Protecting the Most Vulnerable: Pursuing a Clear and Functional Equal Protection Framework for Transgender Youth

W. Seth Cook[†]

The Supreme Court has never addressed whether sexual or gender minorities are entitled to heightened scrutiny when state laws and policies single them out and disparately impact them. The Court has often found ways to avoid questions of entitlements directly or simply has refused to address the appropriate framework to apply to these minorities. Within the Court's silence on the matter, circuit courts have answered this question in light of a common fact pattern: school districts requiring transgender students to use the bathroom correlated with their biological sex or a single-stall bathroom. These bathroom policies have subjected students to isolation, ridicule, and embarrassment. Outside of these policies, transgender youth are already the most likely demographic to commit suicide. Thus, it has never been more important for the courts to develop a cogent, stable, and constitutional framework to ensure this vulnerable population receives the equal protection of laws under the Fourteenth Amendment. There are three primary paths that courts have taken in analyzing this discriminatory pattern. First, the policies are unconstitutional because they discriminate based on sex. Second, these policies are unconstitutional sex discrimination because they are founded on and enforce outdated gender stereotypes. This anti-stereotyping analysis provides a deeper understanding of the underlying animus towards transgender students. Third, this discrimination is subject to intermediate scrutiny not because it is some form of sex discrimination, but because transgender people are members of a quasi-suspect class under the Frontiero *factors analysis. This approach firmly roots the analysis in clear constitutional precedent and provides the strongest social message of equality and affirmative acceptance.*

[†] University of Texas School of Law, Class of 2023; Chief Symposium Editor, THE REVIEW OF LITIGATION, Vol. 42, 2022–2023; Co-President, Texas Law Democrats, 2021–2022. I would like to thank Professor Lawrence G. Sager to the fullest extent possible for his supervision and advice on this paper, his guidance of my legal and constitutional thinking, and for the impact he has had on my time at Texas Law. He is a truly gifted thinker and writer on equality, and I am honored to have his mentorship influencing my thinking and writing. I would also like to thank Professor Cary Franklin for her advice on this paper. Through a relatively brief email exchange, Professor Franklin challenged my thinking and unquestionably improved the analysis in this paper. Finally, while I am not a member of the LGBTQIA+ community and I will never fully understand the plight of many of my friends and loved ones who belong to the LGBTQIA+ community, I hope this Note advances the fight for equality and acceptance of this community.

Introduction

The constitutional status and protection of transgender persons

contentiously invokes religious and moral support and opposition.[1] Further, the current composition of the judiciary gives pause to those who believe the U.S. Constitution should protect all citizens equally.[2] Within this landscape, an investigation of the proper judicial review of state-sanctioned discrimination against transgender people is all the more crucial. Yet, what is the proper constitutional analysis of state action treating transgender people disparately?[3]

Current jurisprudence is mired in conceptual ambiguity.[4] There are

1. *See* Carrie Blazina & Chris Baronavski, *How Americans View Policy Proposal on Transgender and Gender Identity Issues, and Where Such Policies Exist*, PEW RSCH. CTR. (Sept. 15, 2022), https://www.pewresearch.org/short-reads/2022/09/15/how-americans-view-policy-proposals-on-transgender-and-gender-identity-issues-and-where-such-policies-exist/ [https://perma.cc/JVC7-526M] (finding that sixty-four percent of Americans support the protection of transgender people from employment or housing discrimination, but only thirty-eight percent oppose prohibitions on teaching gender identity in public elementary schools and thirty-six percent oppose the investigation of families who provide gender-affirming care to trans youth); Julia Raifman, *Transgender Rights Are Constitutional Rights*, HILL (Nov. 8, 2018, 9:00 AM), https://thehill.com/opinion/civil-rights/415657-transgender-rights-are-constitutional-rights/ [https://perma.cc/TD82-HJFZ] (arguing that state and federal laws and policies directed at transgender people violate the Fourteenth Amendment); Ryan T. Anderson, *Transgender Ideology Is Riddled with Contradictions. Here Are the Big Ones*, HERITAGE FOUND. (Feb. 9, 2018), https://www.heritage.org/gender/commentary/transgender-ideology-riddled-contradictions-here-are-the-big-ones [https://perma.cc/J44V-QJ86] (arguing that transgender individuals have contradictory views about materiality and gender identity); *Against Transgenderism*, NAT'L ASS'N SCHOLARS (July 25, 2022), https://www.nas.org/blogs/statement/against-transgenderism [https://perma.cc/S5WR-PPV8] (announcing its "opposition to transgender ideology first to open wider the 'Overton window' of views that can be expressed in American society"); Michael Lipka & Patricia Tecington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious 'Nones' in U.S.*, PEW RSCH. CTR. (July 7, 2022), https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/ [https://perma.cc/84KJ-43G6] (reporting that seventy-five percent of U.S. Protestants believe that gender is determined by sex at birth and cannot be changed later); *see generally* Adam P. Romero, *The Nineteenth Amendment and Gender Identity Discrimination*, 46 LITIG. J. 48 (2020) (extending Nineteenth Amendment jurisprudence to transgender voters).

2. *See* Ian Millhiser, *A New Supreme Court Case Could Be the Most Important Transgender Rights Decision Ever*, VOX (Mar. 14, 2023, 7:30 AM), https://www.vox.com/politics/2023/3/14/23635663/supreme-court-transgender-sports-constitution-stanford-kyle-duncan-protest [https://perma.cc/G6VL-DHNV] ("It's likely any trans rights plaintiff would already face an uphill battle in the current, very conservative Supreme Court. Republican appointees have a supermajority in this Court, at the same time that Republicans throughout the country are pushing legislation attacking transgender people.").

3. This Note addresses jurisprudence impacting transgender people specifically but should not be interpreted to apply solely to those who identify as transgender. This doctrinal inquiry, if successful, should provide an analytical framework guaranteeing equal protection to all members of the LGBTQIA+ community.

4. *See, e.g.*, Samantha Grund-Wickramasekera, *Lost in Trans*-lation: Why Title VII Jurisprudence Fails to Address Issues of Gender Identity in Employment Discrimination Litigation*, 11 DEPAUL J. FOR SOC. JUST. 1, 2 (2018) ("Currently, the Supreme Court has only recognized gender-based discrimination as discrimination against one's *biological sex*. Because Title VII is silent on the theological debate between sex and gender, lower courts have scrambled to seek

several cases in which the Supreme Court has considered equal protection for members of the queer[5] community.[6] While the Court had ample opportunity to settle how equal protection applies to queer individuals, it has often dodged crucial questions—even in cases where it extended constitutional protections for marginalized sexual minorities.[7] Moreover, due to the Court's ambiguously articulated principles and conceptualization, circuit courts must grapple with an equality-infused liberty interest that provides no substantive inclination on tiers of scrutiny and propagates a confused social meaning from the Supreme Court.[8]

Thus, what is the proper framework to guarantee equal protection to all citizens when transgender people are treated disparately? States have targeted transgender youth in a myriad of ways.[9] This Note employs a common fact pattern litigated in circuit and district courts: a public school denying a transgender student access to their gender-affirming bathroom due to an alleged school policy. This Note will undertake this equal protection inquiry in three parts. First, it will examine the jurisprudence that employs equal protection challenges. In Section I, the Note will trace the line of this jurisprudence from *Bowers v. Hardwick*[10] and *Romer v. Evans*[11] through *Lawrence v. Texas*[12] and *Obergefell v. Hodges*.[13] Then, it will introduce the

guidance when applying Title VII's protections to discrimination based on one's presentation of their gender identity.").

5. As recommended by some LGBTQIA+ advocates, this Note uses the term "queer community" to encompass everyone who identifies within the broader LGBTQIA+ community. *See* Juliette Rocheleau, *A Former Slur Is Reclaimed, and Listeners Have Mixed Feelings*, NAT'L PUB. RADIO (Aug. 21, 2019, 10:33 AM), https://www.npr.org/sections/publiceditor/2019/08/21/752330316/a-former-slur-is-reclaimed-and-listeners-have-mixed-feelings [https://perma.cc/E7Y3-83BJ] (explaining NPR's decision to use "queer" in its reporting because of its broad encompassment of the LGBTQIA+ community and younger generations' reclaiming of the term).

6. *See* discussion *infra* Section I.

7. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) ("We do not hesitate to recognize a necessary consequence of that legislative choice [in Title VIII]: An employer who fires an individual merely for being gay or transgender defied the law.").

8. For another example of where courts must infer tiers of scrutiny, see A. Russell, Bostock v. Clayton County*: The Implications of a Binary Bias*, 106 CORNELL L. REV. 1601, 1603 (2021) (arguing that *Bostock* only considers gender in a binary, leaving nonbinary individuals vulnerable because they do not fall into the Court's conceptualization of gender identity).

9. *See* Letter from Greg Abbott, Governor of Tex., to Jamie Masters, Comm'r, Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/4YVY-CZFF] (instructing the Texas Department of Family and Protective Services to investigate parents of transgender children for alleged child abuse if their child receives gender-affirming healthcare).

10. 478 U.S. 186 (1986).

11. 517 U.S. 620 (1996).

12. 539 U.S. 558 (2003).

13. 567 U.S. 644 (2015).

consistent facts found in the circuit cases and lay them against the backdrop of the Supreme Court's judicial approach.

In Section II, the Note argues for "conceptual clarity." Multiple policy interests should animate the courts to pursue a clear understanding of transgender discrimination. The courts need a stable, coherent, and constitutionally rooted doctrine to ensure that entitled protections are uniform across jurisdictions and despite presidential appointments. Of equal importance, however, is the social meaning behind the law. As Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*[14] made clear, what the Court does or *does not* say communicates the latitude states will have to push the bounds of discrimination.[15]

In Section III, this Note will lay out three potential frameworks to analyze these cases. The U.S. Supreme Court could—and seems inclined to—view discrimination against transgender people as gender discrimination. If a state actor treats people differently based on sex, this discrimination is impermissible. While the gender discrimination approach is attractive because of its simplicity, a deeper inquiry reveals the inherent limitations and contradictions of this approach. Alternatively, the Court could recognize this discrimination as sex discrimination through the enforcement of archaic sex stereotypes. Though transgender people are challenging different stereotypes than those rebelled against by the late Justice Ginsburg, they still face a similar kind of frozen thinking about human sexuality.[16] Finally, the Court could recognize transgender people as a unique and discreet class of individuals suffering structural injustice. While a court may want to prevent discrimination against transgender people in the same way that a court wants to prevent sex and gender discrimination, perhaps the sources of underlying animus behind these respective discriminations are different. If this is the case, applying the *Frontiero* factors allows courts to recognize transgender people as a quasi-suspect class deserving of intermediate scrutiny per se.

14. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

15. *Id.* at 562–63 (Harlan, J., dissenting) (acknowledging that even though the Court declared that states cannot prohibit Black people from serving as jurors, states may test the boundaries of discrimination by segregating people by race by placing partitions in courtrooms because partitions were found to be legal on trains).

16. *See, e.g.*, Rachel McKinnon, *Stereotype Threat and Attributional Ambiguity for Trans Women*, 29 HYPATIA 857, 868 (2014) (arguing that transgender women experience their own set of stereotypes because their behaviors are attributed to their assigned-at-birth gender).

I. Jurisprudence of Gay and Transgender Equality in the Fourteenth Amendment

While the U.S. Supreme Court's consideration of the Fourteenth Amendment's Equal Protection Clause is centuries in the making,[17] the application of this constitutional protection to members of the queer community is a comparatively new endeavor.[18] Most of the Court's precedential decisions have ducked important questions regarding the tiers of scrutiny for equal protection and have instead founded their rulings on the liberty interest of the due process clause.[19] Unsurprisingly, this approach creates numerous ambiguities around the proper approach for the lower courts when confronted with discrimination against sexual minorities. For several years now, the circuit and district courts have grappled with the proper judicial approach to equal protection challenges made by members of the queer community. In this Section, the Note will trace the judicial holdings underlying the leading U.S. Supreme Court cases in this area.

A. Bowers v. Hardwick

In *Bowers*, the police observed a man engaging in consensual sexual conduct with another man in the bedroom of his own home.[20] After being charged for violating a Georgia statute that criminalized sodomy, he challenged the constitutionality of the law.[21] The issue the *Bowers* Court addressed was whether the constitution conferred a fundamental substantive due process right to "engage is sodomy . . . [which could] invalidate the laws of the many States that . . . [made] such conduct illegal."[22] The plurality

17. *See, e.g.*, *Brown*, 347 U.S. at 495 (declaring the "separate but equal" policy of racial segregation in schools unconstitutional under the Equal Protection Clause); Strauder v. West Virginia., 100 U.S. 303, 308 (1879) (guaranteeing the right of people of color to serve on a jury); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (guaranteeing the right of a person to serve on a jury, regardless of ancestry or national origin); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protections Clause.").

18. *See generally* Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 ARCHIVES SEXUAL BEHAV. 427 (2010) (inferring that because the DSM-II removed homosexuality in 1973, American courts have only had roughly fifty years to develop Fourteenth Amendment jurisprudence for the queer community).

19. Romer v. Evans, 517 U.S. 620, 635 (1996) (forgoing any strict scrutiny analysis, although analyzing if the state's discriminatory actions are well-suited to achieve its stated interest); Lawrence v. Texas, 539 U.S. 558, 564 (2003) (concluding that the state law must be assessed under the Due Process Clause of the Fourteenth Amendment); Obergefell v. Hodges, 567 U.S. 644, 672 (2015) (acknowledging that the Equal Protection Clause and Due Process Clause have connected protections, but analyzing similar cases through the Due Process Claus's protections).

20. Bowers v. Hardwick, 478 U.S. 186, 187–88 (1986).

21. *Id*. at 188.

22. *Id*. at 190.

opinion authored by Justice Byron White concisely stated that this right was neither "implicit in the concept of ordered liberty," nor "deeply rooted in this Nation's history and tradition."[23] Justice White also asserted that "law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[24]

Bowers "effectively foreclosed [LGBTQIA+] activists from claiming due process privacy protection arguments in later cases."[25] Additionally, it spurred several circuit courts to hold explicitly that the queer community was "entitled to no special treatment under the Equal Protection Clause as either a suspect or quasi-suspect class because the conduct . . . was not constitutionally protected."[26] Because the Supreme Court cemented itself in *Bowers* as the "implacable foe" to LGBTQIA+ activists,[27] it would take roughly another decade before the Supreme Court would consider another major queer rights case.

B. Romer v. Evans

At issue in *Romer v. Evans* was a newly enacted amendment in the Constitution of the State of Colorado in 1992.[28] The amendment prohibited all legislative, executive, or judicial action designed to protect homosexuals from discrimination.[29] Relying on voting rights cases, the Colorado Supreme

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23. *Id.* at 191–92 (quoting Palko v. Conn., 302 U.S. 319, 325 (1937), and Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

24. *Id*. at 196.

25. James E. Barnett, *Updating* Romer v. Evans*: The Implications of the Supreme Court's Denial of Certiorari in* Equality Foundation of Greater Cincinnati v. City of Cincinnati, 49 CASE W. RES. L. REV. 645, 649 (1999).

26. *Id.*; *see, e.g.*, Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) ("[B]ecause homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.") (citation omitted); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("[A]fter [*Bowers*] it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.").

27. *See* Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 68 (1996).

28. Romer v. Evans, 517 U.S. 620, 624 (1996).

29. *Id.* (stating that the amendment read, "Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority

Court invalidated the law because it "infringed the fundamental right of gays and lesbians to participate in the political process."[30] The U.S. Supreme Court affirmed the state court's judgment, but on different grounds.[31] Justice Anthony Kennedy, writing the majority opinion, observed that the law "has the peculiar property of imposing a broad and undifferentiated disability on a single named group."[32] The Court ruled that the law was a violation of equal protection because, at its core, it singled out a group of citizens and stated that they were *not* allowed to be protected; this was "itself a denial of equal protection of the laws in the most literal sense."[33]

Strikingly, the Court did not address whether the community targeted by the law deserved a heightened tier of scrutiny.[34] Instead, the Court held that the law's "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to a legitimate state interest."[35] To decide the case on a rational basis test brought the conversation on the "rational basis test with bite" into the realm of equal protection for sexual minorities.[36] This use of "elevated rational basis" provided heightened protection against being discriminated against, without actually analyzing if the victims of the law were a protected class deserving of heightened scrutiny.[37]

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status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.").

30. *Id.* at 625.

31. *Id.* at 626.

32. *Id.* at 632.

33. *Id.* at 633–34 ("It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

34. *Cf.* Romer *Has It*, 136 HARV. L. REV. 1936, 1951 (2023) ("Scholars typically interpret *Romer* as having applied rational-basis-with-bite review, allowing the Court to apply a flavor of heightened scrutiny without formally doing so.").

35. *Romer*, 517 U.S. at 632.

36. *See* Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2774 (2005) (describing the "rational basis with a bite" test used in *Romer* but emphasizing that it has been ill defined).

37. *See id.* at 2783 (discussing how commentators described the "pariah principle" as a consequence of the *Romer* decision, in which the government cannot regulate "any class of citizens to the status of untouchables," no matter the badge of inferiority, such as black skin, a yellow star, or a pink triangle).

C. Lawrence v. Texas

Only seven years later in *Lawrence*, "the Supreme Court addressed the same circumstances it had in *Bowers*."[38] Though presented with the opportunity, the Court did not provide any analysis on the tiers of scrutiny or the factors designating suspect classes.[39] The Court instead ruled based on a liberty right under the Fourteenth Amendment's Due Process Clause.[40] The Court held that a Texas statute criminalizing same-sex sodomy was invalid because the Due Process Clause extends to consensual sexual conduct between opposite-sex and same-sex adults.[41]

Though the Court based its decision on liberty and not equal protection, it noted that the argument was "tenable," but *Bowers* required the Court's due process analysis.[42] Writing for the majority, again, Justice Kennedy claimed, "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex partners."[43] Therefore, while the Court only ruled on the substantive liberty interest, it left open the possibility for equal protection arguments.[44] Justice Sandra Day O'Connor chose to base her concurring opinion on the Equal Protection Clause unambiguously.[45] O'Connor's analysis followed the "rational basis with a bite" standard.[46] Her concurrence iterated that "a bare . . . desire to harm a politically unpopular group" is never a legitimate state interest,[47] as she walked through the laws struct down for blatant unconstitutional animus with no legitimate state interest in previous holdings.[48] While O'Connor does not address heightened scrutiny directly,

38. *Id.*

39. *Id.*

40. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government.").

41. *Id.*

42. *Id.* at 574–75.

43. *Id.* at 575.

44. Smith, *supra* note 36, at 2784.

45. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) ("Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth's Equal Protection Clause.").

46. *See id.* at 580 ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

47. *Id.* (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

48. *Id.* (discussing the holdings in U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Cleburne v. Cleburne Living Ctr., 517 U.S. 432 (1985)).

her concurrence further opens the door for equal protection challenges while encouraging heightened scrutiny beyond a rational basis review.

D. Obergefell v. Hodges

Obergefell is a landmark case for the gay rights movement.[49] The Court affirmatively stated that the right for same-sex partners to marry was fundamental and guaranteed by the liberty interest of the Due Process Clause.[50] Justice Kennedy acknowledged the "dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,"[51] and held that a state's refusal to authorize a same-sex marriage was an "imposition of [a] disability on gays and lesbians [that] serves to disrespect and subordinate them."[52] The Court rejected this inherently and, in addition to waxing eloquently about the meaning and importance of marriage, pointed out the varying kinds of harm this discrimination creates.[53]

The Court held that the right to a same-sex marriage was constitutionally protected, as was evident through the right to marry upheld in numerous cases invalidating limitations on marriage based on other discriminatory principles.[54] While the Court did not primarily rule on equal protection grounds, it clarified that the right to marriage was "derived, too, from that Amendment's guarantee of the equal protection of laws."[55] In fact, the Court's previous cases involving the right to marry ruled on equal

49. *See* John Tehranian, *Paternalism, Tolerance, and Acceptance: Modeling the Evolution of Equal Protection in the Constitutional Canon*, 62 WM. & MARY L. REV. 1615, 1667 (2021) ("With . . . *Obergefell*, the Court came closer to embracing third-order protection and actively celebrating diverse sexual identities."); *cf. id.* at 1668 ("*Obergefell* came close to embracing a third-order vision of respect, promoting acceptance, and denouncing hierarchy. Yet even *Obergefell* suffers from critical limitations in its rationale that preclude its embrace of a more capacious notion of equal protection.").

50. Obergefell v. Hodges*,* 576 U.S. 644, 665 (2015).

51. *Id.* at 667.

52. *Id.* at 675.

53. *See id*. at 668 (finding that the "humiliation" imposed by the state extends to the children of parents whose marriages are unrecognized by the state).

54. *Id.* at 664. *See* Loving v. Virginia, 388 U.S. 1, 12 (1969) (invalidating a ban on interracial marriages); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (invalidating a ban on fathers who were behind on child support from marrying); Turner v. Safley, 482 U.S. 78, 99 (1987) (invalidating a regulation preventing people who were imprisoned from marrying).

55. *Obergefell*, 576 U.S. at 672.

protection grounds, too.[56] Further, the "synergy"[57] between the Equal Protection Clause and the Due Process Clause "lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty."[58]

E. Bostock v. Clayton County

Five years later in 2020 , the U.S. Supreme Court expanded LGBTQIA+ rights outside of the realm of sex and marriage in *Bostock v. Clayton County*.[59] The Court analyzed whether the prohibition of "discrimination on the basis of sex" under Title VII of the Civil Rights Act of 1964 included discrimination against gay and transgender people.[60] The *Bostock* Court held that because sex was a "but for" cause of the discrimination experienced by the gay and transgender employees, it was necessarily sex discrimination.[61] Notably, *Bostock* is a statutory interpretation case of Title VII and not an analysis of the Equal Protection Clause in the Constitution.[62] However, the case provides a potential guide to how an ultra-conservative court may rule on the extension of equal protection to members of the queer community.

Bostock's logical structure is simple. "If the employer intentionally relies in part on the individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[63] This analysis asks if the sex of the person played a role—in any way—in the employer's decision-making. The Court then provides an example:

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56. *Id.* at 672–73 ("In *Loving* the Court invalidates a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It states: 'There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.' With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: 'To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.'").

57. *Id.* at 673.

58. *Id.* at 675.

59. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (prohibiting the right to fire a person based on their sexuality or if they are transgender).

60. *Id.* at 1742.

61. *Id.* at 1744.

62. *See id.* at 1737 (explaining that the cause of action arose from Civil Rights Act's prohibitions).

63. *Id.* at 1741.

> Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.[64]

Thus, if the sex—or, arguably, gender—of the employee would have changed the outcome of the situation, discrimination on the basis of sex has occurred.

With this legal context in mind, it becomes apparent why determining the proper judicial approach to equal protection for the queer community is so vital. The current landscape provides no guarantees of equal protection for sexual minorities other than inferences stemming from statements about "equality-influenced liberty."

II. Conceptual Clarity and Its Importance

Conceptual clarity simply refers to the idea that when a complex equal protection challenge is before the court, judges have a precise understanding of the discrimination and the framework through which the constitutional issue is analyzed. Admittedly, this seems like a fairly self-explanatory idea; however, courts have analyzed equal protection challenges without any clear instruction from the U.S. Supreme Court. This creates a challenge for litigants because Supreme Court decisions should be promoting uniformity throughout lower courts so that cases with similar fact patterns have predictable outcomes.[65] Without any instructions for uniform equal protection challenges, litigants face somewhat unpredictable outcomes.[66] This issue is especially pronounced in the context of discrimination levied against the queer community.[67]

A full understanding of the animus underlying the discrimination, as well as the proper legal framework to apply, is necessary for three main reasons. First, courts need a stable, coherent, and constitutionally viable doctrine. Second, the social meaning conveyed through the jurisprudence is paramount to a community consistently striving against structural injustice. Finally, societal belief in the rule of law and the legitimacy of our institutions requires clarity simply for clarity's sake.

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64. *Id.*

65. *See With Roe Overturned, Legal Precedent Moves to Centerstage*, AM. BAR ASS'N (June 24, 2022), https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage/ [https://perma.cc/DKD4-8B26] ("The U.S. Supreme Court has often stated that following its prior decisions encourages stability and brings uniformity in the application of law to cases and litigants.").

66. *Id.*

67. *See* discussion *infra* Section III.

A. A Clear and Coherent Doctrine

Without a stable, clearly articulated, and constitutionally viable doctrine, extending equal protection to citizens experiencing discrimination is on perpetually shaky ground.[68] Without a conceptual framework for analysis that is clear, persuasive, and constitutionally-rooted, the protection granted to transgender people is vulnerable to attack from those with personal disagreements regarding a transgender person's existences.[69] To fully understand what equal protection requires, we must ensure that we fully and precisely understand what the constitutional evil is to ensure that the rights currently protected *stay* protected.

B. Power of the Law's Social Meaning

A less intuitive need for conceptual clarity is its impact on the social meaning of the law. Social meaning of the U.S. Supreme Court's constitutional interpretation has been profound and subject to significant academic study for as long as the Constitution has been studied.[70] The social meanings of constitutional cases reach far beyond the four corners of the pages on which opinions are printed, reflecting public opinion[71] and

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68. *Cf.* Richard H. Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48, MO. L. REV. 587, 590 (1983) (indicating that the courts looking to extend equal protections could find refuge in the Equal Protection Clause's broad language because "[t]he Court has been creating a new role for itself since the 1960's, and equal protection happened to be the vehicle it chose. While the clause historically may have had a specific purpose, the presence of such general language was bound to attract the attention of an activist Court.").

69. An unfortunate and timely example of this proposition was Justice Samuel Alito's draft opinion of *Dobbs v. Jackson Women's Health Organization*. *See* Aaron Burke, *The Supreme Court's Draft Opinion on Overturning* Roe v. Wade*, Annotated*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/politics/interactive/2022/dobbs-alito-draft-annotated/ [https://perma.cc/9V2B-HM2N]. For an example of the ambiguity regarding "emanations of penumbras" and placing a woman's right to choose to terminate her pregnancy in jeopardy in a conservative super majority Court, see Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 n.* (2022) (Thomas, J., concurring) ("Since *Griswold*, the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process.").

70. *See generally* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267 (2011) (addressing state same-sex marriage restrictions communicating a second-class citizenship for LGBTQIA+ individuals); Tehranian, *supra* note 49 (addressing the failure of the Supreme Court to embody full protection and affirmative support for the LGBTQIA+ community in its same-sex marriage equal protection cases).

71. *See* Steve Sanders, *Dignity and Social Meaning:* Obergefell*,* Windsor*, and* Lawrence *as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2073 (2019) ("The gay and lesbian dignity cases were products of constitutional dialogue between the Court and society at large. The decisions built upon one another, moving over the course of thirteen years from the least controversial issue (sodomy laws) to the most controversial (marriage equality in the states). The decisions forthrightly embraced social change, and they recognized that the social meaning of sodomy laws and marriage restrictions has changed as American's attitudes about these issues, and about the status of gays and lesbians generally, continued to evolve. The decisions reflected how questions of sexual orientation

occasionally ushering in progress ahead of the public opinion.[72] This social meaning can be traced throughout the Court's jurisprudence on sexual minorities and their right to be given equal liberty.[73] A deeper analysis of the Court's approach to these cases shows a course from tolerance to social acceptance—yet this social meaning stops short of true constitutional equal protection.

1. Lawrence v. Texas*: Tolerance, but Not Acceptance*

Though the Court recognized a right to consensual intimacy,[74] a closer linguistic reading reveals the Court's posture. This recognition serves as an acknowledgement of a "tolerated variation" of the normal, not to grant same-sex partners normative equal value.[75] This aligns with the libertarian view of equality (i.e., "if you don't bother me, I won't bother you"), which fails to acknowledge the unequal footing of the two parties in reality in contrast.[76]

The Court also couched the right to engage in same-sex sexual conduct by drawing attention to what it is not:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[77]

Contrast this list of what the case does *not* involve to the Court's description of what the case *does* involve: "The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."[78] By first assessing what the right to same-sex consensual intimacy is *not* (i.e., pedophilia, rape, or prostitution), the Court chose to punish state interference and not to protect the victims of

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had transitioned, as Martha Nussbaum has put it, from a 'politics of disgust' to a 'politics of humanity.'").

72. *See, e.g.*, Leslie T. Fenwick, *The Ugly Backlash to* Brown v. Board of Ed *That No One Talks About*, POLITICO MAG. (May 17, 2022, 2:13 PM), https://www.politico.com/news/magazine/2022/05/17/brown-board-education-downside-00032799 [https://perma.cc/MX8Z-BHVY] (describing that there was significant backlash to the *Brown* decision during the implementation of the desegregation of school, despite initial optimism, causing many Black educators to lose jobs as white parents and administrators refused to employ Black teachers).

73. Sanders, *supra* note 71, at 2073.

74. Lawrence v. Texas, 539 U.S. 588, 578–79 (2003).

75. William N. Eskridge Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1065 (2004).

76 *Id.*

77. *Lawrence*, 539 U.S. at 578.

78. *Id.*

discrimination because they inherently deserve to be protected. If the Court had highlighted the same-sex couple's inherent rights, the tone would have been "celebratory and affirming—a quintessential example of third-order protection."[79] The moral distance of the Court's language allowed it to place aside questions of deserved equality for a tone "more libertarian and indifferent, even clumsy (if not offensive) in its reference to the 'homosexual lifestyle.'"[80]

2. From Windsor *to* Obergefell*: Colloquial, but Not Constitutional Acceptance*

In 2013, the Supreme Court in *United States v. Windsor*[81] edged even closer to the fully affirmative protection of equality for the queer community but failed to address crucial aspects of the constitutional question.[82] While "the Court deemed the federal government's refusal to acknowledge same-sex marriages as [degrading] to the 'dignity' that certain states had conferred upon relationships," the Court still seemed to have "a certain remoteness and unease."[83] Instead of directly addressing the marriages as proper, the Court said that the federal government must acknowledge "the status the State finds to be dignified and proper."[84] Ostensibly, the Court took a simple "balls and strikes" approach[85] to federalism concerns without addressing tiers of scrutiny, which the Second Circuit had addressed at length.[86]

Then, two years later, the Court handed down its *Obergefell* opinion.[87] As was discussed in Section I, *Obergefell* was a tremendous win for the constitutional protections of sexual minorities.[88] The Court affirmatively stated that the right for same-sex partners to marry "is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal

79. Tehranian, *supra* note 49, at 1664.

80. *Id.* (citing *Lawrence*'s reference to the "homosexual lifestyle" regarding a same-sex couple's desire to engage in sex).

81. United States v. Windsor, 570 U.S. 744 (2013).

82. Tehranian, *supra* note 49, at 1667.

83. *Id.*

84. *Windsor*, 570 U.S. at 775; Tehranian, *supra* note 49, at 1667.

85. *See* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 642 (2012) ("'[T]o call balls and strikes, and not to pitch or bat' . . . calls attention to the difference not between a judge and legislator—rule applier and rule maker—but between a player and rule enforcer; only the former can be said to win or lose. This connects to [Chief Justice] Robert's most striking and substantive commitment [he made to the Senate Committee on the Judiciary in 2005]: 'I come before the Committee with no agenda. I have no platform.'").

86. I will address the Second Circuit's analysis below as an example of a positive right affirming equality for sexual minorities and extending heightened scrutiny to sexual orientation per se.

87. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the right to same-sex marriage was constitutionally protected).

88. Tehranian, *supra* note 49, at 1667.

Protection Clauses."[89] Again, Justice Kennedy acknowledged that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,"[90] and stated that refusal to allow legal marriage was an "imposition of [a] disability on gays and lesbians [that] serves to disrespect and subordinate them."[91]

However, even this great landmark win for equal marriage rights suffers sharp limitations when it comes to equality. Primarily, *Obergefell* suffers from a lack of clarity regarding tiers of scrutiny, even though this type of "analytic paraphernalia . . . often clutters the Court's contemporary work."[92] For example, the Court did not take the opportunity to deem sexual minorities a suspect class.[93] Notably, what the Court did do was assert the immutability of sexual orientation.[94] This may be viewed as an attempt to lay the groundwork for future cases to assign heightened scrutiny, giving credence to the gradualist approach as a necessary one.

If the Court's analytical framework fails to embrace the nature of the harm fully, this failure will prevent non-queer members of society from fully appreciating the harm the Court is remedying. Regardless of the outcome, the Court commits a fundamental disservice to the affected community if its discriminatory experience is overgeneralized, under-analyzed, and underappreciated. In order to fill out the judicial approach, its posture must reflect one of affirmative acceptance and protection of historically oppressed people to ensure true equal protection.

III. The Questions Building in the Circuits for Transgender Youth

A significant number of cases have risen in the circuit courts in the last few years extending equal protection toward transgender teenagers prohibited from using a gender-affirming bathroom at their public high schools. These cases provide various standards of review for holding these school policies unconstitutional. This Section will lay out the relevant facts of these cases and their holdings to illustrate the urgency and importance underlying this analysis.

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89. *Obergefell*, 576 U.S. at 675.

90. *Id.* at 666.

91. *Id.* at 675.

92. Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 117 (2015).

93. *See id.* (referencing *Obergefell*'s lack of any "discussion of tiers of review, suspect classes, strict scrutiny, or narrow tailoring").

94. *Obergefell*, 576 U.S. at 661 (acknowledging the historical oppression of queer individuals and only recently recognizing that sexual orientation is "both a normal expression of human sexuality and immutable").

A. Whitaker v. Kenosha Unified School District[95]

When assessing the merits of a preliminary injunction in *Whitaker*, the Seventh Circuit held that a transgender student was likely to succeed on his equal protection claim when his high school refused to allow him to continue using the boys' bathroom at school.[96] In its motion to dismiss the student's motion for preliminary injunction, the school district argued that treating a transgender student differently based on their chosen gender identity did not violate either Title IX or the Equal Protection Clause because it was not discriminating on the basis of sex.[97] The district court in Wisconsin denied the motion.[98]

The student publicly transitioned at the end of his sophomore year of high school "without [general] hostility" at first.[99] Despite this, the school district refused to accommodate his request to use the boys' bathroom, even though the student and his mother repeatedly met with a guidance counselor seeking permission.[100] The school only permitted him to use the girls' restroom or a gender-neutral, single-stall bathroom in the nurse's office, which was a considerable distance away from all of his classes.[101] Because he feared punishment that could impact his college applications and he thought his use of the girls' bathroom would prevent people from accepting his transition, the transgender student began to intentionally restrict his water intake.[102] Reduction in his water intake was a substantial risk for the student, who suffered from a disease that caused fainting and seizures when he became dehydrated.[103] The student also experienced stress migraines, increased depression, and anxiety.[104] The school's policy presented what seemed like "an impossible choice between living as a boy or using the restroom."[105] His anxiety increased consistently, triggering suicidal ideation.[106]

During the student's junior year, he had been using the boys' bathroom for six months without incident, until a teacher saw him and reported it to the

95. 858 F.3d 1034 (7th Cir. 2017).

96. *Id.* at 1054.

97. *Id.* at 1045.

98. *Id.* at 1042.

99. *Id.* at 1040.

100. *Id.*

101. *Whitaker*, 858 F.3d at 1040.

102. *Id.* at 1040–41.

103. *Id.* at 1041.

104. *Id.*

105. *Id.*

106. *Id.*

school's administration.[107] After another meeting, the principal informed the student that the school's official records had him listed as female, and the school would not change the records without "unspecified legal or medical documentation."[108] Although the student submitted two letters by pediatric physicians who were treating him, the school later asserted that before he could gain access to the boys' bathroom, he needed to complete a full surgical transition —a procedure illegal for someone under eighteen.[109] Although the school did not explain this policy to the student's family or have it in writing, the school continued to deny him access to the boys' bathroom, even going so far as monitoring his bathroom use through security officers.[110]

Due to the stigmatization and isolation caused by these policies and other actions taken by the school (e.g., referring to the student with female pronouns, refusing to allow him to run for prom king, and requiring him to room with female students on school trips), the transgender student's physical and mental health suffered greatly.[111] After his junior year, the student sought injunctive relief to use his chosen gender's bathroom through a Title IX and equal protection challenge.[112] The district court enjoined the school from denying him access to the boys' restroom, enforcing any policy against him that would prevent restroom access, disciplining him for using the boys' restroom, or monitoring or surveilling his bathroom use.[113] Reviewing the school's policy, the Seventh Circuit found that it "cannot be stated without referencing sex, as the School District decided which bathroom a student may use based upon the sex listed on th student's birth certificate. This policy is inherently based on a sex-classification and heightened scrutiny applies."[114]

B. Grimm v. Gloucester County School Board[115]

The Fourth Circuit in *Grimm* determined whether school policies requiring students to use the bathroom according to their biological sex at birth and prohibiting them from changing their sex on school documents violated a student's rights under Title IX and the Equal Protection Clause.[116]

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107. *Whitaker*, 858 F.3d at 1041.

108. *Id*

109. *Id.*

110. *Id.*

111. *Id.* at 1042.

112. *Id.*

113. *Whitaker*, 858 F.3d at 1042.

114. *Id.* at 1051.

115. Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

116. *Id.* at 593.

The Fourth Circuit held "resoundingly yes."[117]

From the outset, Judge Henry Floyd's opinion addresses the issues transgender people, specifically transgender youth, face in society compared to cisgender people, including the physical and mental health challenges.[118] Conceding that most people carry "heavy baggage into any discussion of gender and sex,"[119] the court introduced key statistical and medical information.[120] Transgender status is "not a psychiatric condition, and 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'"[121] Yet transgender students experience significant hardships: fifty-four percent of transgender people report that they have suffered verbal harassment, fifty-two percent report being prevented from dressing in gender affirming ways, twenty-four percent were physically attacked because of their transgender status, thirteen percent were sexually assaulted because of their transgender status, and so on.[122] Their harassment is correlated with their academic success, such that these harassed students suffer lower grade-point averages.[123] The specific facts relating to the transgender student suing the school district for its bathroom policies did not diverge from these norms.[124]

Although the suing transgender student's assigned sex-at-birth was female, he "always knew he was a boy."[125] In 2013, the student enrolled in his high school as a female.[126] However, that April, he came out to his mother as transgender and soon after began therapy to treat his gender dysphoria.[127] By the end of his freshmen year, the student had changed his name, fully come out to his entire family, and used men's restrooms in public with no incidents or questions asked."[128]

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117. *Id*.

118. *Id*. at 594 ("Given a binary option between 'Women' and 'Men,' most people do not have to think twice about which bathroom to use. That is because most people are cisgender, meaning that their gender identity—or their 'deeply felt, inherent sense' of their gender—aligns with their sex-assigned-at-birth. But there have always been people who 'consistently, persistently, and insistently' express a gender that, on a binary, we would think of as opposite to their assigned sex. Such people are transgender, and they represent approximately 0.6% of the United States adult population, or 1.4 million adults.").

119. *Id.*

120. *Id.* at 594.

121. *Grimm*, 972 F.3d at 594.

122. *Id.* at 597.

123. *Id.*

124. *Id.* at 598.

125. *Id.* at 597.

126. *Id.* at 598.

127. *Grimm*, 972 F.3d at 598.

128. *Id.*

At first, the student obtained permission by his principal to use the boys' bathrooms throughout the school and did so for seven weeks without incident.[129] However, adults inside and outside of the school district "caught wind" of the student using the boy's restroom in school and complained to the school board and superintendent.[130] Only one student ever complained about the transgender student's bathroom use.[131] After community members voiced their concerns at school board meetings that "the 'majority' must be protected from such minority intrusion" and that "allowing transgender students to use the bathroom matching their gender identity would open the door to predatory behavior," the school board passed a resolution requiring students to use the bathroom aligned with their recorded biological sex.[132] The school board meetings treated the student and similar transgender folks with much animus, even with the student and his parents in attendance.[133] Predictably, this led to additional stigmatization and alienation, as the student's only bathroom options were the girls' room or the single stall in the nurse's office.[134] The student avoided using the restroom at school, which caused him to develop urinary tract infections and suffer from dehydration and suicidal ideation.[135]

His senior year, the student underwent chest reconstruction surgery, and was given a new birth certificate identifying his sex as male.[136] The school board continually refused to update their school records and decided that his birth certificate was void, leading to the student's eventual lawsuit.[137] The United States Court for the Eastern District of Virginia concluded that "transgender individuals constitute at least a quasi-suspect class" under a

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 599–600 (reporting that people in these meetings said, "It is a disruption. … [W]e have more to consider than just the rights of one student. … what about the rights of other students, the majority of the students at Gloucester High School" and "A young man can come up and say, 'I'm a girl, I need to use the ladies' rooms now.' And they'd be lying through their teeth.").

133. *See Grimm*, 972 F.3d at 599–600 ("One person called [the student] a 'freak' and likened him to a dog, asking: 'must we use tax dollars to install fire hydrants where you can publicly relieve yourselves?' Another likened [him] to a 'European' asking for a 'bidet.' More than one person talked about [his] gender identity as a choice. And more than one citizen stated that they would vote out the Board members if they allowed [the student] to use the boys restroom."). Community members also asked if it was "morally right for [them] to kneel or bow to the very few who demand that they receive a special identification to meet needs of their own perceived body functions" and likened transgender people's identity to non-heterosexual identities that were "addiction[s]" that "Jesus Christ [can] set . . . free." *Id.*

134. *Id*. at 598.

135. *Id*. at 603.

136. *Id*. at 593.

137. *Id*. at 601.

theory of sex-stereotyping, based on the amended complaint's allegations.[138] Like other circuits courts in substantially similar cases,[139] the Fourth Circuit held that the Board's policy was in violation of the student's equal protection rights because it punished transgender people for "failing to conform to the sex stereotypes propagated by the Policy."[140]

C. Adams *ex rel.* Kasper v. School Board of St. Johns County[141]

The final case—and the one most likely to reach the Supreme Court—is *Adams ex rel. Kasper v. School Board of St. Johns County*, which has a complicated procedural history.[142] The Eleventh Circuit first affirmed the three-judge panel's opinion in 2021 through a narrowed holding.[143] Following the first three-judge panel's decision, a member of the court withheld issuance of the mandate, so the court entered into a new judgment "in an effort to get broader support amongst [their] colleagues."[144] The new opinion did not reach the Title IX question, and instead focused solely on the equal protection question.[145]

In this case, Florida school officials "considered [a transgender student to be] a boy in all respects but one: he was forbidden to use the boys' restroom."[146] The student came out to his parents in the eighth grade after suffering serious amounts of anxiety and depression throughout the

138. Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730, 749–50 (E.D. Va. 2018).

139. *Grimm*, 972 F.3d at 609; *see* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that the school's bathroom policy "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently"); Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011) ("Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes."); Smith v. City of Salem, 378 F.3d 566, 573–75, 578 (6th Cir. 2004) (holding that equal protection rights were violated under a sex-stereotyping theory); M.A.B. vs. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d 704, 719 (D. Md. 2018) (holding that a school locker room policy "classifie[d] [the plaintiff] differently on the basis of his transgender status, and, as a result, subject[ed] him to sex stereotyping").

140. *Id.* at 608.

141. Adams *ex rel.* Kasper v., Sch. Bd. of St. Johns Cnty., 3 F.4th 1299 (11th Cir.), *vacated*, 9 F.4th 1369 (11th Cir. 2021), *and on reh'g en banc rev'd*, 57 F.4th 791 (11th Cir. 2022).

142. *See* Sarah Jana, *Transgender Students' Rights to the Restroom: Exploring the Eleventh Circuit's Divide in* Adams v. School Board of St. Johns County, 91 U. CIN. L. REV. (2023), https://uclawreview.org/2023/03/28/transgender-students-rights-to-the-restroom/ [https://perma.cc/EP2D-8DFN] (previewing the procedural history of the case).

143. Adams *ex rel.* Kasper v. Sch. Bd. 3 F.4th 1299, 1304 (11th Cir. 2021) (holding that preventing the transgender student from using the boys' restroom violated his equal protection rights since the school district's discrimination was arbitrary).

144. *Id.* at 1303–04.

145. *Id.* at 1304.

146. *Id.*

beginning of puberty.[147] After beginning to transition, his family noted that he "went from this quiet, withdrawn, depressed kid to this very outgoing, positive, bright, confident kid."[148] He began the standard treatment for children with gender dysphoria, including presenting and living as a male.[149] The court emphasized the necessity of this type of gender-affirming care because, as leading childcare specialists have noted, "not allowing students to use the restroom matching their gender identity promotes further discrimination and the segregation of a group that already faces discrimination and safety concerns."[150]

Since he began publicly transitioning, the student had been using the boys' bathroom "without incident" for six weeks when two unidentified, female students complained about his use of the *boys'* bathroom.[151] Although the school district did not have a single negative incident involving a transgender student using a bathroom and neither of the female students' complaints expressed privacy or safety concerns, the school adopted an unwritten policy requiring students to use the bathroom based on their sex marker on their enrollment documents.[152] Because the transgender student entered the school district identifying as a girl, the school district required him to use either the girls' restroom—an option that deeply insulted him—or a single-stall room—a burdensome option that left him feeling alienated and humiliated.[153]

The school's bathroom policy was an arbitrary one because the school would only consider the sex identity on a student's birth certificate at the time of their enrollment, and the school would not change their official school records if any government documentation was submitted indicating a different sex.[154] The student felt that this policy sent a plain message to the other students: he is different.[155] For two years, he and his mother filed requests, sent letters, and petitioned the U.S. Department of Education's Office of Civil Rights.[156] Finally, the student sued, alleging Title IX and

147. *Id*

148. *Id.*

149. *Adams*, 3 F.4th at 1305 ("To treat and alleviate [the student's] gender dysphoria, the psychiatrist recommended [he] socially transition to living as a boy. This included cutting his long hair short, dressing in more masculine clothing, wearing a chest binder to flatten breast tissue, adopting the personal pronouns 'he' and 'him,' and using the men's restroom in public.").

150. *Id.*

151. *Id.* at 1306.

152. *Id.*

153. *Id.*

154. *Id.* at 1310.

155. *Adams*, 3 F.4th at 1306–07.

156. *Id.* at 1307.

equal protection violations.[157]

After a bench trial, the district court held that the student was entitled to declaratory, injunctive, and monetary relief on his constitutional and Title IX claims.[158] The Eleventh Circuit first affirmed the lower court's holding that the policy could not be stated without referencing sex-based classifications, and that it unconstitutionally punished the student for not conforming with the sex-based stereotypes associated with the sex he was assigned at birth.[159] The Eleventh Circuit granted the school board's petition for a rehearing in 2022, ultimately vacating its previous decision.[160] The court maintained that the school's policy was a sex-based classification that required intermediate scrutiny,[161] but the school had a privacy interest to regulate sex-based bathrooms, since "students' use of the sex-separated bathrooms is not confined to individual stalls, e.g., students change in the bathrooms and, in the male bathrooms, use undivided urinals."[162] The court's change in opinion woefully reflects the growing animus towards transgender people, as the court narrow-mindedly degraded the student's gender identity to a mutable characteristic undeserving of constitutional protection.[163] As the court wrote:

> [T]he district court did not make a finding equating gender identity as akin to biological sex. Nor could the district court have made such a finding that would have legal significance. To do so would refute the Supreme Court's longstanding recognition that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." Thus, we are unpersuaded . . . that the district court could make any factual finding (that would not constitute clear error) to change an individual's immutable characteristic of biological sex, just as the district court could not make a factual finding to change someone's immutable characteristics of race, national origin, or even age for that matter.[164]

IV. Three Paths to Ensure Equal Protection for Transgender Youth

With these important cases building in the circuits, determining the proper equal protection analysis to ensure the state does not discriminate against transgender youth is of the utmost importance. Thus, it is vital for

157. *Id.*

158. *Id.*

159. *Id.* at 1310–11.

160. Adams *ex rel.* Kasper v., Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 799–800 (11th Cir. 2022).

161. *Id.* at 801, 803.

162. *Id.* at 806.

163. *Id.* at 807.

164. *Id.* at 807–08 (citations omitted).

courts not to simply reach the proper result, but to do so through a reasoned and stable framework. There are three viable and persuasive paths taken by the courts.

First, a court could hold these state actions violate the Equal Protection Clause simply because the state makes classifications based on sex. For the ease of the reader and writer, this Note will call this framework the "anti-classification approach." This approach is what is historically understood to be sex discrimination.[165] Essentially, a law that treats two people differently because of their sex violates the Equal Protection Clause and is thus subject to heightened scrutiny.[166] Second, the Court could determine that discrimination against transgender people is sex discrimination because it seeks to reinforce archaic gender norms. This theory tracks the reasoning found in much of Justice Ruth Bader Ginsburg's writing on sex equality.[167] This Note will refer to this theory as the "anti-stereotyping principle."[168] Third, the Court could hold that the transgender community is a quasi-suspect class deserving of intermediate scrutiny per se. The *Frontiero* factors articulate a test to determine whether a group of people sharing a certain characteristic is a suspect class.[169] In applying this test, a court could acknowledge that transgender people are exactly the kind of community suffering under systematic inequality sought to be protected by the tiers of scrutiny.

A. The Anti-Classification Model of Transgender Discrimination

The anti-classification model of transgender discrimination provides a simplicity likely to be very attractive to courts. This reasoning is most analogous to the analysis found in *Bostock v. Clayton County*.[170] This analysis, however, seems to be the least persuasive option. Viewing the discrimination experienced by transgender students as run-of-the-mill gender

165. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (discussing sex discrimination historically as the differential treatment of men and women based on their sex).

166. *Id.* at 682.

167. *See* United States v. Virginia, 518 U.S. 515, 534 (1996) (noting that gender-based classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic interiority of women").

168. *See generally* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (arguing that anti-stereotyping theory undergirds sex-discrimination cases from the 1970s); *Frontiero*, 411 U.S. at 683 (detailing that the appellee argued in favor of a sex-based discrimination because "men (are) as a rule more conversant with business affairs than . . . women").

169. *See Frontiero*, 411 U.S. at 683–88 (establishing historical discrimination, political powerlessness, immutability of characteristics, and no relationship between the characteristic and ability to contribute as the *Frontiero* factors).

170. 140 S. Ct. 1731, 1741 (2020) (describing its analysis by seeing if an employer would have made a firing decision solely on the fact that a person was or was not transgender).

discrimination is seemingly straightforward; however, it results in a reductive view that would create profoundly inconsistent and incoherent results.

This analysis requires a "but for" test: if the result of the action would have been different had the victim's sex been different, it necessarily discriminated based on sex.[171] For example, imagine a small, family-owned business run by a patriarchal father. His son, who is the Chief Financial Officer, comes to him one day and says he hired Pat for the accountant role. He then informs his father that Pat is transgender. Without hesitation, the father-owner demands that his son fire Pat because he doesn't want "those kinds of people" representing his business. The father-owner has no idea whether Pat was born a male and has transitioned to be a female or vice versa—Pat's biological sex has no bearing on the discriminatory animus involved. The animus expressed was based on the concept of a transgender identity—not whatever biological sex Pat was born.[172] This difference in animus would allow the discrimination to pass the "but for" test for sex discrimination but is unquestionably a display of transphobic animus.

Additionally, this line of reasoning is revealed to be insufficient when looking at the concept of gender-segregated restrooms in society in general. Based on the "but for" test of classification based on sex, gender-segregated bathrooms are necessarily discriminatory based on sex. Obviously, there are powerful social reasons for thinking there is no inherent injustice found in gender-specific bathrooms.[173] Thus, there must be more to the analysis of what defines sex discrimination than simply if sex is involved in the outcome at all.

The circuit courts have not found this analysis to be sufficient. The Seventh, Fourth, and Eleventh Circuits all addressed the fact that the school district's policies classified the students on the basis of sex.[174] Every single circuit addresses the fact that the policies classify on the basis of sex in conjunction with a deep analysis of the sex-stereotypes and gender identity norms promoted by the school policies.[175]

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171. *Id.*

172. This fact pattern follows closely to one of the cases mentioned in the procedural history of *Bostock*. *Id.* at 1738. In the Sixth Circuit, a transgender women got a job at a funeral home when she presented as a male, but she later transitioned to living as a woman after she was diagnosed with gender dysphoria. *Id.* Her employer ultimately fired her after she informed the funeral home that she would return to work as a woman. *Id.* The Sixth Circuit held that her employer could not discriminate against her transgender status, and the U.S. Supreme Court in *Bostock* upheld this decision. *Id.* at 1754.

173. *See* discussion *supra* Section IV.

174. Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020); Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1051 (7th Cir. 2017); Adams *ex rel.* Kasper v., Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1308 (11th Cir. 2021).

175. *See, e.g.*, *Whitaker,* 858 F.3d at 1052 (holding the school board's argument that their policy was formally equal as insufficient because it rested on sex stereotypes).

B. The Sex Stereotyping Principle of Transgender Discrimination

The sex stereotyping principle of discrimination against transgender people is far more persuasive as a conceptual framework—it is also the most prevalent approach taken by circuit courts. While a significant number of the cases cite the sex stereotyping theory of sex discrimination in their justification for heightened scrutiny, they do not all lay out its logical steps.[176] Professor Cary Franklin of the University of California, Los Angeles School of Law has laid out the theory of sex stereotyping in equal protection jurisprudence that is important for understanding this model.[177]

1. Franklin on Sex Stereotyping

In her article, Professor Cary Franklin outlines the philosophical underpinnings of the anti-stereotyping view of sex discrimination.[178] The basis for this concept was John Stuart Mill's work on sex equality and subjugation.[179] Specifically, Mill argued that "certainly most, and probably all, of the existing differences of character and intellect between men and women were due to the very different attitudes of society toward members of the two sexes from their earliest infancy."[180] The existence of these differing attitudes has been apparent in constitutional law since the beginning.[181] Franklin provides an impressive and exhaustive list of examples of cases fighting against "sex-role systems" in the work of Ruth Bader Ginsburg through the American Civil Liberties Union's Women's Rights Project.[182]

Franklin's commentary on the intersection of sex-role subjugation of women and the gay liberation movements is most relevant here. She addresses the parallel and divergent developments of the women's and gay liberation movements in the 1970s.[183] While the two movements diverged quite often, many queer authors aligned with the feminist writers on a

176. *See Adams,* 3 F.4th at 1307 (mentioning that the purpose of heightened scrutiny was to "eliminate discrimination on the basis of gender stereotypes," but does not specify exactly what stereotypes are in play in *Adams*); *see also* Adams *ex rel.* Kasper v., Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 808 (11th Cir. 2022) (discussing the stereotypes that the district court did not adequately scrutinize).

177. *See generally* Franklin, *supra* note 168 (offering "anti-stereotyping" as an emerging theory in historical sex discrimination cases).

178. *Id.* at 92–97.

179. *Id.* at 92.

180. *Id.* at 94.

181. See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

182. Franklin, *supra* note 168, at 119–42.

183. *Id.* at 114–19.

fundamental belief.[184] "'[R]igid sex roles' and 'male supremacy' were interlocking forms of oppression, and . . . freedom from one required freedom from the other."[185] Both movements saw their own failures to qualify as proper men and women in the popular social order as the basis for their rejection.[186]

2. Distinct Strands of Sex Stereotypes

In the present analysis, there is an additional layer of distinctions to sift through before we can see the clear metes and bounds of how these principles apply to discrimination against transgender people. First, what exactly does sex stereotyping encompass? Are there different categories of sex stereotypes, and if so, which are relevant here? For an equal protection analysis, there are at least three distinguishable versions of an impermissible sex stereotype.[187] First, gender roles that express normative views on what people should do are some of the most commonly recognizable stereotypes.[188] These stereotypes say, "as a woman/man, you should do this and not that, because the opposite sex does that." The second stereotype involves heteronormative assumptions about human sexuality on a binary spectrum (e.g., a spectrum excluding agender and non-binary people), insisting "as a woman/man, you should love or marry the opposite sex." These normative prescriptions reflect intertwining views of family structure and dynamics, as well as indirectly implicating gender identity. For example, this second type additionally will ask, "if there are two fathers, who will be the homemaker and raise the children?" The third type of stereotyping reflects interlocking conceptions of human sexuality and gender identity. These say, "you should express the identity of your sex as it was assigned at birth (i.e., cisgender) in this heteronormative way and not in a way that deviates from your assigned-at-birth sex (i.e., transgender/non-binary) or in

184. *Id*. at 117.

185. *Id*.

186. *Id*. at 116 ("Gay and lesbian activists observed that a 'real man' and 'real woman' are not so by their chromosomes and genitals, but by their respective degrees of 'masculinity' and 'femininity,' and by how closely they follow the sex-role script in their relationships with individuals and society. They noted that people who deviated from this script in any way (female construction workers, effeminate men) were labeled 'dyke,' 'faggot,' and 'queer' in order to signal that they no longer counted as proper men and women. These labels were used to keep people in check.").

187. *Cf.* Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1192 (2016) (arguing that there are permissible forms of sex-stereotyping for reasonings based on cultural norms, "real" biological differences, and privacy concerns).

188. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (identifying the traditional male role as the protector and the destiny of women as to fulfill the "noble and benign offices of wife and mother"); United States v. Virginia, 518 U.S. 515, 541–42 (1996) (acknowledging the existence of gender roles and pronouncing that notions concerning these differing roles and abilities may not form the basis for permissible gender-based exclusion).

a non-heteronormative way."

3. Sex Stereotyping in the Circuits

The stereotype of interlocking ideas of sexuality and gender identity are the most prevalent iteration of sex stereotyping in *Whitaker*, *Grimm*, and *Adams*. In *Whitaker*, the Seventh Circuit held that the school board's policy of only allowing students to use the bathrooms correlating with the biological sex marked on their registration papers was unconstitutional sex discrimination.[189] The school board argued that because it treated all students equally according to this policy, it did not discriminate.[190] The court rejected this argument as formal equality, stating "the School District treats transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. . . . [T]he School District [must] demonstrate that its justification for the bathroom policy is not only genuine, but also 'exceedingly persuasive.'"[191] This statement is far more profound than it seems at first glance because the Seventh Circuit rejects formal equality as constitutionally sufficient.[192] Instead, the court probes the injustice perpetuated by the policy.[193] This signals that the school's normative judgments on how a student *ought* to act have no place in the policies it promotes.

The Seventh Circuit also stopped short of acknowledging that transgender people should receive heightened scrutiny per se, as they are members of a minority class who have been historically subjected to discrimination based upon the immutable characteristics of their gender identities.[194] However, attempting not to reach constitutional decisions unnecessarily, the court found it sufficient that the student suffered discrimination on the basis of sex stereotyping.[195] Regardless, the depth of analysis given by the court to the plaintiff's argument for heightened scrutiny per se means it is hardly a trivial argument.[196]

In *Grimm*, the Fourth Circuit similarly held that a school policy "necessarily rests on a sex classification" if the "school district decides which

189. Whitaker v. Kenosha Unified Sch Dist., 858 F.3d 1034, 1039 (7th Cir. 2017).

190. *Id.*

191. *Id.* at 1051.

192. *Id.*

193. *Id.*

194. *Id.* ("There is no denying that transgender individuals face discrimination, harassment, and violence based on their gender identity. . . . But this case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny. It is enough to say that . . . the record for the preliminary injunction shows sex stereotyping.").

195. *Whitaker*, 858 F. at 1051.

196. *See* Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020) (claiming that according to facts similar to *Whitaker*, "heightened scrutiny should apply").

bathroom a student may use based upon the sex listed on the student's birth certificate"[197] As the court concludes, "[o]n this ground alone, heightened scrutiny should apply."[198] Discrimination on the basis of transgender status is sex-based discrimination under the Equal Protection Clause because it punishes people for "failing to conform to the sex stereotypes propagated by the Policy."[199]

In *Adams*, the Eleventh Circuit first adopted the district court's analysis of the standard of scrutiny before it reversed its initial opinion one year later.[200] The district court reasoned that the student was entitled to heightened scrutiny because "[t]he School Board's bathroom policy cannot be stated without referencing the sex-based classification, as it requires what it terms 'biological boys'—intended by the School Board to mean those whose sex assigned at birth is male—to use the boys' bathrooms or gender-neutral bathrooms."[201] Importantly, however, the district court also reasoned that because the policy treated most students the same, but treated the student differently because of his transgender status, it was punishing him for not "act[ing] in conformity with the sex-based stereotypes associated with the sex he was assigned at birth."[202] By recognizing that the classification alone was insufficient to fully adjudicate the equal protection issue, the court was able to assess the underlying animus that differentiates policies that simply classify by sex and policies that single out transgender students based on gender identity stereotypes.[203]

4. Conceptual Limitations to the Sex Stereotyping Analysis

The theory of discrimination against transgender people as sex discrimination is immensely persuasive. Under this model, courts must answer the following question: do transgender people face animus by the state because they fail to conform to expectations of their assigned-at-birth sex? But this sex stereotyping analysis is not without its limitations. For example, the "politics of similarity" provides a compelling ideological argument against the necessity of this line of thinking.[204] Much of the

197. *Id.* (citing *Whitaker*, 858 F3d. at 1051).

198. *Id.*

199. *Id.* at 608.

200. Adams *ex rel.* Kasper v., Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1312 (11th Cir.), *vacated*, 9 F.4th 1369 (11th Cir. 2021), *and on reh'g en banc rev'd*, 57 F.4th 791 (11th Cir. 2022).

201. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293, 1312 (M.D. Fla. 2018).

202. *Id.*

203. *Id.* at 1306–07.

204. *See* Tehranian, *supra* note 49, at 1680 (defining "politics of similarity" as "a search to recognize the inherent humanity of people with different beliefs and practices than our own and to appreciate that such people are 'like' us").

literature and case law devoted to articulating the rights of marginalized people demonstrates that transgender people as a subset are not as different from cisgender people.[205] This "politics of similarity" refers to the legal development of new constitutional protection.[206] While this has significant applications both with race and sex, there are certain philosophical limitations to it.[207] Specifically, if the only way for the U.S. Constitution to protect a class of people from discrimination is to liken them to a previous class, that creates a standard bearer person who has already received a right of equal protection.[208] The proximity to this standard person is thus necessary to receive a right to be protected from discrimination.[209] The Fourteenth Amendment provides a far more fertile ground of protections than that; if the language guarantees equal protection to all citizens, certainly one does not need to illustrate their similarity to the "normal" to be protected.

This logic applies to discrimination against transgender individuals. The analysis provided by the Supreme Court for determining quasi-suspect classes applies to transgender people. They are entitled to equal protection under law regardless of whether their discriminatory experience is sufficiently similar to the subjugation historically suffered by women.

C. Transgender People as a Quasi-Suspect Class

The third potential judicial approach is recognizing that the queer community—and specifically its transgender members—is a discreet and insular class, subject to structural injustice, and deserving of intermediate scrutiny per se.[210] Courts hesitate to pursue this line of analysis,[211] but a quasi-suspect status undoubtedly provides the most robust protection with the strongest social meaning. This status enables courts to recognize the unique harms suffered by transgender people and apply the U.S. Supreme Court's precedents for determining suspect and quasi-suspect classes.

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205. *Id.* (addressing the "politics of similarity" in Justice Kennedy's opinion in *Obergefell*).

206. *See* Courtney Megan Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. 943, 945 (2011) (introducing this concept as an "antidote to disgust," while also acknowledging some of its drawbacks, such as its ability to distort measurable differences statistically proven).

207. *Id.*

208. *Id.* at 956.

209. *Id.*

210. *See* Selene C. Vázquez, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIAMI INTER-AM. L. REV. 63, 78 (2020) (discussing the U.S. Supreme Court's extension of equal protection to communities by recognizing them as "quasi-suspect" classes).

211. *See* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1050 (7th Cir. 2017) ("[W]e are mindful of our duty to avoid rendering unnecessary constitutional decisions.").

Frontiero v. Richardson[212] laid out factors for assessing whether a class deserves heightened scrutiny.[213] These factors have been applied to members of the queer community, and specifically transgender youth, by the circuit courts in clear and articulate ways, like in *Windsor v. United States*.[214] This path provides a bright-line analysis and a powerful social meaning of acceptance and equality.

1. The Recognition of a Quasi-Suspect Class in Lower Court Decisions

In 2012, the Second Circuit handed down an opinion in *Windsor*, holding that the denial of marital benefits to same-sex couples was subject to heightened scrutiny as sexual minorities constituted a quasi-suspect class.[215] Though not expressly applying the reasoning to transgender people, the Second Circuit provides a compelling roadmap for applying equal protection to the queer community.[216] Most significantly, the Second Circuit provided a model for the application of heightened scrutiny to discrimination on the basis of sexual orientation per se—not by first conceptualizing it as sex discrimination.[217]

In *Windsor*, a widow was denied the benefit of her deceased wife's deduction for federal estate taxes.[218] The justification for this denial was that the federal government did not recognize her as married under the Defense of Marriage Act (DOMA).[219] The district court and appellate court held that DOMA did not survive the rational basis review.[220] Notably, the district court was applying a more demanding rational basis test because of "historic patterns of disadvantage suffered by the group adversely affected by the statute."[221] While the Second Circuit acknowledged that this form of rational basis has some "doctrinal instability," the court found it unnecessary because a far better option was available—heightened scrutiny.[222]

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212. 411 U.S. 677 (1973).

213. *Id.* at 683–88 (establishing historical discrimination, political powerlessness, immutability of characteristics, and no relationship between the characteristic and ability to contribute as the *Frontiero* factors).

214. *See, e.g.*, 699 F.3d 169, 181–85 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013) (holding that homosexuals are a quasi-suspect class based on the *Frontiero* factors).

215. *Id.* at 185.

216. *Id.* at 181–85 (applying the *Frontiero* factors to homosexuals).

217. *Id.*

218. *Id.* at 175.

219. *Id.* at 175–76 (defining "marriage" as "a legal union between one man and one woman as husband and wife" and "spouse" as "a person of the opposite sex who is a husband or wife").

220. *Windsor*, 699 F.3d at 176, 188.

221. *Id.* at 180 (quoting Massachusetts v. U.S. Dep't of Hum. & Health Servs., 682 F.3d 1, 10–11 (1st Cir. 2012)).

222. *Id.* at 180–81.

The court applied the *Frontiero* factors to decide if queer individuals qualified as a new quasi-suspect class.[223] In sum, those factors are:

> A) [W]hether the class has been historically "subjected to discrimination[]"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society[]"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group[]"; and D) whether the class is "a minority or politically powerless."[224]

The court then methodically walked through each factor as applied to people in same-sex marriages.[225] While the analysis is specific to those in same-sex relationships, the analysis provides a model for extrapolating heightened scrutiny to all members of the queer community.

First, consider the history of discrimination against the queer community. The court acknowledges that "[i]t is easy to conclude that homosexuals have suffered a history of discrimination."[226] Many states prohibited consensual sexual relationships between members of the same sex until the U.S. Supreme Court overturned these prohibitions in 2003.[227] While the federal government argued that homosexuals had not "suffered discrimination for longer than history has been recorded,"[228] the court quickly dismissed this assertion.[229]

Similarly, the relation of the characteristic to the person's ability to contribute to society is fairly undisputed.[230] While the court has decided that heightened scrutiny need not apply to certain classes because they rationally relate to societal contribution,[231] the court found, "no such impairment" in that case.[232] The government argued that same-sex marriages result in a "diminished ability to discharge family roles in procreation and the raising of children," but the court dismissed this argument as contrary to the case

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223. *Id.* at 181.

224. *Id.* (citations omitted).

225. *Id.* at 181–85.

226. *Windsor*, 699 F.3d at 182.

227. *See generally* Lawrence v. Texas*.,* 539 U.S. 558 (2003).

228. *Windsor*, 699 F.3d at 182.

229. *Id.* ("[W]hether such discrimination existed in Babylon is neither here nor there. [The Bipartisan Legal Advisory Group of the United States House of Representatives] conceded that homosexuals have endured discrimination in this country since at least the 1920s. Ninety years of discrimination is entirely sufficient to document a 'history of discrimination.'").

230. *Id.* (stating that this factor was "[a]lso easy to decide in this case").

231. *Id.*; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (concluding that "mental retardation" is not rationally related to societal contribution, because "those who are mentally retarded have a reduced ability to cope with and function in the everyday world").

232. *Windsor*, 699 F.3d at 182.

law.[233]

The immutability factor provides challenges for the protection of the queer community. The government argued that sexual orientation is amorphous, malleable, and exists along a spectrum, precluding it from being discrete and obvious.[234] However, the court acknowledged that immutability does not require an "obvious badge," because a characteristic of the class must merely "call[] down discrimination when it is manifest."[235] Notably, the court fails to consider how the immutability interacts with the parts of a person's identities which may not be inherent but are still vital. However, the importance of this analysis is whether the characteristic places the person in a separate category, set aside as different, when the characteristic manifests itself.[236]

Finally, the court addressed the political power of the queer community.[237] The court did not require a complete lack of political victory.[238] Certainly, by the time the case was heard, the queer community had achieved certain political representation.[239] However, "the seemingly small number of acknowledged homosexuals so situated is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private—which, for [the court's] purposes, amounts to the same thing."[240] The court determined that DOMA did not survive intermediate scrutiny.[241] While *Windsor* was not a case about transgender students using their gender-affirming bathroom, the structural analysis of applying heightened scrutiny provides an excellent model to applying that same analysis to other members of the queer community.

Following this reasoning, the Fourth Circuit in *Grimm* held similarly that the school board's policy requiring transgender students to use a single-stall bathroom was subject to intermediate scrutiny.[242] The school board suggested that because the school had a single-stall bathroom created for students with "gender identity issues," the differentiation relied solely on

233. *Id.* at 183 (citing to *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

234. *Id.* at 184.

235. *Id.* at 183.

236. *Id.*

237. *Id.* at 184–85.

238. *Windsor*, 699 F.3d at 184 ("The question is not whether homosexuals have achieved political successes over the years. . . . The question is whether they have the strength to politically protect themselves from wrongful discrimination.").

239. *Id.*

240. *Id.* at 184–85.

241. *Id.* at 188.

242. Grimm v. Gloucester City Sch. Bd., 972 F.3d 586, 611–13 (4th Cir. 2020) (applying the *Frontiero* factors to a transgender student's situation when the school board creates a policy denying them access to their gender-affirming bathroom).

transgender status and was not subject to heightened scrutiny.[243] In addition to the court's sex stereotyping analysis, the Fourth Circuit held that heightened scrutiny applied per se because transgender people constitute *at least* a quasi-suspect class, consistent with numerous district court holdings.[244] As the court concluded, "each [*Frontiero*] factor is readily satisfied."[245]

2. Stability and Social Message

Recognizing transgender people as members of a quasi-suspect class provides the most stable and clearly articulated framework for ensuring equal protection. It also contains the strongest message of affirmative equality and protection of any path analyzed. Extending this classification to the queer community centers the unique experience of the transgender people when it is traditionally misunderstood by cisgender people. Despite the preceding analysis, a few questions must be addressed before the benefits of the quasi-suspect classification can be fully appreciated.

This analysis also has an attractive simplicity, lacking nothing in breadth and depth. A transgender woman can be the victim of disparate treatment in such a way that a cisgender woman will never suffer.[246] Another example is the conundrum presented when a transgender woman is discriminated against because of generic sexism. Suppose a transgender woman is not hired because the employer does not believe women should be in the workforce. In that case, the result is ironically both gender-affirming and discriminatory on the basis of sex.[247] Thus, recognizing animus against transgender people as more insidious and complex is necessary to ensure their plight is not glossed over or viewed superficially.

The distinction from the sex stereotyping theory provides a more

243. *Id.* at 608.

244. *Id.* at 610; *see also* Evancho v. Pine–Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (holding that transgender people constitute a quasi-suspect class); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (holding that transgender people constitute a quasi-suspect class); Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (holding that transgender people constitute a quasi-suspect class); M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d 704, 718–19 (D. Md. 2018) (holding that transgender people constitute a quasi-suspect class); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (holding that transgender people constitute a quasi-suspect class); F.V. v. Barron, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (holding that transgender people constitute a quasi-suspect class); Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018) ("[O]ne would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.").

245. *Id.* at 611.

246. *See generally* McKinnon, *supra* note 16, at 865–68 (arguing that transgender women face additional struggles that cisgender women will not experience).

247. *Id.* at 866–67.

formidable conceptual challenge. However, does animus result from a failure to align with social and sexual expectations? One potential answer is simply no. While cisgender women can suffer because an oppressive regime rejects their desire to have autonomy over themselves, transgender people suffer because the same regime rejects their very identity entirely. However, this critique could simply be exemplifying the distinctions between the first and third types of sexual stereotypes articulated above.[248] The challenging attempt to draw these distinctions reveals the remaining issue of whether conceptual clarity requires *only one* underlying reason to explain how discrimination is unjust. In fact, transgender discrimination could be—and likely is—driven by a disbelief in a person's identity *and* a product of outdated assumptions on human sexuality and gender.

While there are still important questions regarding this judicial approach, an immensely powerful message is communicated by recognizing the transgender community as a quasi-suspect class. Not only would these victims of discrimination have a guarantee of true equal protection, but that guarantee would be founded on their status as transgender people alone, as opposed to being protected merely because their harm is *like* the harm of another historically oppressed groups, like women.

Conclusion

The lower federal courts have modeled three main conceptual frameworks for extending equal protection to members of the queer community, including transgender youth. Exploring which of these approaches is the most coherent, stable, and constitutionally permissible is a necessary endeavor to extend protections to all transgender youth. A favorable ruling in the lower court mired in ambiguous and opaque reasoning fails to sufficiently guarantee the equal protection promised by the U.S. Constitution. Only through the clear conceptual understanding of these issues can courts ensure that their extended equal protection will have longevity, legitimacy, and a social meaning of affirmative acceptance and equality.

In order to achieve this conceptual clarity, courts can first recognize anti-transgender school bathroom policies as unconstitutional sex-based discrimination. This traditional anti-classification approach prohibits states from treating transgender people differently, but the approach requires biological sex to be a but-for cause of the discrimination. This framework, modeled in *Bostock v. Clayton County*,[249] provides an attractive simplicity, but fails to encompass the fullness of the complexity of the issue. As explained above, there are numerous situations of clear animus not captured by this test while innocuous and common place institutions would be

248. *See* discussion *supra* Section III.

249. 140 S. Ct. 1731, 1738 (2020).

presumptively unconstitutional.

Secondly, courts can recognize that these policies are founded on enforcing sex and gender stereotypes, qualifying them as unconstitutional sex discrimination. Schools are punishing transgender students for not conforming to systemic ideas of how they should identity based on their assigned-at-birth sex. While sifting through the types of sex stereotyping can be conceptually challenging, this theory provides a much more fertile landscape for extending equal protection under the Fourteenth Amendment. This analysis recognizes policies as unconstitutional because they are founded on unjust animus, not simply because they acknowledge sex and gender.

Finally, courts could apply the *Frontiero* factors, and recognize transgender people as members of a traditionally marginalized community affected by structural injustice, which would enable a court to apply intermediate scrutiny per se to laws classifying people on the basis of transgender status. This approach has the benefit of analytical simplicity because it sends the most powerful social message of affirmative equality. It ensures that transgender people are given equal protection of laws in the future. However, this approach lacks practical feasibility with the current make-up of the federal court system.

Additionally, there is a possibility that the correct analysis is not just one of the above-listed paths. Discrimination against transgender people embodies both a reliance on frozen thinking and stereotypes of human sexuality and gender while also expressing a unique and distinct form of animus. While there are certainly benefits and limitations to each potential analytical path, a clear conception of the injustice being perpetrated and how the Equal Protection Clause remedies that injustice is of paramount importance. The Fourteenth Amendment promises that all citizens will have equal protection of laws. With conceptual clarity of this particular form of discrimination and equality-pursuing jurisprudence, our courts can fulfill that promise in a way that conveys affirmative equality and not mere toleration of historically marginalized queer communities.