GAY QUOTAS

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ABSTRACT

In an era where diversity often takes center stage, the conversation around true equality for vulnerable minorities remains pressing. This essay explores the concept of implementing gay quotas as a pathway to not only increasing representation but also redefining the legal framework for equality. The implementation of quotas for lesbian, gay, and bisexual (LGB) individuals presents an opportunity to address disparities within educational institutions and workplaces directly. By setting a standard for inclusion, these quotas could help ensure that sexual minorities have equitable access to opportunities, ultimately fostering a more diverse and inclusive environment. Moreover, the legal challenges arising from such policies could prompt courts to establish more explicit standards for equal protection related to sexual orientation, creating lasting change.

This essay critiques the current political strategies and Supreme Court decisions that have led to a muddled landscape for equality, particularly for sexual orientation. It argues that the focus on diversity as a means of inclusion has distracted from true equality, especially in the context of race and sexual orientation. The Supreme Court's inconsistent application of equal protection principles in cases involving sexual orientation has led to unclear legal standards. This essay also discusses ongoing discrimination and harassment faced by LGB individuals in the workplace. Implementing LGB quotas could push courts to clarify their stance on equal protection for sexual orientation, thereby setting important legal precedents.

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I. INTRODUCTION

In an era where diversity often takes center stage, the conversation around true equality for vulnerable minorities remains pressing. This essay explores the concept of implementing gay quotas as a pathway to not only increasing representation but also redefining the legal framework for equality. The implementation of quotas for lesbian, gay, and bisexual (LGB) folk presents an opportunity to address disparities within educational institutions and workplaces directly.[1] By setting a standard for inclusion, these quotas could help ensure that sexual minorities have equitable access to opportunities, ultimately fostering a more diverse and inclusive environment. Moreover, the legal challenges arising from such policies could prompt courts to establish more explicit standards for equal protection related to sexual orientation, creating lasting change.

This thought experiment argues for implementing LGB quotas. It examines how a quota remedy could benefit not only LGB individuals but also ethnic and racial minorities and any holders of vulnerable social identities. This essay aims to reorient the conversation toward a robust equality rationale by addressing the deficiencies in legal and political strategies.

First, this essay describes the muddled equality landscape that vulnerable minorities must traverse to fight against discrimination. This essay argues that political strategy has led minority rights advocates to abandon bold, explicit discussions of equality in favor of "feel-good" arguments that appeal to the masses. This lack of clarity is not limited to advocates. Still, it can be seen—at least in the realm of sexual orientation law—by the failure of the Supreme Court of the United States (SCOTUS) to issue equal protection decisions that clearly articulate the tier of scrutiny that they are utilizing.[2] Second, this essay proposes the institution of LGB quotas as one practice to remedy the problem of muddled equality. Finally, I explain

1. This essay focuses on race/ethnicity and sexual orientation and, for simplicity's sake, does not dive into gender identity issues. Ethnicity and race tend to have a heightened standard of review. Whereas sexual orientation is analyzed using a lower standard of review called rational basis (or some might argue rational basis with teeth/bite). Sex identity or sex discrimination adds an additional wrinkle or tier to an equal protection analysis because it uses intermediate scrutiny. In the present moment, it is unclear what tier of scrutiny gender identity and gender expression may have, as it remains to be seen what standard of review (if any) gender discrimination will receive, given the SCOTUS current case of *US v. Skrmetti*. As this is a thought experiment, I limit this brief essay to race and sexual orientation because there are two tiers of scrutiny to consider. While I do not discuss transgender identity as a main focus, I believe that this essay's goals of seeking further clarification of the scrutiny tier for sexual orientation is something that will ultimately benefit the equal protection of rights for transgender folk.

2. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

why instituting LGB quotas is beneficial not only for LGB folk but also for vulnerable minorities (e.g., racial minorities) regardless of their sexual orientation, practice, or identity.

II. THE PROBLEM OF MUDDLED EQUALITY

A. Diversity as a Double-Edged Sword

In the legal fight for access and inclusion for vulnerable ethnic, racial, and sexual identity minorities, there are ways that equality arguments become either obfuscated or muddled. The first way that equality gets derailed is by promoting diversity arguments. Institutions in society have used diversity—the attainment of difference and variety among social identities—as a means of including vulnerable minorities.[3] The term diversity is often discussed as though it is synonymous with equality.[4] However, while the concepts may overlap, they are distinct.[5] Diversity is about including different types of people, like various races, genders, ages, and backgrounds.[6] Equality means people do not have disparities in opportunities and rights, ensuring everyone is treated fairly.[7] Think of diversity as all the different ingredients in a salad—like lettuce, tomatoes, and carrots.[8] Equality is making sure each ingredient gets the right amount of dressing.

Diversity has been used to justify race-based affirmative action in higher education,[9] and has been a goal for employers seeking multicultural

3. U.S. DEP'T OF LAB., *History of DE&*I, OFF. MGMT. STANDARDS, https://www.dol.gov/agencies/olms/deia/history (Dec 15, 2023).

4. *See id.*

5. *See id.*

6. *Diversity Definition & Meaning*, Merriam-Webster, https://www.merriam-webster.com/dictionary/diversity (last visited Dec 30, 2024).

7. *Equality*, Oxford English Dictionary, https://www.oed.com/dictionary/equality_n (last visited Dec 30, 2024). Definition 5b (defining equality as "The condition or fact of having the same rights, advantages, or opportunities as others or another, (in later use) *esp.* regardless of differences in gender, ethnicity, class, etc. Also in phrases with *of*, as equality of access, equality of opportunity, etc.").

8. There is a common cultural idea of describing America either as a melting pot—where everyone blends—or as a mixed salad, where cultures keep their distinctiveness but are tossed together to make something new and interesting. While the salad metaphor (as all metaphors) has its problems, this essay draws on it to clarify how to think about equality and diversity. *See Melting Pots and Salad Bowls*, HOOVER INST. (Oct. 26, 2012) https://www.hoover.org/research/melting-pots-and-salad-bowls; Sulianet Ortiz, *COLUMN: Diversity Not so Simple as 'Melting Pots' and 'Salads*,*'* IOWA STATE DAILY (Jun. 23, 2004), https://iowastatedaily.com/191815/uncategorized/column-diversity-not-so-simple-as-melting-pots-and-salads/.

9. Grutter v. Bollinger, 539 U.S. 306, 311-16 (2003).

inclusion, especially for race, gender, and sexual orientation.[10] But legal scholars have warned that the push for diversity—particularly in fights for racial justice—is a distraction from equality.[11] In his writings, legal scholar Colin Diver illustrates how the diversity rationale arose from Justice Powell's plurality opinion in the *Bakke* decision,[12] just as most justices were restricting the use of remedial rationales focused on eliminating race discrimination.[13] Diver notes that the *Grutter* decision later endorsed the diversity rationale.[14] Diversity continues to survive in the Court's post-*Grutter* affirmative action cases.[15] Ken Nunn supports this view, writing that diversity fails as a social justice tool because it is a dead-end alternative to remedial rationales for race-conscious remedies that the SCOTUS has disavowed.[16]

Because the Court closed the door on remedial rationales like fixing societal discrimination, affirmative action advocates decided to focus on diversity rationales.[17] It is important to note that this was a strategic decision.[18] These advocates could have also articulated remedial rationales that the Court had not closed the door on.[19] Instead, pro-affirmative action

10. *See, e.g.*, *Better Business: The Benefits of LGBTQ+ Inclusion in the Workplace,* U.S. CHAMBER OF COM. (Mar. 24, 2023), http://www.uschamberfoundation.org/corporate-social-responsibility/better-business-benefits-lgbtq-inclusion-workplace (stating that LGBTQ inclusion efforts were concurrent with workplace changes in light of racial equality in response to the murder of George Floyd in 2020).

11. Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIA. L. REV. 577, 577 (2009); s*ee also* Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 721 (2008).

12. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

13. Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691, 697 (2004).

14. *Id.* at 698; *see also Grutter*, 539 U.S. at 325.

15. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016); Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023). This essay includes *SFFA v. Harvard* as a case that affirms the diversity rationale, because despite the fact that the Court ruled that the use of race in college admissions was an unconstitutional violation of the Fourteenth Amendment, it never stated that diversity was not a compelling interest. The *SFFA* Court never took issue as to whether diversity was a compelling government interest, but stated that it was unworkable and couldn't satisfy the narrow tailoring prong of strict scrutiny because the interest could not "be subjected to meaningful judicial review." *Students for Fair Admissions*, 600 U.S. at 214.

16. Nunn, *supra* note 11, at 720.

17. *Id.* at 732.

18. *See id.*

19. One example of a remedial rationale that the Court had not foreclosed was to consider race to correct the racial bias already present in a school's admissions measures (i.e., standardized tests, grades, letters of recommendation). This rationale was discussed in Justice Douglas's dissenting opinion in *DeFunis v. Odegaard*, 416 U.S. 312, 335-36 (1974) (Douglas, J., dissenting) and in Justice Powell's footnote 43 of his plurality opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978). For a discussion of these decisions see Sheldon Bernard Lyke, *Defense Against the Dark Arts: The Diversity Rationale and the Failed Affirmative Defense of Affirmative Action*,

advocates moved away from anti-discrimination and shifted to diversity. The push towards diversity muddled the fight for equality. This muddling is not limited to race, and we see the rhetoric of diversity infiltrating anti-discrimination discourse for all vulnerable identities, including sexual orientation.[20]

B. The Supreme Court's Ambiguity on Equal Protection

A second way that equality gets muddled is by the justices on the Court. Except for *Romer v. Evans*, the Court's LGB rights cases do not primarily analyze equal protection doctrine.[21] These decisions do not provide straightforward applications of the equal protection tiers of scrutiny.[22]

Whether deciding due process or equal protection, Fourteenth Amendment analyses follow a tiered approach.[23] Under due process, the question is whether the law regulates or restricts a fundamental right.[24] If no fundamental right exists, a low level of scrutiny (rational basis) is used, but if one is found, a heightened level (strict scrutiny) is used.[25] This same tiered approach applies to equal protection, where the question shifts to whether a law regulates or restricts a protected class of individuals.[26] If a law regulates a suspect status, e.g., race, then the law is subject to heightened review (strict scrutiny).[27] Still, if the law regulates milkmen—a non-suspect class—there is no heightened review, and the law is subject to rational basis analysis.[28]

The last time the Court applied a clear-tiered equal protection analysis for sexual orientation was in *Romer v. Evans*, where the Court declined to consider sexual orientation as a suspect classification and subsequently used the rational basis test to strike Colorado's amendment banning laws that

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80 WASH. & LEE L. REV. 1873, 1886 n.47 (2024). For a discussion of Powell's footnote 43 of his Bakke plurality opinion, see Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 UC DAVIS L. REV. 1117 (2019).

20. *See* 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, 70-72 (1993).

21. *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

22. This section highlights that there are also not clear scrutiny analysis for due process as well.

23. *See* Maxwell L. Stearns, *Obergefell, Fisher, and the Inversion of Tiers*, U. PA. J. CONST. L. 1043, 1048-49 (2017); LEE J. STRANG, 5 FEDERAL CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT 97, 221 (Matthew Bender ed., 2013).

24. *See id.* at 97-98.

25. *See id.* at 97.

26. *See id.* at 221.

27. *See id.*

28. *Id.* at 222.

protected individuals from sexual orientation discrimination.[29] While sexual orientation rights cases after *Romer*, like *Lawrence v. Texas* and *Obergefell v. Hodges*, raised both due process and equal protection concerns, they either primarily focused on due process or ignored equal protection altogether.[30] In *Lawrence*, the Court struck down the Texas same-sex sodomy statute as a violation of due process, and the majority did not address equal protection.[31] In *Obergefell*, while the Court addressed both due process and equal protection concerns, Justice Kennedy, who penned the majority opinion, principally relied on due process to strike marriage bans of same-sex couples.[32] In addition, the Court's post-*Romer* sexual orientation decisions avoid a precise tiered scrutiny analysis for sexual orientation.[33]

In sum, when advancing civil rights before SCOTUS for vulnerable minorities, equal protection remedial rationales are not the principal arguments at the forefront of litigation.[34] This section suggests that there appears to be a muddling of equality. Advocates and judges are focused less on remedying discrimination against vulnerable minorities based on the equal protection of the law and more on alleviating discrimination based on concepts like diversity or dignity in due process. This is a problem in a world that often resorts to a rhetoric of fairness and is quick to label equality for the vulnerable as preferential treatment or special rights.[35]

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

30. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015). Not included in these cases is *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* is a landmark SCOTUS decision that barred discrimination of LGBT employees under Title VII of the 1964 Civil Rights Act and labeled it sex discrimination. *Id.* at 682-83. I do not include *Bostock* because it is a case interpreting a statute—the Civil Rights Act, as opposed to the Constitution and the Equal Protection Clause. *Id.* at 649-52. While the *Bostock* Court ruled that employment discrimination against LGBT individuals constitutes sex discrimination under Title VII, it is not clear that they will do the same thing under the Equal Protection Clause or what tier of scrutiny they will use (if any). The Court is currently considering this issue with respect to transgender youth in *United States v. Skrmetti*, which considers whether state bans of gender affirming care for transgender youth violates the Equal Protection Clause. Brief for Petitioner at 1, United States v. Skrmetti, No. 23-477 (U.S. Aug. 27, 2024). Therefore, *Bostock* does not offer much for interpreting the Equal Protection Clause, and the concepts and litigation that this essay is concerned with falls under the Fourteenth Amendment.

31. *See Lawrence*, 539 U.S. 558.

32. Stearns, *supra* note 23, at 1049, 1061.

33. Stearns references the *Obergefell* Court's "avoidance of tiers of scrutiny analysis." Stearns, *supra* note 23, at 1049. Stearns also notes that the same critique holds true for the *Lawrence* Court and the Court's decision in *US v. Windsor*, which struck the Defense of Marriage Act. *See* United States v. Windsor, 570 U.S. 744 (2013). These decisions also failed to engage a tiers of scrutiny analysis. *See* Stearns, *supra* note 23, at 1061-62.

34. *See* Nunn, *supra* note 11, at 727.

35. Lyke, *supra* note 19, at 1905. I am aware that my call for more arguments rooted in equality can (and likely will) be met with the same labels of preferential treatment or special rights. My response is that because detractors will make these arguments no matter what, then it is best to

The marriage equality movement for same-sex marriage rights may have been popularly successful because of its equal protection view that people, regardless of whom they love, should have the same access to institutions. Interestingly, while marriage equality was the rhetorical device used to the masses, the Court articulated its remedy mainly in terms of due process.[36] There is nothing wrong with due process arguments for same-sex rights. However, all vulnerable minorities benefit from a robust equal protection jurisprudence.[37] This essay suggests that one way to engage in a kind of rights solidarity that can bolster a discourse around equality and remedy for vulnerable minorities is to advocate for LGB quotas.

III. THE CALL FOR LGB QUOTAS

This essay calls for explicit affirmative action for LGB individuals as a means for creating more significant opportunities for sexual orientation minorities in both education and employment. This is not the first law review essay to advocate for LGB affirmative action.[38] In 1993, Jeffrey Byrne proposed affirmative action for lesbian and gay men to combat employment discrimination and encourage opportunity and workplace diversity.[39] Drawing on Oppenheimer's five models on affirmative action,[40] Byrne suggested using a model of affirmative action that focused on attaining "goals and timetables" after an institution self-evaluates any disparities it may be experiencing between the number of minorities in the institution and the number of qualified minorities who exist in the available market.[41] Byrne focuses on voluntary goal-oriented affirmative action in the workplace, which is more "flexible" and "temporary."[42]

This essay suggests that the affirmative action remedy should take the form of a more rigid quota, one that is strict and mechanical, which requires

address them and attempt to guide a fairness discourse that helps the masses better understand how the anti-discrimination practices that benefit vulnerable minorities are fair and equal.

36. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

37. *See* David Benjamin Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42, 61 (1988).

38. *See* Byrne, *supra* note 20, at 47.

39. *Id.* at 51.

40. Oppenheimer, *supra* note 37, at 43-50. Oppenheimer identifies five models of affirmative action: (1) quotas, (2) preferences, (3) goals and timetables to eliminate disparities where there is no apparent non-discriminatory explanation for the disparity, (4) support programs for minorities, and (5) actively deciding to stop discrimination practices. Some of these models may not be so distinct given a critical review. For example, Model 5—eliminating discriminatory practices—could be characterized as providing a racial preference under Model 2, because eliminating privilege for an advantaged group can often be interpreting as privileging a disadvantaged group.

41. Byrne, *supra* note 20, at 50-51.

42. *Id.* at 51.

a set number or percentage of LGB folk to be admitted into an educational institution or hired by an employer. In the private context, this can take the form of changing policy standards in admission or hiring practices. In the public arena, this can be a law setting a quota percentage requirement for state employers and universities. For example, to account for its history of discriminating against LGB teachers,[43] Florida could pass a law requiring school districts to commit to recruitment efforts, outreach to LGB minorities, or hiring practices designed to achieve a 3 to 5% representation of LGB individuals among its teachers.

IV. THE CASE FOR LGB QUOTAS

A. Addressing Workplace Discrimination

One of the main reasons for having LGB affirmative action is discrimination in the workforce. Over thirty years ago, Byrne wrote about the issues that LGB workers faced, including anti-gay prejudice and hesitation for individuals to come out due to fear of stigmatization.[44] Byrne cited work that claimed that "between 37% and 59% of lesbians and gay men had not come out to any co-workers."[45] Things have not significantly improved over the last thirty years.[46] LGB employees are still reluctant to come out, even after the *Bostock* decision, which ruled that sexual orientation discrimination constituted illegal sex discrimination under Title VII. In its key findings of an LGBTQ workplace report, the Williams Institute reported that in 2023, "[n]early half (46%) of LGBTQ employees said that they are not open about being LGBTQ to their current supervisor, and one-fifth (21%)

43. *See* Madeline Will, *LGBTQ Teachers Await Decision on Discrimination Protections*, EDUCATION WEEK (Jan. 14, 2020), https://www.edweek.org/policy-politics/lgbtq-teachers-await-decision-on-discrimination-protections/2020/01 (stating that nearly 200 educators lost their jobs in Florida between 1957 to 1965 after the Florida state legislature established an investigation committee that attempted to identify and discharge gay and lesbian teachers and professors who worked in public schools and universities).

44. Byrne, *supra* note 20, at 48-49, 84.

45. Byrne, *supra* note 20, at 56-57 (citing data from a nationwide survey of 400 lesbians and gay men and a survey of 400 gay and lesbian residents of San Francisco reported in Results of Poll, S.F. Examiner, June 6, 1989, at A-19.). Byrne's work relied on an article: Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923 (1986). Byrne mistakenly states that Herek's citation to the *S.F. Examiner* report is on page 146 of the Herek article, which is impossible given that the article begins on page 923. *Id.*

46. Christy Mallory, Brad Sears & Andrew R. Flores, *The Role of Sexual Orientation and Gender in Workplace Experiences of Cisgender LGB* Employees, 1, WILLIAMS INST. (Sept. 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bisexual-Workplace-Discrimination-Sep-2022.pdf.

are not out to any of their co-workers."[47] There does not seem to be a significant difference in individuals' fear of the stigma associated with coming out in 2023 compared to 1987.[48]

In addition to a fear of coming out, we can look to the self-reported experiences of workers in the workplace as evidence of the presence of discrimination, harassment, and unfair treatment in employment.[49] When questioned in a survey about their lifetime workplace experience, the Williams Institute found that "[a]bout one in five LGBTQ employees reported being fired (21%), not hired (23%), and/or not promoted (22%) because of their sexual orientation or gender identity at some point in their lives."[50] Thirty-five percent of LGBTQ employees reported unfair treatment at work due to their gender identity or sexual orientation.[51] Of importance to this essay's goal of promoting solidarity and highlighting the intersecting interests among ethnic, racial, and sexual identity minorities, it is essential to emphasize that LGBTQ employees of color reported experiencing discrimination at higher rates than their White counterparts.[52]

Of interest is that data on the recent experiences of LGBTQ employees reveal that they continue to experience significant discrimination, harassment, and unfair treatment at work despite living in a post-*Bostock* world, which granted nationwide Title VII protections to sexual orientation and gender identity minorities based on sex discrimination.[53] The Williams Institute found that within the past five years, 22% of LGBTQ employees experienced sexual orientation or gender identity discrimination, while 24%

47. Brad Sears et. al., *LGBTQ People's Experiences of Workplace Discrimination and Harassment 2023,* 4 (August 2024), Williams Inst., https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Aug-2024.pdf.

48. It is important to note that the 1993 survey and the 2023 Williams Institute survey are different and were conducted by the same institutions and did not use the same sampling methods. Not only is the difference discussed not a longitudinal comparison, but the samples do have some significant differences. For example, unlike the 2023 survey, the 1993 survey did not include transgender individuals. Regardless of whether these numbers can be used to make a statement about longitudinal change, what is clear is that at two distinct time periods—separated by thirty years—groups that at the time that were considered sexual orientation minorities (and in the case of 2023 gender minorities) expressed significant fear at revealing their identity as it related to their LGBTQ status. *Compare* Byrne, *supra* note 21, at 55-56, *with* Sears et al., *supra* note 47 at 2-4, 6.

49. *See* Sears et al., *supra* note 47, at 10.

50. *Id.* at 3.

51. *Id.*

52. Forty-two percent of LGBTQ employees [of color] reported a discrimination experience compared to 27% of White LGBTQ employees. *Id.*

53. *See id*; Bostock v. Clayton Cnty., 590 U.S. 644, 652 (2020).

experienced harassment.[54] When narrowed to the past year, 11% experienced discrimination, while 12 % experienced harassment.[55]

Affirmative action is a necessary tool for combatting present-day problems that vulnerable minorities face in the workplace, and quotas, because of their permanent rigidity, can be beneficial. They create and hold definite spaces for individuals in these groups, which can lead to a higher likelihood of hiring, promotion, and retention.[56] Assuming rationality, an employer may be less likely to fire someone based on sexual orientation if they know the individual will be replaced with another person who shares that minority identity.

B. Promoting Inclusion in Higher Education

In higher education, many of the same concerns that arise in the workplace for LGB people, like discrimination and harassment, also exist for LGB students once they arrive on college campuses.[57] A 2022 study by the Williams Institute reveals that at all levels of higher education—community college, four-year college institutions, and graduate schools—LGBTQ students experienced more discrimination and violence than their non-LGBTQ colleagues.[58] This same study showed that at four-year colleges, 33% of LGBTQ students were assaulted, bullied, or harassed in comparison to 19% of non-LGBTQ students.[59]

There is a potential concern that LGB quotas are not helpful in higher education climates where LGB students face discrimination and harassment.[60] One might argue, *Why use quotas to attract gay and lesbian students to an institution so that they can face the brutality of homophobia?* Using quotas could ensure that a critical mass of LGB students exists on college campuses, creating a more inclusive environment with greater safety

54. Sears et al., *supra* note 47, at 3-4.

55. *Id.* at 4.

56. *See* Rachel Gisselquist & Min J. Kim, *Affirmative Action Policies to Increase Diversity Are Successful, but Controversial, Around the World*, U.N. UNIV. (Feb. 28, 2024), https://unu.edu/article/affirmative-action-policies-increase-diversity-are-successful-controversial-around-world.

57. *See Creating a Positive Work Environment for LGBT Faculty: What Higher Education Unions Can Do,* AFT HIGHER EDUC. 9-10, https://www.aft.org/sites/default/files/media/2014/genderdiversity_lgbt0413.pdf (last visited Jan. 21, 2025).

58. Press Release, Williams Inst., LGBTQ People Four Times More Likely Than Non-LGBTQ Peers to Choose a College Away From Home to Find Acceptance (May 11, 2022), https://williamsinstitute.law.ucla.edu/press/lgbtq-college-decisions/.

59. *Id.*

60. *See* Katharina Resch, *Student Voice in Higher Education Diversity Policies: A Systematic Review,* FRONTIERS EDUC. 8-10 (Feb. 16, 2023), https://www.frontiersin.org/journals/education/articles/10.3389/feduc.2023.1039578/full.

in numbers. Colleges and universities can make community and student spaces even safer and more inclusive by using quotas aimed at hiring LGB faculty and staff.

C. Legal Strategic Implications for Equality

1. Pushing For Legal Clarity

The goal of this essay behind using gay quotas is to push legal arguments that advocate equality and remedial rationales and seek to make the Court produce clear and consistent rules dealing with the application of equal protection. In the realm of race-based affirmative action, litigation has seen unusual alliances, where white women and Asian Americans became victims of so-called reverse discrimination.[61] This essay introduces LGB quotas to encourage a strategy that aligns ethnic, racial, and sexual orientation minority interests to expand minority rights under the equal protection doctrine.

In the search for synergy and intersection, one might ask, how would implementing a rigid identity-conscious remedy like quotas—popularly associated with race and deemed unconstitutional by the Court when utilized as a race-conscious remedy—provide strategic legal gains for LGB communities? Challenging gay quotas could push courts to clarify their stance on equal protection for sexual orientation. These court decisions can set important legal precedents and provide more straightforward guidelines for future cases. LGB quotas would likely be challenged as a form of heterosexual sexual orientation discrimination. While litigants representing heterosexual interests might challenge quotas on both due process and equal protection grounds, it is more than likely that an appellate court deciding this issue on the merits will focus on equal protection. First, the Court has a deep, half-century-long practice of deciding affirmative action cases using equal protection.[62] Second, unlike *Obergefell* and *Lawrence*—both of which could

61. The first two SCOTUS affirmative action cases—*DeFunis* and *Bakke*—saw two white men (Allan Bakke and Marco DeFunis) as litigants claiming reverse discrimination. *See* DeFunis v. Odegaard, 416 U.S. 312, 314-15 (1974); Regents of the Univ. of Cal. v. Bakke 438 U.S. 265, 276-78 (1978). The next set of affirmative action cases before the Court included the Michigan affirmative action cases (*Gratz* and *Grutter*), and the *Fisher I* and *II* cases, which saw three white women (Jennifer Gratz, Barbara Grutter, and Abigail Fisher) as litigants claiming reverse discrimination. *See* Gratz v. Bollinger, 539 U.S. 244, 249-52 (2003); Grutter v. Bollinger, 539 U.S. 306, 311-17 (2003); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 301-03 (2013); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 375-76 (2016). The *SFFA* decision was the last affirmative action case before the Court, and it saw Asian-American applicants as the complainants. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. and Univ. of N.C., 600 U.S. 181, 272 (2023).

62. One might argue that the Court has a long history of deciding LGB cases using due process, though this is not entirely true. As discussed earlier, the Court has focused on equal protection

have been decided on equal protection grounds—a gay quota challenge may not have a credible due process claim. Heterosexual claimants must claim that an LGB quota burdens liberty interests expressed in the *Lawrence* decision.[63] LGB quota advocates would argue that *Lawrence* is inapplicable because the *Lawrence* decision determined the legality of a criminal statute that regulated sexual conduct.[64] The Texas sodomy statute did not criminalize one's status as gay or homosexual, which would have been a violation of the Eighth Amendment.[65] The *Lawrence* decision ultimately struck down the Texas sodomy statute because it was an impermissible regulation of conduct, not status.[66] Therefore, because the LGB quota does not classify people based on their sexual conduct or actions, there is no due process issue.[67]

An LGB quota challenge could be a chance to rectify a missed opportunity in the *Lawrence* decision when the four liberal justices (Stevens, Souter, Ginsburg, and Breyer) joined Justice Kennedy in striking the Texas sodomy statute on due process grounds, may have also been able to have joined Justice O'Connor's equality rationale that sodomy statutes that distinguish based on status classifications violate equal protection.[68] A challenge could be an opportunity for advocates to press the Court to articulate a clear standard for the level of scrutiny that should be placed on laws that classify sexual orientation, given the Court's failure to do so in

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regarding sexual orientation civil rights in *Romer* and, although not principal, has addressed equal protection claims in *Obergefell*. *See* Romer v. Evans, 517 U.S. 620, 631-32 (1996); Obergefell v. Hodges, 576 U.S. 644, 673-75 (2015).

63. *See* Lawrence v. Texas, 539 U.S. 558, 562-64, 578-79 (2003).

64. *See id.* at 562.

65. *See* Robinson v. California, 370 U.S. 660, 677-78 (1962) (ruling that it is unconstitutional to punish one's status as opposed to conduct); *Lawrence*, 539 U.S. at 562.

66. *See Lawrence*, 539 U.S. at 578-79.

67. This is almost a perverse reversal of the status/conduct distinction that for decades was the means that governments took to block the rights of sexual orientation minorities who argued that they were not discriminating based on sexual orientation, but on the basis of conduct. You see these distinctions made in arguments around sexual orientation in the realm of criminal sodomy laws and military participation. For a discussion of how the status/conduct distinction worked against sexual orientation minority rights, see Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology*, 3 GLQ J. LESBIAN GAY STUD. 159 (1996).

68. *See Lawrence*, 539 U.S. at 562-80. Although it is rare for the Court to have its majority decision split in parts among justices, there is precedent. In *McConnell v. FCC*, 540 U.S. 93 (2003), the Court determined the legality of the Bipartisan Campaign Reform Act of 2002 (BCRA). Justices Stevens and O'Connor delivered the opinion of the Court concerning BCRA Titles I and II. Justices Souter, Ginsburg, and Breyer joined them. Justice Rehnquist delivered the opinion of the Court concerning BCRA Titles III and IV. Kennedy, O'Connor, Scalia, and Souter joined him. Justice Breyer delivered the opinion of the Court on BCRA Title V, and he was joined by Justices Ginsburg, O'Connor, Souter, and Stevens. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 114 (2003).

Romer and *Obergefell*.[69] Regardless of the standard the Court decided, the clarity could be immensely liberating for LGB folk. If the Court ruled that LGB quotas should be subjected to a heightened level of scrutiny, then gay quotas would likely be ruled impermissible. This ruling could still be a win for gay rights advocates. A ruling stating that strict scrutiny should be applied to laws that make distinctions based on sexual orientation could be used to counteract ongoing and provide protection against future government discrimination against many sexual minorities. Also, a ruling striking LGB quotas doesn't mean that affirmative action for LGB individuals would have to be struck down, it doesn't mean that affirmative action for gays has to go away.

If the Court used a clear, rational basis test, then having clarity could be helpful. In addition to having a clear legal standard to rely on, the Court's use of a rational basis analysis would likely allow an LGB quota to exist. This would further benefit LGB individuals by allowing for greater education and workforce inclusion. There is a possibility that the Court might articulate a "rational basis with bite" standard, as seen in *Romer*.[70] This standard uses low-tier scrutiny but applies an elevated level of scrutiny instead.[71] The result could lead to a decision that strikes the use of quotas for LGB inclusion. Even in this scenario, however, LGB affirmative action would not be destroyed because, depending on the decision, a more flexible, less rigorous tool (e.g., a plus factor) might survive the rational basis with bite standard and be used for LGB inclusion. Using a tool like quotas that is considered to be extreme allows advocates to understand better the parameters of what the Court is willing and unwilling to do.[72] Also, because the desire for quotas is not at the forefront of civil rights demands for LGB movements, this information might be gained at a low cost, i.e., without civil rights setbacks to LGB individuals.[73]

69. *See* Romer v. Evans 517 U.S. 620, 633-36 (1996); Obergefell v. Hodges, 576 U.S. 644, 663-64, 679-81 (2015).

70. *See Romer Has It*, 136 HARV. L. REV. 1936, 1951 n.158 (2023) (stating that "[s]cholars typically interpret Romer as having applied rational-basis-with-bite review").

71. For a discussion of rational basis with bite, see Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779-80 (1987).

72. *See* Ketan Bhirud & Simeon Brier, *A Year Since 'Students for Fair Admissions v. Harvard': State Attorneys General Are Split on DEI*, REUTERS (Aug. 23, 2024, 6:29 AM), https://www.reuters.com/legal/legalindustry/year-since-students-fair-admissions-v-harvard-state-attorneys-general-are-split-2024-08-23/.

73. *See Romer Has It*, *supra* note 71, at 1951-52.

2. Synergy with Broader Civil Rights Movements and Vulnerable Minorities

What strategic legal gains could arise for underrepresented ethnic and racial minority communities (e.g., Blacks and Latinos) by instituting LGB quotas? Advocates for race-based affirmative action need a pause. Higher education race-based affirmative action has been challenged and led to Court decisions in several cases including *DeFunis*,[74] *Bakke*,[75] *Gratz*,[76] *Grutter*,[77] *Fisher I*,[78] *Fisher II*,[79] and *SFFA*.[80] This does not count the multiple cases where the Court has decided the legality of race-based affirmative action policies and regulations in other contexts, like contract awards,[81] non-college level education,[82] and state bans on race-based affirmative action.[83] Advocates for race-based affirmative action need a break. Since 1978, the fight for affirmative action has been fought entirely by those defending race who use a diversity rationale as a defense.[84] However, many individuals and groups who benefit from diversity arguments and inclusion freeride on the civil rights struggles that take place in the land of race-based affirmative action.[85] By advocating for LGB quotas, the national conversation can

74. DeFunis v. Odegaard, 416 U.S. 312, 314 (1974).

75. Regents of the Univ. of Cal. v. Bakke 438 U.S. 265, 269-70 (1978).

76. Gratz v. Bollinger, 539 U.S. 244, 249-52 (2003).

77. Grutter v. Bollinger, 539 U.S. 306, 311-17 (2003).

78. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 301-03 (2013).

79. Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 375-76 (2016).

80. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll. and Univ. of N.C., 600 U.S. 181, 272 (2023).

81. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 204-05 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 477-78 (1989).

82. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709-11 (2007).

83. *See* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 298-300 (2014).

84. *See* Becky Sullivan, *How the Supreme Court Has Ruled in the Past About Affirmative Action*, NAT'L PUB. RADIO (Nov. 1, 2022, 5:01 AM), https://www.npr.org/2022/11/01/1132935433/supreme-court-affirmative-action-history-harvard-admissions-university-carolina%201/18.

85. The use of the word "free-ride" is not meant to ignore the important solidarity work that members of various communities and groups have in the struggles for race-based affirmative action. Many groups stand behind Blacks and Latinos in the fight for race-based affirmative action. This can be found in social movement work, protests, and especially in the amicus briefs that organizations have filed in support of race-based affirmative action. For example, the National LGBTQ Bar Association filed an amicus brief in support of Harvard in *SFFA*. *See* Brief of Amici Curiae Nat'l Asian Pac. Am. Bar Ass'n and Nat'l LGBTQ Bar Ass'n In Support of Respondents at 1-2, Students for Fair Admission v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023) (Nos. 20-119 & 21-707), https://www.supremecourt.gov/DocketPDF/20/20-1199/232362/20220801140645092_20-1199%2021-707%20bsac%20National%20Asian%20Pacific%20American%20Bar%20Association%20And%20National%20LGBTQ%20Bar%20Association.pdf. The call

broaden beyond seeing affirmative action as a concept linked solely to race. In addition, if a quota is sustained for LGB individuals, it could be an opportunity to have a national conversation about the utility of quotas in ensuring equality—a strategy used in G20 countries like Brazil, India, and South Africa.[86] This richer experience and shared understanding could lead to a greater societal acceptance of affirmative action.

V. CONCLUSION: RE-IMAGINING EQUALITY THROUGH QUOTAS

The fight for equality in the United States continues to be in contestation. The reliance on diversity rhetoric and the Supreme Court's inconsistent application of equal protection principles have left vulnerable minorities without robust legal safeguards. This essay argues that LGB quotas could address these shortcomings by directly confronting workplace and educational discrimination, fostering inclusion, and compelling courts to clarify their equal protection jurisprudence.

Quotas are not a panacea but represent a bold step toward a more equitable society. By championing LGB quotas, advocates can shift the conversation from diversity to equality, creating a legal and social framework that benefits all marginalized communities. In doing so, we can lay the groundwork for a future where equal protection is not just an ideal but a reality for all.

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for LGB quotas however is to no longer have organization stand behind Black and Latino struggles, but to have them stand side-by-side in those struggles, broaden the conversation, and present a more uniform argument for the importance and significance of affirmative action for all vulnerable minorities. *Id.*

86. *See* Naiara Galarraga Gortázar, *Affirmative Action in Brazilian Universities: "I Am Living Proof That Quotas Work"*, EL PAIS (Aug. 25, 2023, 09:44 AM), https://english.elpais.com/international/2023-08-25/affirmative-action-in-brazilian-universities-i-am-living-proof-that-quotas-work.html; Jaya Nayar, *Equal Representation? The Debate Over Gender Quotas (Part 2)*, HARV. INT'L REV. (Aug. 15, 2022), https://hir.harvard.edu/equal-representation-the-debate-over-gender-quotas-part-2/; Nkateko Mabasa, *South Africa's Controversial 'Race Quota' Law Stirs Debate*, AL JAZEERA (Jul. 28, 2023), https://www.aljazeera.com/news/2023/7/28/south-africas-controversial-race-quota-law-stirs-debate.