-affirmative-action (noting that safe spaces and LGBTQ centers are more necessary than LGBTQ tokenism in admissions).

imperative that the bases for LGBTQ affirmative action programs be "legitimate" both in a legal sense and a moral sense and that schools not tokenize students. Critical masses of LGBTQ students, student centers, and affirming and supportive policies and resources must underlie LGBTQ affirmative action for the benefits to exist and not undermine efforts to revive affirmative action as a receptive policy.[212]

IV. Advocating for the Inclusion of LGBTQ Students into Affirmative Action Programs

For some, the reasons against affirmative action programs for LGBTQ applicants at colleges and universities are easily stated.[213] They may find that LGBTQ applicants lack both the need for a preference in admissions as well as the history of social strife necessary to deserve pointed affirmative action programs.[214] In addition, detractors of these programs may look to the Supreme Court's treatment of affirmative action in higher education as revealing a bias against such programs targeting specific groups.[215]

In a recent article, Professor Herbert Brown, Jr. discusses the possibility for LGBTQ affirmative action.[216] In his article, Professor Brown identifies affirmative action as a useful tool to a) counter discrimination, b) redress past and present discrimination against the group, c) ensure representation of groups, and d) promote equal opportunity.[217] In examining the case for LGBTQ affirmative action, the author

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[212] *See* Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 Educ. Researcher 115, 116 (2014) (referring to these factors as being key to providing "an atmosphere that is 'most conducive to speculation, experiment, and creation'" (quoting *Bakke*, 438 U.S. at 312)).

[213] *See e.g.*, Todd Elfman, *LGBT Affirmative Action Furthers Inequality*, PolicyMic (Nov. 18, 2011), http://www.policymic.com/articles/2454/lgbt-affirmative-action-furthers-inequality (last assessed May 20, 2017) (describing LGBT affirmative action as an initiative that "provides deferential treatment to members of the LGBT community"); Richard D. Kahlenberg, *Admission Preferences for Gays?*, Chronicle of Higher Ed. Blog (Aug. 24, 2011), chronicle.com/blogs/innovations/admissions-preferences-f or-gays/30190 (cautioning against higher education institutions considering sexual orientation as a factor in their admissions processes because this practice too closely resembles "affirmative action" instead of "equal treatment").

[214] *See,* Elfman, *supra* note 213.

[215] *See* Kahlenberg, *supra* note 213.

[216] Herbert C. Brown, Jr., *A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals*, 21 Wm. & Mary J. Women & L. 603, 666–67 (2015) (concluding that one rationale for making gay students the beneficiaries of affirmative action plans s their contribution to college diversity).

[217] *Id.* at 603–04.

ultimately decides that while such as system would be constitutional, today's LGBTQ population is ultimately not worthy of such a gesture.[218]

In Professor Brown's reading, LGBTQ applicants lack the moral standing for affirmative action protections due to a lack of economic disadvantage due to past or present discrimination, citing invisibility as the sole effect of societal homophobia.[219] To make this argument, the author points to the archetype of the powerful, but closeted gay person as proof that "discrimination against LGBT individuals did not completely lock the LGBT community out of opportunities."[220] This analysis—which is based on stereotypes of LGBT individuals as white, male, and affluent—ignores the lower incomes and higher poverty rates sexual minorities have as compared to straight people.[221]

Deeper probing, however, uses the narratives behind affirmative action to vindicate the idea of including LGBTQ students in these plans. LGBTQ students bring another form of diversity to the campus and classroom setting and colleges have the ability to recruit a class of students that have a myriad of perspectives and histories.[222] At many colleges, a program of affirmative action for LGBTQ applicants would indicate yet another level of enthusiasm for LGBTQ presence at institutions of higher learning.[223] Other such displays include nondiscrimination pol-

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[218] *Id.* at 663 ("[T]he parallel between LGBT individuals, African Americans and women provides little support for a need for affirmative action treatment for LGBT individuals.").

[219] *Id.* at 655 ("The most distinguishing feature of present consequence of the past discrimination for racial minorities and women is that '[r]ace and gender discrimination create economic disadvantage, whereas sexual orientation discrimination most often creates gay and lesbian invisibility.'") (quoting Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 Yale L. & Pol'y Rev. 47, 74 (1993)).

[220] *Id.* at 663.

[221] *See* Randy Albelda, et al., *Poverty in the Lesbian, Gay, and Bisexual Community*, Williams Inst. (Mar. 2009), https:// williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

[222] *See* Kim Brooks & Debra Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 Harv. Women's L.J. 89, 91 (2004) (noting that, for the authors, "[W]e were convinced there might be something unique about being queer, but at the same time, we were dedicated to reflecting the reality that a range of personal and group characteristics and experiences flavor that uniqueness. We also believed that nonqueer students and professors could use some queering.").

[223] *See* Rankin, *supra* note 127 (highlighting increased college marketing to LGBTQ students). This work is important, as both recruitment and retention of LGBTQ students is difficult. *See* Olivia Mancini, *Attrition Risk and Resilience Among Sexual Minority College Students*, 2 Colum. Soc. Work Rev. 8, 13–14 (2011) (explaining theories that LGBTQ students are especially in need of social support on campuses where they may still suffer isolation as a result of their sexual minority status).

icies in faculty and staff hiring or gender-inclusive restroom and housing programs.[224] From this perspective, LGBTQ affirmative action programs fit within the prerogative of colleges and universities that value the inclusion of LGBTQ communities and cultures.[225]

A. *Benefits of LGBTQ Affirmative Action Programs*

There are three major benefits to LGBTQ affirmative action programs in American colleges and universities. First, these programs will help pool the relatively low number of LGBTQ applicants applying to schools across the country.[226] In order to have a critical mass of LGBTQ students who can truly ingratiate a campus with the benefits of intergroup relations and social leadership, LGBTQ applicants need to know to apply to some schools over others.[227] Like the fictional high school student in the Introduction, LGBTQ applicants who see a LGBTQ affirmative action policy will be drawn to schools that have these programs.[228] For schools seeking to improve or introduce LGBTQ leadership spaces into their campuses, this benefit alone will be appealing to them.

Second, LGBTQ affirmative action programs will help increase the marketability of any college or university introducing it. LGBTQ affirmative action programs are rare and relatively new, making any introduction of such a program newsworthy.[229] For small, rural, and state schools

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[224] Fewer than 10 percent of American colleges and universities give explicit nondiscrimination protections to LGBTQ faculty, staff, and students. Mancini, *supra* note 223, at 13.

[225] This can contribute to a culture of best practices in LGBTQ recruitment in higher education. *See* Tyler D. Cegler, *Targeted Recruitment of GLBT Students by Colleges and Universities*, J. C. Admission, 18, 22 (2012) ("Professionals in higher education must be mindful of their actions and actively engage best practices in both admission and GLBT student services. As the two functional areas fuse during the recruitment process, active research, evaluation, and assessment of programs must occur.").

[226] *See* Illingworth & Murphy, *supra* note 190, at 202 (Estimating the population of LGBTQ students to 2.8 percent for men, 1.4 percent for women, and a small, but imprecise proportion of transgender students).

[227] *See* Webber, *supra* note 144 (discussing the signaling that LGBTQ admissions policies did for small schools like Elmhurst College in Illinois).

[228] *See supra* Introduction.

[229] *See* Andrew Bunting, *Asking Tough Questions: College and LGBT Applicant Identification*, Diverse Iss. Higher Educ. (Apr. 7, 2013), http://diverseeducation.com/article/52429/ (describing the aforementioned policies at Elmhurst); *see also* Samantha Stainburn, *The Gay Question: Check One*, N.Y. Times (July 30, 2013), http://www.nytimes.com/2013/08/04/education/edlife/more-college-applications-ask-about-sexual-identity.html?ref=edlife&_r=0 (identifying Massachusetts Institute of Technology and the University of Iowa as schools that have followed Elmhurst College's lead in including questions regarding prospective students' sexual orientation); Kahlenberg, *supra* note 213.

in particular, policies actively inviting LGBTQ applications would only serve to boost a school's reputation, given the historically favorable views on sexual orientation diversity in the United States today.[230]

Last, pro-LGBTQ diversity policies, such as affirmative action, lie largely in line with the diversity prerogative of businesses in the United States.[231] In race-based affirmative action programs, colleges and universities have centered the diversity perspective on creating marketable graduates since the early 2000s.[232] LGBTQ persons, as discussed above, add to this marketable diversity greatly.[233] By tapping directly into this resource by initiating an affirmative action program for sexual minorities, schools can create an even more symbiotic relationship between their diversity goals and those of businesses.

B. *Potential Risks of LGBTQ Affirmative Action Programs*

There are multiple risks to contemplate in considering an LGBTQ affirmative action program. The two biggest potential risks to LGBTQ Affirmative action plans are related. First, tokenism to LGBTQ students is a large concern. Since there are so few LGBTQ applicants in a given admissions cycle,[234] a failed attempt to build a critical mass of admitted LGBTQ students could have detrimental effects on the LGBTQ student experience and fail to produce the benefits of diversity in the educational setting.[235] However, institutional commitment should mitigate this problem.

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[230] *See* Cathy Lynn Grossman, *Survey: Americans Turn Sharply Favorable on Gay Issues*, Wash. Post (Feb. 26, 2014), http://www.washingtonpost.com/national/religion/survey-americans-turn-sharply-favorable-on-gay-issues/2014/02/26/cb6a6a72-9ea5-11e3-878c-65222df220eb_story.html (detailing the sharp change in attitudes towards LGBTQ people in past decade).

[231] *See* Martin deCampo, *Gay Recruiting – LGBT Staffing Critical to a Diversity Strategy*, Hire Centrix, http://www.hirecentrix.com/gay-recruiting-lgbt-staffing-critical-to-a-diversity-strategy (last visited June 7, 2017) (discussing the boom in LGBTQ diversity hiring).

[232] *See* Ellen C. Berrey, *Why Diversity Became Orthodox in Higher Education, and How it Changed the Meaning of Race on Campus*, 37 Critical Soc. 573, 574 (2011) ("By the early 2000s, [universities'] diversity discourse and programs put greater emphasis on the marketable skills acquired through interacting with diverse groups, while downplaying race and racial minorities.").

[233] *See*, *supra* notes 229–232 and accompanying text.

[234] *See* Stainburn, *supra* note 229 (reporting that during Elmhurst College's first year of asking prospective students for LGBT information, the College found that only 2.7 percent of students identified as LGBTQ).

[235] This can be a major disservice to LGBTQ applicants or any applicant reviewed in part due to their potential contribution to institutional diversity. *See* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind.

The second potential problem with LGBTQ affirmative action plans is possible academic and social stigma towards those perceived to benefit from these policies. There are many who consider status- or identity-based affirmative action inherently unfair in any incarnation, and those people may disfavor sexual minorities for being beneficiaries of it. This is a potentially grave issue, as the last thing LGBTQ students need is more stigma from sexual majority members.[236] Again, this issue requires proactivity from colleges and universities to alleviate any potential problems.

Other potential problems with the promulgation of LGBTQ affirmative action programs are more theoretical than practical and center on affirmative action's role in the social justice history of the United States. Principally, affirmative action is the cultural property of racial minorities (specifically Black Americans), and the onus is put on us to defend it. In the legal context, however, affirmative action is within the domain of colleges and universities, a wholly separate actor that has different motives and responsibilities than racial minorities as a class. Expanding or redefining affirmative action programs to target LGBTQ applicants further pushes affirmative action from a debate about the vestiges of the Black civil rights movement to the prerogatives and liberties of colleges and universities. This move has the potential to further estrange African Americans and other racial minorities from leading on affirmative action without necessarily removing the burden of perceived special preference from the imaginations of the majority.

To prevent this shift, colleges need to do right by racial minorities in theory and in practice. First, college administrators and scholars must remember the beginnings of affirmative action and always act for social justice in conjunction with Black and other racial minority leaders to ensure that these programs continue to work in the ways originally designed. Second, colleges that adopt LGBTQ affirmative action programs should do so in conjunction with other plans, not as a replacement. Moreover, affirmative action benefits should apply especially to Black

L.J. 1197, 1242 (2010) (describing how a sense of tokenism—an institutional accommodation to allow a few representatives from other groups to join institutions—can make students from these backgrounds feel that they are minstrels for the education and entertainment of students from the majority group).

[236] *See* Michelle Birkett et al., *Sexual-Orientation Disparities in School: The Mediational Role of Indicators of Victimization in Achievement and Truancy Because of Feeling Unsafe*, 104 Am. J. of Pub. Health, 1124, 1124–28 (2014) (discussing the relationship between LGBTQ students' experiences of harassment and their subsequent truancy).

and other racial minority LGBTQ students to help fulfill the promise of the program and promote the benefits of intersectional representation.[237]

Conclusion

Jonathan, the fictional adolescent whose college application process began this Article, loved his four years at Local State. Although it did not provide him with the cosmopolitan exterior of Big Private, Local State gave him the opportunity, community, and support he needed to thrive in college. In his first semester, Jonathan earned an internship at the new LGBTQ center, and spent many evenings creating and facilitating programs, meeting other queer students from throughout the country, and working with contacts in the administration to make Local State and even better environment for LGBTQ students. In the end, Jonathan's college journey was all that he was looking for.

The reason that Jonathan had such a good experience is a direct result of Local State's affirmative action program for LGBTQ applicants. Affirmative action programs at American colleges and universities have had a long and bitter fight to survive constitutional challenge but that is because these programs have always been explicitly tagged to the race of the applicant. Racial classifications necessitate strict scrutiny, and once outside of the demands that strict scrutiny requires, affirmative action programs for LGBTQ applicants are much more permissible. Government actions that classify people by sexual orientation currently face no stronger standard of review than rational basis 'with bite,' and that is unlikely to change soon.

Nevertheless—as discussed above—affirmative action programs that target LGBTQ applicants can plausibly survive at any level of scrutiny since LGBTQ applicants add to diversity, have a history of societal persecution, and these programs would go far to create role models for the community. This is especially true when colleges and universities execute these programs in a conscious and equitable way. That means recruiting for and selecting a wide variety of LGBTQ applicants, particularly African American applicants and others from traditionally disadvantaged groups, and providing institutional and administrative support for students throughout their experience there. With this caveat, LGBTQ affirmative action programs like the one advocated for here can help advance the social justice motives of African American and other groups symbolically, rhetorically, and in practice.

[237] For more about the unique contribution to diversity that intersectional lenses bring, *see generally* Joanna Anneke Rummens, *Conceptualising Identity and Diversity: Overlaps, Intersections, and Processes*, 35 Canadian Ethnic Stds. J. 10 (2003).