NO TIME FOR CAUTION: ENSURING EQUITY FOR TRANSGENDER INDIVIDUALS IN FOURTEENTH AMENDMENT EQUAL PROTECTION CHALLENGES

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ABSTRACT

For more than a century and a half, the Fourteenth Amendment of the United States Constitution has served as an indispensable vehicle for the advancement of civil rights. Within this monolithic amendment rests the Equal Protection Clause, which enshrines the notion that all persons are entitled to an equal disposition under state and federal laws. Though initially codified to anchor Reconstruction Era policies into the nation's constitutional framework, the Equal Protection Clause's application has since expanded far beyond the scope of racial discrimination. Today, the broad ambit of the clause extends to discrimination on a variety of bases, including sex-based discrimination.

Despite its name and purported application, the legal mechanisms underlying the Equal Protection Clause do not always render equitable results. This notion is especially true in the context of its gradual expansion; while the outer boundaries of equal protection have undoubtedly broadened, clashes with the doctrine of judicial restraint have more than once created inequitable outcomes for victims of invidious discrimination. The transgender community consistently finds itself overlooked in this regard. Despite consistently finding themselves beset by an ambient milieu of legislative and social harms, the transgender community has yet to receive formal recognition from the U.S. Supreme Court as a protected class under the Equal Protection Clause.

This Note assesses the gradual expansion of the Equal Protection Clause into the realm of sex- and gender-based discrimination, identifying the preexisting juridical framework that supports an application of so-called "intermediate scrutiny" to the transgender community. Examining foundational sex discrimination cases and contemporary jurisprudence alike, this Note proposes that such an application is the next logical progression in the development of the Equal Protection Clause. Given the growing conflagration of iniquitous anti-transgender legislation, such expansion is paramount.

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INTRODUCTION

At the threshold of the United States (U.S.) Supreme Court, lanterns illuminating the courthouse façade rest not upon traditional clawed feet, but rather ornate carvings of turtles.[1] These decorative reptiles can be found across the courthouse grounds—embossed on its marble walls and adorning the feet of its desks—with each turtle serving as a constant reminder of the "slow and steady pace of justice."[2] Such symbolism is apt considering the Supreme Court's continuous promotion of judicial restraint in constitutional interpretation.[3] While the exercise of such restraint may be necessary to ensure the continuity and stability of U.S. citizens' constitutionally afforded rights, judicial restraint has more than once resulted in contentious decisions regarding civil equality.[4] This tension is never more present than in the application of the Fourteenth Amendment's Equal Protection Clause.

The Fourteenth Amendment of the U.S. Constitution prevents states from denying individuals the equal protection of their laws through arbitrary or unnecessary classifications.[5] In deciding whether or not a challenged law or action violates the Fourteenth Amendment, courts exercise various levels of scrutiny regarding the classifications rendered by a law's language or effect.[6] While the Fourteenth Amendment was originally passed with the goal of protecting then recently emancipated slaves from exploitative treatment on the basis of race, its protections have since been extended to a variety of other

1. *See* Bill Mears, *Behind-the-Scenes Tour Reveals Supreme Court Traditions, Grandeur*, CNN (Dec. 23, 2010, 5:08 PM), http://www.cnn.com/2010/US/12/23/supreme.court.building.75/index.html.

2. *Supreme Court of the United States Coloring Booklet*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/visiting/activities/pdf/ColoringBooklet_Web_Version_Oct2021.pdf (last visited Mar. 3, 2024).

3. *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784–87.

4. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 235 (1944) (holding that the exclusion and internment of Japanese-American citizens was in the interest of preventing espionage); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (upholding segregation and the "separate but equal" doctrine).

5. *See* U.S. CONST. amend. XIV, § 1.

6. The general levels of scrutiny that a reviewing court may apply during a Fourteenth Amendment equal protection challenge include "strict scrutiny," "intermediate scrutiny," and "rational basis scrutiny." *See infra* Section I.B.1. (discussing the three standards).

"suspect" and "quasi-suspect" classifications,[7] including sexual orientation,[8] disability,[9] and sex.[10]

While the current purview of the Fourteenth Amendment is far more expansive than it was at its genesis, this evolution was not achieved without a notable degree of strife. The U.S. Supreme Court is consistently hesitant in applying heightened levels of scrutiny to previously unrecognized classifications.[11] Equal Protection Clause challenges brought by plaintiffs who do not fit within a previously recognized suspect or quasi-suspect class are often afforded the lowest, most deferential form of scrutiny.[12] As a result, judicial decisions based on Equal Protection Clause challenges often fail to keep pace with developing social norms and tend to render inequitable outcomes for members of unrecognized classes.[13]

At the forefront of contemporary Equal Protection Clause legal development stands the transgender community. As of the 2024 legislative session, over 460 pieces of anti-transgender legislation circulated through state legislatures, effectively seeking to disenfranchise transgender populations through the denial of basic services and dignities.[14] While extensive legislation has sought to afford transgender individuals with protections under federal Titles IX[15] and VII,[16] the

7. "Suspect" and "quasi-suspect" classifications generally refer to discrete groups of individuals who are particularly vulnerable to discriminatory and invidious treatment at the hands of state actors and legislation. Identifying such classifications is the first step in conducting a Fourteenth Amendment equal protection challenge analysis. *See* Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 (last visited Feb. 22, 2024).

8. *E.g.*, Romer v. Evans, 517 U.S. 620, 620–21 (1996) (using the Equal Protection Clause to strike down an amendment to Colorado's state constitution on the grounds of its discriminatory treatment toward "homosexuals").

9. *E.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (using the Equal Protection Clause to strike down a zoning ordinance that "appear[ed] to rest on an irrational prejudice" against the mentally disabled).

10. *E.g.*, Reed v. Reed, 404 U.S. 71, 77 (1971) (using the Equal Protection Clause to strike down a law that drew arbitrary distinctions between men and women).

11. *See, e.g.*, Romer, 517 U.S. at 635 (declining to extend intermediate scrutiny to sexual orientation classifications).

12. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (declining to extend heightened scrutiny to wealth-based classifications).

13. *See id.*

14. *See Mapping Attacks on LGBTQ Rights in U.S. Legislatures*, AM. CIV. LIBERTIES UNION (Mar. 14, 2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights?state= (last updated Feb. 27, 2024) [hereinafter ACLU].

15. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619 (4th Cir. 2020).

16. *See* EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 572 (6th Cir. 2018); *see also* 20 U.S.C. § 1681(a).

Supreme Court has declined to adequately consider whether laws that draw classifications against the transgender community should receive a heightened form of scrutiny under the Fourteenth Amendment's Equal Protection Clause.[17] Though the Court tangentially discussed the issue in *Bostock v. Clayton County*,[18] its equal protection analyses have yet to adequately address the rights of the transgender community.

Federal courts of appeals have rendered split decisions regarding the applicability of heightened scrutiny toward laws that create classifications based on transgender status, leaving an open question as to whether transgender classifications necessarily implicate sex-based discrimination. On one hand, the Fourth Circuit in *Grimm v. Gloucester County School Board*[19] extended heightened scrutiny to a gender-based classification in a claim brought by a transgender individual.[20] Conversely, the Eleventh Circuit in *Adams v. School Board of St. John's County*[21] rejected the notion that gender-based classifications should be equated to sex for the purposes of analyzing equal protection claims.[22] How the U.S. Supreme Court chooses to rectify this divide will likely dictate many facets of life for the transgender community, including the availability of access to gender-affirming care as well as the level of protection that transgender individuals receive from discriminatory legislation at both the state and federal level.[23]

This Note proposes that the U.S. Supreme Court assess laws that encroach upon transgender individuals' rights in the context of both sex-based and quasi-suspect classifications—specifically through the lens of intermediate scrutiny under the Equal Protection Clause. Part I provides a fact-based inquiry into the transgender identity to provide a cohesive understanding of the unique issues

17. *See* Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (denying writ of certiorari to hear a transgender equal protection classification issue).

18. 140 S. Ct. 1731 (2020).

19. 972 F.3d 586 (4th Cir. 2020).

20. *Id.* at 608.

21. 57 F.4th 791 (11th Cir. 2022).

22. *Id.* at 807–08 ("Regardless of [the plaintiff's] genuinely held belief about gender identity—which is not at issue—[the plaintiff's] challenge to the restroom policy revolves around whether [the plaintiff], who was 'determined solely by the accident of birth' to be a biological female—is allowed access to restrooms reserved for those who were 'determined solely by the accident of birth' to be biologically male. . . . [The plaintiff's] gender identity is thus not dispositive for our adjudication of [their] equal protection claim.").

23. *See, e.g.*, L.W. v. Skrmetti, 83 F.4th 460, 479–81 (6th Cir. 2023) (writ of certiorari pending) (refusing to apply intermediate scrutiny to Kentucky and Tennessee state law bans on gender-affirming care for minors); H.R. 401, 2023 Leg., Reg. Sess. (Ala. 2023) (criminalizing the display of "[a]ny sexual or gender oriented material that exposes minors to . . . male or female impersonators" in public spaces).

faced by the transgender community as a whole. This Part also introduces the core concepts of Equal Protection Clause analyses, intermediate scrutiny, and the Supreme Court's juridical treatment of transgender individuals. Part II proposes that the Court adopt the standards of scrutiny set forth in *Grimm* and *Glenn v. Brumby*[24] by affording transgender classifications intermediate scrutiny.

I. THE TRANSGENDER IDENTITY AND THE EQUAL PROTECTION CLAUSE

Upon a cursory glance, reconciling the transgender identity with the current standards of equal protection claim analyses may seem challenging, especially considering the historic comingling of the contemporarily distinct concepts of sex and gender.[25] However, this Note argues that inspecting the infringement of transgender individuals' rights with intermediate scrutiny under the Equal Protection Clause is the next logical step in the evolution of Fourteenth Amendment interpretational jurisprudence.

The following Part lays the necessary framework to demonstrate how the transgender identity fits within the context of contemporary equal protection analyses. Section I.A. provides a cohesive summary of modern interpretations of sex, gender, and the transgender identity. Section I.B. outlines the current standards of Equal Protection Clause challenges, paying particular attention to the gradual emergence of intermediate scrutiny as a mechanism for achieving equitable outcomes for previously unrecognized classes of individuals. Lastly, Section I.C. details four watershed equal protection challenges brought by transgender individuals and establishes how federal courts of appeals assess the transgender identity within an application of intermediate scrutiny.

A. *Developing a Fact-Based Understanding of the Transgender Identity*

To adequately address the question of where transgender individuals' rights fall within an equal protection analysis, a fact-based understanding of the transgender identity is indispensable. This Section provides both a statistical overview of the transgender community's representation in the American populace, as well as an explanation of contemporary medical and psychological understandings of the transgender identity. First, this Section summarizes the current terminology associated with the transgender identity.[26] Second, this

24. 663 F.3d 1312 (11th Cir. 2011).

25. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985) (using the terms "gender" and "sex" interchangeably).

26. *See* discussion *infra* Section I.A.1.

Section examines the transgender identity, as well as the history of discrimination faced by the transgender community in the United States.[27]

1. Glossary of Key Terms Associated with Sex and Gender

Due to continuously evolving understandings of gender, any conversation about gender runs the risk of conflating or misunderstanding its unique terminology.[28] This is especially true in the context of legislation and judicial decisions, where the comingling and confusion of distinct terms has mired the advancement of gender-based equality. For example, notice how the language of the U.S. Supreme Court's opinion in *City of Cleburne v. Cleburne Living Center, Inc.*[29] repeatedly conflates and alternates between the terms "sex" and "gender":

> Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest.[30]

In order to avoid confusion resulting from the interchangeable use of medically and sociologically distinct terms, uniform understandings and applications of critical language are paramount.[31] The following list explains the critical vocabulary which courts arguably must utilize when assessing equal protection matters regarding the transgender community. This list primarily relies upon definitions posited by the American Psychological Association (APA), which routinely updates its practice guidelines to keep pace with

27. *See* discussion *infra* Section I.A.2.

28. *See* Kristina Conger, *Of Mice, Men, and Women,* STAN. MED. MAG., (May 22, 2017), https://stanmed.stanford.edu/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health/ ("But in people, sex and gender together make up a complex stew of biology and behavior that can be difficult to swallow for researchers, who want simple answers. . . . Even many research articles, and researchers, refer to gender when they mean sex. . . . Our concepts about gender have been evolving so fast that the definitions can't keep up.").

29. 473 U.S. 432 (1985).

30. *Id.* at 440–41 (alternations in original) (citations omitted).

31. *See* Conger, *supra* note 28.

developing scientific norms.[32] While this is by no means an exhaustive list of the terminology relevant to modern understandings of gender and sex,[33] it highlights key terms found in federal court analyses.[34]

- **Sex/sex assigned at birth**: A term referring to an individual's biological status, typically falling within the categories of male, female, or intersex.[35] Sex is usually assigned at birth and is established based upon biological markers such as genitalia, hormonal balance, and chromosomal alignment.[36] However, biological indications of sex also include neurological considerations, such as an individual's gender identity and gender role.[37] These neurological considerations are considered predominant and determinative when divergences are present among an individual's other biological markers.[38]

- **Intersex:** An umbrella term referring to a variety of medical conditions and diversities "associated with atypical development of an individual's physical sex characteristics."[39] An intersex individual may possess differences between their "internal and/or external reproductive organs, sex chromosomes, and/or sex-related hormones."[40] The prevalence of such differences may result in complications during sex assignment at the time of birth.[41]

32. *See* Am. Psych. Ass'n, *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, 67 AM. PSYCH. 10–11 (2012) [hereinafter Am. Psych. Ass, *Psychological Practice with LGB Clients*].

33. *See, e.g.*, *Glossary*, MICH. STATE. UNIV., https://gscc.msu.edu/education/glossary.html#gender (last visited Feb. 22, 2024) (listing additional terms related to gender and sex and noting that "language around sexuality and gender is always changing" necessitating regular review).

34. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 594 (4th Cir. 2020) (stating as background that "[j]ust like being cisgender, being transgender is natural and is not a choice" and "many transgender people are clinically diagnosed with gender dysphoria").

35. Am. Psych. Ass, *Psychological Practice with LGB Clients*, *supra* note 32, at 10–42.

36. Am. Psych. Ass'n, *Guidelines for Psychology Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 862 (2015) [hereinafter Am. Psych. Ass'n, *Psychological Practice with Transgender and Gender Nonconforming People*].

37. *See* Adams v. Sch. Bd. of St. John's Cnty., 57 F.4th 791, 836 (11th Cir. 2022) (Pryor, J. dissenting).

38. *Id.*

39. Am. Psych. Ass'n, *Psychological Practice with Transgender and Gender Nonconforming People*, *supra* note 36, at 861.

40. *Id.*

41. *Id.*

- **Gender/gender identity**: A term referring to a person's "deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender."[42] A person's gender identity may or may not align with their assigned sex at birth or traditional biological markers.[43]

- **Gender Expression**: The manner through which an individual presents themselves, including "physical appearance, clothing choice . . . and behaviors that express aspects of gender identity or role."[44] An individual's gender expression does not necessarily correlate to their gender identity.[45]

- **Gender binary**: A categorization of gender into two distinct categories; man/male or woman/female.[46] Legislators and judiciaries have traditionally relied upon the gender binary in passing laws and rendering decisions based on sex and gender classifications.[47]

- **Cisgender**: **"**An adjective used to describe a person whose gender identity and gender expression" correlate to their sex assigned at birth.[48] Based upon self-reporting, most individuals can be characterized as cisgender.[49]

- **Cisgenderism**: A systemic bias that is "based on the ideology that gender expression and gender identities are determined by sex assigned at birth rather than self-identified gender identity."[50] Traditional legal understandings of sex and gender are rooted in

42. *Id.* at 862.

43. *Id.*

44. *Id.* at 861.

45. *Id.*

46. *Id.*

47. Anna High, *The Gender Binary*, MARQ. UNIV. L. SCH. FAC. BLOG (Nov. 22, 2013), https://law.marquette.edu/facultyblog/2013/11/the-gender-binary/.

48. Am. Psych. Ass'n, *Psychological Practice with Transgender and Gender Nonconforming People*, *supra* note 36, at 861.

49. Grimm v. Gloucester Cnty. Sch. Bd., 972 F. 3d 586, 594 (4th Cir. 2020); *What Percentage of the U.S. Population is Transgender?*, USAFACTS (November 15, 2023), https://usafacts.org/articles/what-percentage-of-the-us-population-is-transgender/#footnote-1 (noting that 97.5% of the U.S. adult population self-identifies as cisgender).

50. Am. Psych. Ass'n, *Psychological Practice with Transgender and Gender Nonconforming People*, *supra* note 36, at 861.

cisgenderism, with laws and decisions often failing to delineate between the sex assigned at birth and gender identity.[51]

- **Gender Dysphoria**: The discomfort or distress arising from an "incongruence between a person's gender identity, sex assigned at birth, and/or primary and secondary sex characteristics."[52] Gender Dysphoria was adopted by the American Psychological Association's fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) in 2013, replacing the previously termed diagnosis of "Gender Identity Disorder."[53]

- **Transgender**: An umbrella term that describes individuals whose gender identity does not align with what is "typically associated with their sex assigned at birth."[54] This includes a number of unique gender identities, including gender non-conforming and genderqueer.[55]

- **Transition**: A term describing the process that some transgender individuals undertake when they "shift toward a gender role that differs from the one associated with their sex assigned at birth," and begin developing a gender expression that is more congruent with their gender identity.[56] The process of transitioning is unique to each individual, varying widely in scope and length.[57] The transition process may include social changes (changes in name, gender

51. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985) (in which the U.S. Supreme Court used the terms "sex" and "gender" interchangeably to refer to sex assigned at birth).

52. Am. Psych. Ass'n, *Psychological Practice with Transgender and Gender Nonconforming People*, *supra* note 36, at 861.

53. *Id.* The change in terminology served to focus on the "gender identity-related distress that some transgender people experience" instead of "on transgender individuals or identities themselves." *Gender Dysphoria Diagnosis*, AM. PSYCH. ASSOC. (Nov. 2017), https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/genderdysphoriadiagnosis#:~:text=With%20the%20publication%20of%20DSM%E2%80%935%20in%202013%2C%20%E2%80%9Cgender,%2C%20medical%2C%20and%20surgical%20treatments). Moreover, "[t]he *DSM-5* articulates explicitly that 'gender non-conformity is not in itself a mental disorder.'" *Id.*

54. *Id.* at 863.

55. *Id.* (stating that genderqueer is a term used to describe an individual "whose gender identity does not align with a binary understanding of gender").

56. *Id.*

57. *Id.*

expression, and pronouns) and/or medical changes (hormone therapy, surgery, and other intervention methods).[58]

- **Gender-Affirming Care**: An umbrella term referring to a large range of intervention methods "'designed to support and affirm an individual's gender identity' when it conflicts with the gender they were assigned at birth."[59] Such intervention methods "fall along a continuum," including counseling, changes in gender expression, and medical intervention.[60] Gender-affirming care is often misconstrued as predominantly surgical.[61] In reality, models of gender-affirming healthcare are "highly individualized and focus[] on the needs of each individual by including psychoeducation about gender and sexuality (appropriate to age and developmental level), parental and family support, social interventions, and gender-affirming medical interventions."[62]

The language of this Note has been tailored to adhere to these definitions. However, it is important that both legal practitioners and legislators alike research and incorporate any updated definitions as they are presented. Section I.A.2. will address the multitude of harms faced by the transgender community in American society.

2. The Transgender Identity and American Perils

Traditional judicial interpretations of sex and gender have relied heavily upon the cisgenderist gender binary of "male" or "female," often correlating the concept of sex assigned at birth with gender identity.[63] However, despite the judiciary's traditional reliance upon the gender binary, there has always existed a community of individuals who "consistently, persistently, and insistently" express a gender that does not conform with their assigned sex.[64] These

58. *Id.*

59. Patrick Boyle, *What is Gender-Affirming Care? Your Questions Answered*, ASS'N OF AM. MED. COLL. (April 12, 2022), https://www.aamc.org/news-insights/what-gender-affirming-care-your-questions-answered.

60. *Id.*

61. *See* Karen M. Matouk & Melinda Wald, *Gender Affirming Care Saves Lives*, COLUM. UNIV. DEP'T OF PSYCH. (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives.

62. *Id.*

63. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1315 (11th Cir. 2011) (observing that the U.S. Supreme Court in *Cleburne* used gender and sex interchangeably).

64. Grimm v. Gloucester Cnty. Sch. Bd., 972 F. 3d 586, 994 (2020).

transgender[65] individuals comprise approximately 0.6% of the U.S. population, equating to 1.6 million individuals out of the United States' total 334 million population.[66]

In the ceaseless endeavor of attaining equality for all, the transgender community continuously slips through the cracks of the American consciousness and faces immense discrimination on nearly every front.[67] For much of the twentieth century, transgender and gender non-conforming individuals faced intense societal rejection. Non-cisgender identities were deemed "perverse" and "deviant,"[68] and transgender individuals were subject to "sex-affirming" medical practices aimed at "rectifying" discrepancies between their gender identity and sexes assigned at birth.[69] These supposedly remedial practices often forced their subjects to live in accordance with expectations traditionally associated with their sex assigned at birth.[70] While the last fifty years have demonstrated a marked improvement in medical conceptions of gender and sex,[71] generations of

65. As noted in Section I.A.1., "transgender" is an umbrella term which includes a wide variety of unique gender identities. For the purposes of this Note, the term transgender should be construed so as to include any individual whose gender identity does not conform with their sex assigned at birth, including those individuals who identify as non-binary or genderqueer.

66. Andrew R. Flores, Taylor N.T. Brown & Jody L. Herman, *Race and Ethnicity of Adults Who Identify as Transgender in the United States*, WILLIAMS INST. 2 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf. Although this number is likely under-representative of the total transgender population. *See* Am. Psych. Ass'n, *Psychological Practice with Transgender and Gender Nonconforming People*, *supra* note 36, at 832; *Census Bureau Projects U.S. and World Populations on New Year's Day*, U.S. CENSUS BUREAU, https://www.census.gov/newsroom/press-releases/2022/new-years-day-population.html#:~:text=DEC.,Day%20(April%2-01)%202020 (last visited Feb. 22, 2024).

67. *See Transgender People and Discrimination*, ACLU, https://www.aclu.org/news/by-issue/transgender-people-and-discrimination (last visited Feb. 22, 2023) (collecting articles concerning discrimination against transgender individuals in the United States).

68. *Report of the APA Task Force on Gender Identity and Gender Variance*, AM. PSYCH. ASS'N 35 (2008), https://www.apa.org/pi/lgbt/resources/policy/genderidentity-report-.pdf.

69. *Id.* at 27.

70. *See id.*

71. *Id.* ("Since the late 1970s, the focus of research on transgender issues has broadened beyond the earlier clinical focus. . . . Spurred by the growing visibility of the transgender movement, scholars and researchers developed a strong interest in the diversity of sex, gender identity, and gender expression. Studies emerged that approached transgender issues from such disciplines as psychology, anthropology, sociology, and the humanities. And since the 1990s, a public health research agenda has developed in response to the impact of the HIV/AIDS epidemic on some segments of the transgender community. The number of

erasure have left deep gouges in the transgender community's health and stability.

Transgender individuals experience exponentially higher mortality and premature death rates than their cisgendered cohorts, including disproportionate exposure to communicable and noncommunicable diseases,[72] substance abuse disorders,[73] depressive and anxiety conditions,[74] suicidal ideation,[75] and interpersonal violence.[76] Since 2008, at least 300 transgender individuals have been murdered in the United States.[77] However, even this abhorrent statistic is likely "grossly underestimated because gender identity is not routinely reported in violent crime statistics."[78] Considering all of the aforementioned factors, transgender individuals in the United States are nearly "twice as likely to die" than their cisgendered counterparts.[79]

Alongside these horrific statistics, transgender individuals in the United States face a deadly triad of crises: difficulties accessing employment, housing discrimination, and denial of basic healthcare.[80] Discrimination both at home and

publications in this area grew substantially, reflecting a variety of scientific and scholarly approaches ranging from case reports, grounded theory, feminist analysis, cross-sectional surveys and interviews, and longitudinal and intervention studies." (citations omitted)).

72. Landon D. Hughes, Wesley M. King, Kristi E. Gamarel, Arline T. Geronimus, Orestis A. Panagiotou & Jaclyn M.W. Hughto, *Differences in All-Cause Mortality Among Transgender and Non-Transgender People Enrolled in Private Insurance*, 59 DEMOGRAPHY 1023, 1024 (2022) ("[W]hen compared to their non-trans counterparts, trans people have a higher prevalence of HIV, cardiovascular disease, and diabetes.").

73. Jaclyn M.W. Hughto, Emily K. Quinn, Michael S. Dunbar, Adam J. Rose, Theresa I. Shireman & Guneet K. Jasuja, *Prevalence and Co-occurrence of Alcohol, Nicotine, and Other Substance Use Disorder Diagnoses Among US Transgender and Cisgender Adults*, 4 JAMA NETWORK OPEN 2 (2021) ("Research suggests that substance misuse and related disorders are in part associated with some transgender people's reliance on substances to cope with the psychological toll of discrimination. . . Significantly more transgender people than cisgender people had a nicotine, alcohol, or drug [Substance Use Disorder Diagnostics].").

74. Janelle M. Downing & Julia M. Przedworski, *Health of Transgender Adults in the U.S., 2014–2016*, 55 AM. J. OF PREVENTATIVE MED. 336, 339 (2018).

75. Hughes et al., *supra* note 72, at 1024 ("Among trans populations, prevalence estimates for attempted suicide range from 10% to 44%, much higher than the estimated 4.6% among the general U.S. population. Furthermore, the prevalence of suicidal ideation among trans populations ranges from 37% to 83% across studies.").

76. *Id.*

77. *See id.*

78. *Id.*

79. *Id.* at 1023.

80. *See* Willy Wilkinson, *Public Health Gains of the Transgender Community in San Francisco: Grassroots Organizing and Community Based Research*, *in* TRANSGENDER RIGHTS 192, 192 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006); Downing &

in public prevents many transgender youth from effectively accessing basic educational opportunities.[81] Those who flee from violence and harassment at home are often confronted by a job market that is particularly hostile to their identities, leaving many in a state of severe financial instability.[82] While searching for housing opportunities, transgender individuals encounter similarly dismal prospects; one in five transgender individuals experience homelessness in their lifetime and transgender youth account for "'an estimated 20–40% of the more than 1.6 million homeless youth' in the United States."[83] Despite the Fair Housing Act and the U.S. Department of Housing and Urban Development's prohibition of discrimination against renters or homebuyers on the basis of gender identity, "[o]ne in five transgender people in the United States has been discriminated [against] when seeking a home, and more than one in ten have been evicted from their homes."[84] The combination of these difficulties compromises the health and welfare of transgender individuals, consequentially limiting their ability to participate equally in society.

While the myriad of perils associated with the transgender identity pose extreme risks to the health and wellbeing of transgender individuals, research overwhelmingly demonstrates that individualized gender-affirming healthcare serves to mitigate some of the most severe psychological outcomes that permeate

Przedworski, *supra* note 74, at 339 ("[C]ompared with cisgender respondents, [t]ransgender people had lower educational attainment and income and were more likely to be unemployed, never married, and uninsured.").

81. *See generally* Joseph G. Kosciw, Emily A. Greytak, Noreen M. Giga, Christian Villenas & David J. Dischewsk, *The 2015 National School Climate Survey*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 12–13 (2016), https://www.glsen.org/sites/default/files/2020-01/GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf (stating that 43.3% of transgender students felt unsafe at school on account of their gender expression and 39.4% of transgender students avoided school restrooms because they felt unsafe or uncomfortable).

82. *Employment*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org-/issues/employment (last visited Feb. 22, 2024) ("More than one in four transgender people have lost a job due to bias, and more than three-fourths have experienced some form of workplace discrimination. Refusal to hire, privacy violations, harassment, and even physical and sexual violence on the job are common occurrences, and are experienced at even higher rates by transgender people of color. Many people report changing jobs to avoid discrimination or the risk of discrimination. Extreme levels of unemployment and poverty lead one in eight to become involved in underground economies—such as sex and drug work—in order to survive.").

83. *Housing & Homelessness*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transeq-uality.org/issues/housing-homelessness (last visited Feb. 22, 2024).

84. *Id.*

the transgender community.[85] Gender-affirming healthcare models such as counseling, social transition, hormone therapy, and surgery have rendered immensely beneficial outcomes for transgender individuals, including the reduction of suicidal ideation and suicide attempts by up to 73%[86] and the likelihood of experiencing depression by 60%.[87] Yet, despite these near miraculous results, state legislatures across the United States continuously seek to suppress access to gender-affirming care.[88] Without access to such care, transgender youth and adults continue to weather immense "societal stigma and discrimination" as a result of expressing their gender identities.[89]

85. *See, e.g.*, *Gender Affirming Care for Youth*, THE TREVOR PROJECT (Jan. 29, 2020), https://www.thetrevorproject.org/research-briefs/gender-affirming-care-for-youth/; Matouk & Wald, *supra* note 61; Diana M. Tordoff, Jonathon W. Wanta, Arin Collin, Cesalie Stepney, David J. Inwards-Breland & Kym Ahrens, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 JAMA NETWORK OPEN 2 (2022); Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, 156 JAMA SURGERY 611, 612 (2021).

86. Giuliana Grossi, *Suicide Risk Reduces 73% in Transgender, Nonbinary Youths with Gender-Affirming Care*, HCPLIVE (Mar. 8, 2022), https://www.hcplive.com/view/suicide-risk-reduces-73-transgender-nonbinary-youths-gender-affirming-care; THE TREVOR PROJECT, *supra* note 85 (finding lower incidences of suicidal ideation and behavior when a transgender youth's chosen name is consistently used).

87. *See* Grossi, *supra* note 86.

88. *See* ACLU, supra note 14 (identifying 122 circulating pieces of state legislation targeting healthcare access for transgender individuals as of April 22, 2023); *see, e.g.*, TENN CODE ANN. § 68-33-103(a)(1) (West 2023) (prohibiting healthcare providers from "performing on a minor or administering to a minor a medical procedure if the performance or administration of the procedure is for the purpose of: . . . Enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex"); Letter from Ken Paxton, Att'y Gen. of Tex, to Matt Krause, H. Comm. On Gen. Investigating (Feb. 18, 2022), https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf (Texas Governor Greg Abbott declaring that gender-affirming care constitutes child abuse, and directing the Texas Department of Family and Protective Services to investigate the parents of a child "who is subjected to these abusive gender-transitioning procedures"). *See also* Kevin Freking, *House Approves Trans Athlete Ban for Girls and Women's Teams*, AP NEWS (Apr. 21, 2023), https://apnews.com/article/congress-transgender-women-sports-ban-athletes1c58c20cac2b1-91e323e4376d7949a2d (reporting on federal congressional efforts to bar transgender athletes whose assigned sex was male at birth from competing on girls or women's sports teams at federally-supported schools).

89. Kevin B. O'Reilly, *Why Anti-Transgender Bills are a Dangerous Intrusion on Medicine*, AM. MED. ASS'N (May 7, 2021), https://www.ama-assn.org/delivering-care/population-care/why-anti-transgender-bills-are-dangerous-intrusion-medicine.

The transgender community permeates nearly all facets of American society. Transgender individuals exist across all racial and ethnic demographics.[90] They reside in every state, raise families, and serve in the U.S. military.[91] Members of the transgender community are responsible for many cultural innovations: Wendy Carlos shifted the paradigm of music by co-creating the synthesizer in the 1960s,[92] while Lily and Lana Wachowski's *Matrix* franchise has dominated American culture since 1999.[93] Transgender individuals hold seats in public offices across the United States[94] and preside over courtrooms in multiple jurisdictions.[95] Yet, despite their omnipresent status in American society, the transgender community faces an incessant onslaught of deadly threats from all sides.

Throughout the 2024 legislative session, over 460 unique pieces of anti-transgender legislation circulated among state legislatures, each seeking to restrict the liberties and rights of members of the transgender community in some

90. Halley P. Crissman, Mitchell B. Berger, Louis F. Graham & Vanessa K. Dalton, *Transgender Demographics*: *A Household Probability Sample of US Adults, 2014*, 107 AM. J. PUB. HEALTH 213, 214–15 (2017).

91. *See* Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, WILLIAMS INST. (2014), http://williamsinstitute.law.ucla.edu/wpcontent/uploads/Transgender-Military-Service-May-2014.pdf; Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anifi, *The Report of the 2015 U.S. Transgender Survey* 2, NAT'L CTR. FOR TRANSGENDER EQUAL. 167 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%CC20Report%20-%20FINAL%201.6.17.pdf; Rebecca L. Stotzer, Jody L. Herman & Amira Hasenbush, *Transgender Parenting: A Review of Existing Research*, WILLIAMS INST. (2014), http://williamsinstitute.law.ucla.edu/research/parenting/transgenderparenting-oct-2014.

92. Natasha MacDonald-Dupuis, *Meet Wendy Carlos; The Trans Godmother of Electronic Music*, VICE (Aug. 11, 2015, 7:40 AM), https://www.vice.com/en/article/53agdb/-meet-wendy-carlos-the-trans-godmother-of-electronic-music.

93. *See* Tracey Baim, *Second Wachowski Filmmaker Sibling Comes Out as Trans*, WINDY CITY TIMES (Mar. 3, 2016), https://www.windycitytimes.com/lgbt/Second-Wachowski-filmmaker-sibling-comes-out-as-trans-/54509.html; Emily St. James, *How the Matrix Universalized a Trans Experience– And Helped Me Accept My Own*, VOX (Mar. 30, 2019), https://www.vox.com/culture/2019/3/30/18286436/the-matrix-wachowskis-trans-experience-redpill.

94. *See* Rachel Savage & Thomas Haynes, *4 Openly Trans Politicians and Government Officials Making History Around the World*, GLOB. CITIZEN (Mar. 31, 2021), https://www.globalcitizen.org/en/content/transgender-politicians-trans-day-of-visibility/ (reporting that, in 2021, Four-Star Admiral and current Assistant Secretary for Health Rachel Levine became "the first openly transgender person confirmed in a top government job by the US Senate").

95. *See, e.g.*, Katie Campbell, *Transgender Judge Takes Bench as Gender Issues Heat Up*, ARIZ. CAP. TIMES (Oct. 26, 2018), https://azcapitoltimes.com/news/2018/10/26/arizona-tracey-nadzieja-transgender-judge-takes-bench-as-gender-issues-heat-up/.

manner or fashion.[96] These proposed pieces of legislation impact nearly all areas of life for transgender individuals. Many of these proposed laws aim to codify scientifically outdated and cisgenderist notions of sex into the respective states' legal framework,[97] while others seek to further disenfranchise the transgender community by limiting access to medical care,[98] requiring that school administration "out" transgender students to their parents,[99] and banning educational curricula that does not adhere to cisgenderist principles.[100] Elevating the civil rights assault to even higher degrees, some legislation attempts to weaponize the framework of equal protection challenges against transgender plaintiffs by explicitly codifying anti-transgender "dogwhistles" as important

96. *See* ACLU, *supra* note 14.

97. *See, e.g.*, H.R. 2391, 56th Leg., 2d Reg. Sess. (Ariz. 2024) (proposing to define "sex" for the purposes of any state law or record-collecting procedure as "[an] individual's biological sex at birth, either male or female."); H.R. 1291, 123d Gen. Assemb., 2d Reg. Sess. (Ind. 2024) (seeking to redefine a person's "sex" for the purposes of state benefits and discrimination as "the biological, genetic identity of a person as either male or female . . . [not including] gender identity or any other term that conveys a person's subjective identification of a term other than male or female."). *But see* Adams v. Sch. Bd. of St. John's Cnty., 57 F.4th 791, 836 (11th Cir. 2022) (Pryor, J. dissenting) (recognizing the importance of neurological considerations of gender identity and gender role in determining a person's sex).

98. *E.g.*, H.B. 419, 67th Gen. Assemb., Reg. Sess. (Idaho 2024) (forbidding the use of state Medicare funds to fulfill any gender reassignment procedures, including treatments and surgery for any resident over eighteen (18) years of age"); H.B. 4096, 103d Gen. Assemb., Reg. Sess. (Ill. 2024) (defining sex as indicated by sex assigned as birth and forbidding the use of "any medical procedure, including a surgical procedure, to affirm a person's perception of his or her sex if that perception is inconsistent with the person's sex" on any person under eighteen years old).

99. *E.g.*, H.B. 1045, 157th Gen. Assemb., 2d Sess. (Ga. 2024) (forbidding school personnel from knowingly "withhold[ing] from the parent or legal guardian of a student under the age of 18 years information related to his or her perception that his or her gender is inconsistent with his or her sex" and providing parents with a private right of action for any violation); S.B. 1810, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024) (requiring that school administration report to a student's parents if the student requests that they "be addressed using a name that differs from the name assigned to the[m] on the [their] school registration forms or in the [their] educational record, or that the [they] be addressed using a pronoun that does not correspond with the sex listed on the [their] official birth certificate . . . "and proving parents with a private right of action for any violation).

100. *E.g.*, S.B. 5653, 2024 Leg., Reg. Sess. (Wash. 2024) (forbidding classroom instruction on gender expression or identity "in kindergarten through third grade or in a manner that is not age appropriate or developmentally appropriate for students"; simultaneously creating "procedures for a parent to object to classroom materials and activities" on the bases of "beliefs regarding morality, sex, and religion or the belief that such materials or activities are harmful"); H.B. 122, 2024 Leg., Reg. Sess. (La. 2024) (forbidding school employees and presenters from discussing; (1) "topics of sexual orientation or gender identity in any classroom discussion or instruction" or "during any extracurricular academic, athletic, or social activity" or; (2) discussing "his own sexual orientation or gender identity.").

government interests[101] and forbidding accommodations to transgender individuals if such accommodations "undu[ly] burden" cisgendered people.[102] All told, the startling array of invidious and targeted legislation against the transgender community evinces an inexplicable malice harbored by state legislators. If left unchecked, these laws can only serve to bolster the deluge of existential threats faced by the transgender community.

B. *The Equal Protection Clause: Development and Current Framework*

Though the transgender community faces immense threats and hardships,[103] the U.S. Supreme Court has yet to afford them heightened Fourteenth Amendment scrutiny protections against discriminatory or invidious legislation. This Section argues that the history of Equal Protection Clause jurisprudence indicates a slow yet deliberate expansion of its protections, demonstrating how and why the transgender community should be afforded a heightened degree of scrutiny. The following Sections provide an analysis of equal protection claims under the Fourteenth Amendment, including: (1) a brief summary of the Equal Protection Clause and the general contemporary framework of equal protection claim analyses, and; (2) an outline of the development of the intermediate scrutiny standard and the Supreme Court's treatment of sex-based classifications under the Equal Protection Clause.

1. The Equal Protection Clause

The Fourteenth Amendment has served as the vehicle for the largest expansions of civil rights in contemporary history.[104] Ratified at the height of the Reconstruction Era, the Amendment was intended to protect then recently

101. *See, e.g.*, H.B. 2391, 56th Leg., 2d Reg. Sess. (Ariz. 2024) ("Distinctions between the sexes with respect to athletics, prisons or other detention facilities, domestic violence shelters, sexual assault crisis centers, locker rooms, restrooms and other areas where biology, safety or privacy are implicated that result in separate accommodations are substantially related to the important government objectives of protecting the health, safety and privacy of individuals in those circumstances."); *see* discussion *infra* Section II.A.2. (providing further discussion of privacy interests in the context of transgender discrimination).

102. H.B. 325, 2023 Leg., Reg. Sess. (Iowa 2023) ("[W]ith respect to gender accommodations provided to a person whose gender identity is not the same as the person's sex, an accommodation for the person shall not be made if the accommodation places an undue burden on another person whose gender identity is the same as the person's sex.").

103. *See* discussion *supra* Section I.A.2.

104. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (invalidating state segregation statutes); Roe v. Wade, 410 U.S. 113, 165–66 (1973) (holding that there is a fundamental right to receive an abortion).

emancipated slaves from invidious and discriminatory legislation enacted by state governments.[105] Today, the Amendment is interpreted as precluding any legislation that discriminates against "different classes [of individuals] on the basis of criteria wholly unrelated to the objective of that [legislation]."[106] Under this Amendment, citizens may attack a law or government action based on its discriminatory treatment against a protected class of individuals.[107] At the core of each anti-discrimination case rests the Amendment's Equal Protection Clause, which prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[108] While the Fourteenth Amendment was originally drafted within the context of race, the U.S. Supreme Court has repeatedly interpreted the broad wording of the Equal Protection Clause to preclude discrimination based on a variety of other classifications.[109] The Clause's extensive application has earned it the recognition as the "single most important concept in the Constitution for the protection of individual rights."[110]

In order to bring an equal protection claim, a plaintiff must demonstrate the government has created a distinction (or "classification") between similarly situated individuals that results in disparate treatment of the two classes.[111] Plaintiffs may challenge a law or government action on equal protection grounds when the government "impos[es] a burden or confer[s] a benefit on one class of persons to the exclusion of others."[112] These classifications may be facially apparent in the law's statutory text, or observable through the effect of a neutrally written law that "distribut[es] burdens or benefits unequally."[113]

105. Fitzpatrick & Shaw, *supra* note 7. Although this Note focuses on the Fourteenth Amendment and its implications on state legislation, it is important to note that the Supreme Court has interpreted the Fifth Amendment's Due Process Clause as applying the Equal Protection Clause of the Fourteenth Amendment to the federal government. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

106. Reed v. Reed, 404 U.S. 71, 75–76 (1971) ("A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (internal citation omitted)).

107. *See* Jane Langdell Robinson, *Recent Developments in Equal-Protection Litigation for Transgender People*, 84 TEX. B.J. 966, 966 (2021).

108. U.S. CONST. amend. XIV.

109. *See* Fitzpatrick & Shaw, *supra* note 7.

110. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989) (quoting JOHN E. NOWAK, RONALD ROTUNDA, & J. NELSON YOUNG, CONSTITUTIONAL LAW 524 (3d ed. 1986)).

111. *See id.* at 123.

112. *Id.*

113. *Id.*

Consider the following example from the watershed equal protection case *Craig v. Boren*[114]: a state law regulates the selling of "nonintoxicating" 3.2% alcohol-by-volume beer to minors.[115] Under the law's statutory language, women are allowed to purchase the beverages upon turning eighteen years of age.[116] However, the same law prohibits men from purchasing the very same beverages until they turn twenty-one years of age.[117] Under such circumstances, the law is "subject to scrutiny under the Equal Protection Clause" because of its facial classification that discriminates between individuals of different sexes.[118] When the U.S. Supreme Court heard this matter in 1976, it ultimately invalidated the law under the Equal Protection Clause.[119]

Equal protection claim analyses utilize a series of "means-end" tests in order to determine whether the government's discriminatory classification is sufficiently justifiable.[120] These tests, known as "levels of scrutiny," balance the intrusion upon individual rights against a deference to the purported purpose of the legislation.[121] The specific framework of a plaintiff's equal protection claim—and, ultimately, their likelihood of success[122]—rests largely upon which level of scrutiny is applied.[123] In determining the applicable level of scrutiny, courts must first identify the class of individuals against whom the challenged law or action discriminates.[124] The processes of identifying and applying each test are discussed below, beginning with the most rigid standard (i.e., more protective of individual rights) and progressing to the most deferential to the

114. 429 U.S. 190 (1976).

115. *Id.* at 191–92.

116. *Id.*

117. *Id.*

118. *Id.* at 197 (quoting Reed v. Reed 404 U.S. 71, 75 (1971)).

119. *Id.* at 210; *see* discussion *infra* Section I.B.2.c. (discussing the Supreme Court's holding in *Craig v. Boren* and resultant introduction of the intermediate scrutiny test).

120. Galloway Jr., *supra* note 110, at 123.

121. *See* R. Randall Kelo, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 3–4 (1995) (explaining that in applying certain forms of equal protection analyses, "the court does not give special deference to the legislature's judgment, but rather balances for itself the relevant costs and benefits of the governmental program to ensure that the balance is sufficiently rational and does not reflect an excessive burden on the individual").

122. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (positing that heightened scrutiny is "strict in theory and fatal in fact" while the lowest form of scrutiny is "minimal . . . in theory and virtually none in fact" (internal quotation marks omitted)).

123. Galloway Jr., *supra* note 110, at 124–25.

124. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2019).

government's purported purpose of the statute in question. The standards include strict scrutiny, intermediate scrutiny, and rational basis review:

Strict Scrutiny: When a challenged law or action creates a discriminatory "suspect" classification based upon race, ethnicity, national origin, or the burdening of an individual's fundamental right,[125] courts exercise strict scrutiny in determining whether such discrimination is constitutional. In the plainest of terms, strict scrutiny necessitates that the challenged law or government action is only upheld if it is "narrowly tailored" to a "compelling government interest."[126] This standard is especially formidable, as the *actual* underlying objective of the challenged law or action must hold such great societal importance that it can rightfully be considered "compelling."[127] Compelling interests are few and far between, reserved only for the most pressing of circumstances, including national security[128] and remedying the effects of past de jure discrimination.[129]

If a compelling interest is found, the government must then demonstrate that the law or action is narrowly tailored to its objective. "Narrowly tailored" sets a twofold standard: the action or law must be: (1) substantially effective in achieving its objective, and; (2) the "'least restrictive alternative' available to pursue those [interests]."[130] A narrowly tailored law must not be "overinclusive" or "underinclusive" in scope.[131] While an overinclusive law affects more individuals than necessary to achieve its objective, an underinclusive law does not affect enough individuals to achieve its objective.[132] Under the strict scrutiny test, if the challenged law or action fails to present a compelling interest, or the

125. "Fundamental rights" refer to unenumerated constitutional rights, such as the right to marry and the right to conduct interstate travel. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").

126. *See* Galloway, Jr., *supra* note 110, at 125.

127. *See* Winkler, *supra* note 124, at 800.

128. *See* Korematsu v. United States, 323 U.S. 214, 219–20 (1944).

129. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007).

130. Winkler, *supra* note 124, at 800.

131. *Id.* at 804.

132. *See id.*

means of achieving that interest are not narrowly tailored, then the law is unconstitutional.[133]

Intermediate Scrutiny: Reserved for laws that discriminate based on sex-based classifications, intermediate scrutiny requires that the challenged law or action be "substantially related" to an "important governmental objective[]."[134] While not as restrictive as the strict scrutiny test, intermediate scrutiny similarly requires that the challenged law or action be both "substantially effective and necessary" for furthering its actual interest.[135] Intermediate scrutiny analyses require that the government demonstrate an "exceedingly persuasive justification" for its challenged law or action.[136]

The important interest at the heart of the challenged action need not be as overwhelming as those required by strict scrutiny, but must still meet certain standards of consequentiality.[137] For example, a court implementing intermediate scrutiny will reject any proposed governmental interest based in "administrative convenience"[138] or gender-based stereotypes.[139] Prior decisions of the U.S. Supreme Court have identified numerous important governmental interests—many of which concern protecting interests of the familial unit—such as

133. *See* APRIL J. ANDERSON, CONG. RSCH. SERV., IF12391, EQUAL PROTECTION: STRICT SCRUTINY OF RACIAL CLASSIFICATIONS 1 (2023).

134. Craig v. Boren, 429 U.S. 190, 197 (1976).

135. Galloway Jr., *supra* note 110, at 143–44.

136. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

137. *See* Galloway Jr., *supra* note 110, at 143.

138. *E.g.*, *Craig*, 429 U.S. at 198 (discussing the insufficiency of "administrative ease and convenience" in justifying "gender-based classifications"); Stanley v. Illinois, 405 U.S. 645, 656–57 (1972) (rejecting the interest of administrative convenience in "procedure by presumption" for certain sex-based classifications); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (recognizing that "any statutory scheme which draws a sharp line between the sexes, Solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the (Constitution) . . . .'" (alteration in original) (citations omitted)).

139. *Hogan*, 458 U.S. at 724–25 ("[T]he test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."). This language serves as an additional example of the historic interchangeable use of the terms "sex" and "gender" in the context of intermediate scrutiny. Examples of how contemporary case law has parsed apart the differences and acknowledged the similarities between sex-based stereotypes and gender-based stereotypes can be found in Sections I.B.2.a., b. and I.C.2.

preventing illegitimate teenage pregnancies[140] and fostering opportunities for relationships between mothers and their biological children.[141]

Upon finding an actual important governmental interest, the court must then determine whether the challenged law or act is substantially related to its objective. The ill-defined requirements of a "substantial relationship" have puzzled judicial factfinders for decades,[142] but the general consensus is that the requirements of "substantial effectiveness" and "narrowly tailored means" utilized in strict scrutiny also apply at the intermediate level.[143]

Rational Basis: When neither of the aforementioned levels of heightened scrutiny are applicable, courts will implement the exceedingly deferential rational basis test.[144] Under a rational basis review, the challenged law or action will withstand scrutiny so long as it is rationally related to a conceivably legitimate government interest.[145] Unlike in a heightened standard of review, where the stated government interest must be the challenged law or action's *actual* interest, judges and counsel conducting a rational basis analysis are permitted to conceive of and suggest their own legitimate interests in the government's stead.[146]

While nearly all government interests are held to be legitimate, courts may elevate their standard of review if they suspect that the governmental interest is tainted by prejudice or animosity against a particular class of individuals.[147] When such animus is found, the proverbial well is poisoned, and the law is struck down.[148]

A class of individuals who otherwise would have received rational basis scrutiny will be afforded heightened scrutiny if they are able to demonstrate that they are "quasi-suspect."[149] In identifying quasi-suspect classes, courts look for: (1) a history of discrimination against the class; (2) defining characteristics which "bear relation to [the class's] ability to contribute to society;" (3) the presence of

140. Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 470–71 (1981).

141. Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 64–65 (2001).

142. *Michael M.*, 450 U.S. at 475 n.10 ("The question whether a statute is *substantially* related to its asserted goals is at best an opaque one." (alteration in original)).

143. *See, e.g.*, *id.* at 473–75 (assessing the efficacy and tailoring of a gender-discriminatory statute).

144. For example, classifications drawn on the basis of wealth have repeatedly been afforded rational basis scrutiny. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966).

145. Galloway, Jr., *supra* note 110, at 126.

146. *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300 (1998).

147. Romer v. Evans, 517 U.S. 620, 632 (1996).

148. *Id.*

149. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610 (4th Cir. 2020).

immutable or distinguishing characteristics within the class; and (4) whether the class is politically powerless.[150] Despite the utility of this mechanism in affording heightened scrutiny to vulnerable populations, the ambiguous and seemingly amorphous nature of the criteria defining quasi-suspect classifications often leads courts to eschew granting quasi-suspect status to previously unidentified classes.[151]

The value that a heightened form of scrutiny holds in a challenger's equal protection claim is immeasurable. Under both intermediate and strict scrutiny, the challenged law is presumed unconstitutional and the government bears the burden of proving that it is sufficiently justifiable under the applicable test.[152] Under rational basis, however, the law is presumed constitutional and the burden of proof shifts to the challenger to demonstrate that the government's purported justifications are either illegitimate or not rationally related to the action taken.[153] On top of this already exceedingly high bar for the challenger, courts conducting rational basis review offer substantial deference to the justifications provided by the government.[154] This renders a challenger's chances of success under rational basis scrutiny nigh on impossible, leading legal scholars to postulate that "once the [c]ourt sorts the case into . . . [a] constitutional bin"—strict scrutiny, intermediate scrutiny, or rational basis—"the outcome is virtually foreordained."[155] For this reason, the utility that intermediate scrutiny review provides to challengers cannot be understated.

150. *Id.*

151. Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 914–17 (1981).

152. Galloway, Jr., *supra* note 110, at 124.

153. Heller v. Doe, 509 U.S. 312, 320–21 (1993) ("A statute is presumed constitutional, and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.'" (citations omitted)); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563 (2012) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting Hooper v. California, 155 U.S. 648, 657 (1895))).

154. *See Heller*, 509 U.S. at 321 ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'" (citations omitted)); Winkler, *supra* note 124, at 799 ("The leniency of the [rational basis] standard is essentially the judiciary's way of implementing deference.").

155. Winkler, *supra* note 124, at 799 (quoting JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 55 (1997)).

2. The Development of the Intermediate Scrutiny Test for Sex-Based Discrimination

Intermediate scrutiny is a relatively new facet of equal protection jurisprudence. At the outset of early Fourteenth Amendment litigation, heightened scrutiny was only available to claims based upon racially discriminatory classifications.[156] While these claims were entitled to strict scrutiny review, all other classifications were relegated to the highly deferential rational basis test.[157] The lenient standards of rational basis rendered the dismissal of a plaintiff's challenge a foregone conclusion.[158] Thus, with the deck stacked against them, plaintiffs offering claims based upon non-suspect classifications stood virtually no chance to satisfy their burden of proof.[159] Under rational basis, governmental defendants could rationalize their actions under any number of hypothetical or ad hoc justifications.[160] If plaintiffs could not provide

156. *See History of Equal Protection and the Levels of Review*, LAWSHELF, https://lawshelf.com/coursewarecontentview/history-of-equal-protection-and-the-levels-of-review (last visited Feb. 22, 2024) ("Although the Equal Protection Clause has been read to protect against the discriminatory use of classifications besides race and national origin, in areas outside of race discrimination, the equal protection clause was not traditionally a major consideration. Historically, so long as the legislative classification (other than race or national origin) was rationally related to the legislative purpose, courts were not likely to strike down the law as an Equal Protection violation, even if the legislative purpose was itself invalid."); Gerald Gunther, *Foreward: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) ("At the beginning of the 1960's, judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases.").

157. LAWSHELF, *supra* note 156 ("For a number of years, all Equal Protection cases were subject either to rational basis review or to strict scrutiny.").

158. *See id.*

159. Winkler, *supra* note 124, at 799 ("This [rational basis] standard is famously lenient, and, according to widespread belief, nearly every law judged by it is upheld."); Gunther, *supra* note 156, at 8 (referring to rational basis as providing "minimal scrutiny in theory and virtually none in fact").

160. *See* Wexler, *supra* note 146, at 300; *see, e.g.*, FCC v. Beach Commc'n, Inc., 508 U.S. 307, 313 (1993) ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices . . . [A] statutory classification that [does not proceed] along suspect lines . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where . . . there are plausible reasons for Congress' action, our [rational basis] inquiry is at an end. It is . . . "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," because this Court has never insisted that a legislative body articulate its reasons for enacting a statute" (citations omitted)).

evidence of some underlying prejudice or animus, then the court would defer to the government's purported justifications on nearly every occasion.[161]

The intermediate scrutiny test, as demonstrated by its long lineage of case law, was developed in hopes of striking a balance between the fatal-in-fact strict scrutiny test and the fatal-in-theory rational basis test.[162] Under intermediate scrutiny, courts began extending heightened protections to classes of individuals whose claims would have otherwise been relegated to rational basis review due to the nature of the classification drawn by the challenged action.[163] Classifications drawn along the lines of sex were the first and foremost to receive intermediate scrutiny, but variations of the test have since been applied to classifications drawn against quasi-suspect classes, such as illegitimate children.[164]

The following Section outlines the gradual evolution of the intermediate scrutiny test through the U.S. Supreme Court's jurisprudence, with particular attention paid to the developments of protections against statutory sex-based classifications. First, Section I.B.2.a. discusses *Reed v. Reed*,[165] a probate case often deemed the incipiency of the intermediate scrutiny test.[166] Next, Section I.B.2.b. assesses the development of the *Reed* holding in *Frontiero v. Richardson*,[167] a case wherein a female member of the armed services challenged

161. *See* Winkler, *supra* note 124, at 799; Gunther, *supra* note 156, at 8 (referring to rational basis as providing "minimal scrutiny in theory and virtually none in fact").

162. *See* Wexler, *supra* note 146, at 300 ("Intermediate scrutiny is one of the Court's most frequently employed balancing techniques. Unlike strict scrutiny, which is generally 'strict in theory and fatal in fact,' or rationality review, which is used to uphold laws justified even by hypothesized or ad hoc state interests, intermediate scrutiny requires the Court to weigh conflicting rights and interests and does not predetermine the outcome of the case." (internal quotation marks omitted) (footnotes omitted)); Kathleen M. Sullivan, *Post-Liberal Judging; The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) ("'Intermediate scrutiny,' unlike the poles of the two-tier system, is an overtly balancing mode. It has various incarnations in modern constitutional cases, even though not all of them employ that label.").

163. *See generally* Craig v. Boren, 429 U.S. 190 (1976) (without the development of intermediate scrutiny, this claim—raised on the basis of sex discrimination—would have received a highly deferential rational basis review).

164. *See, e.g.*, Matthews v. Lucas, 427 U.S. 495, 505 (1976) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent." (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972))).

165. 404 U.S. 71 (1971).

166. *Reed v. Reed at 40: A Landmark Decision*, NAT'L WOMEN'S L. CTR (Nov. 16, 2011), https://equity.siu.edu/_common/documents/resources/reed-vs-reed40.pdf.

167. 411 U.S. 677 (1973).

the denial of her right to claim her husband as a "dependent" "for the purposes of obtaining increased" employment benefits.[168] Section I.B.2.c. further analyzes *Craig v. Boren*, in which the parameters of modern intermediate scrutiny test began to materialize.[169] Taken together, these cases demonstrate how the intermediate scrutiny test has gradually expanded to stamp out a wide swathe of capricious legislation based upon both sex stereotypes and gender roles.

a. Sex-Based Classifications and the Guise of Rational Basis in *Reed v. Reed*

The first inklings of intermediate scrutiny analysis appeared in October of 1971, in which the U.S. Supreme Court presided over a dispute regarding an Idaho statute that compelled preferential treatment to males over females in the appointment of estate administrators.[170] Upon the death of their adopted son, separated parents Sally and Cecil Reed each filed competing petitions seeking appointment to administer the decedent minor's estate.[171] Though equally qualified, the probate court ultimately appointed the father as the administrator, citing to Idaho Code Statutes 15–312 and 15–314 as controlling their decision.[172] These code sections, designed to designate priority to certain applicants for administration status of an individual who dies intestate, identified eleven classes determinative of an applicant's relevant rights.[173]

Under Section 15–312, a decedent's father and mother ranked as equal "members of the same entitlement class," and would seemingly be entitled to equal appointment rights.[174] However, Section 15–314 required that, in instances of conflict between equally entitled applicants for letters of administration, "males must be preferred to females."[175] Sally Reed, the mother of the decedent, raised an equal protection challenge against the validity of Section 15–314, arguing that the statute drew an arbitrary sex-based classification that had no relation to "the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate."[176] Chief Justice Warren E. Burger spoke for a unanimous Supreme Court in holding that this "arbitrary preference" of males to females "cannot stand in the face of the Fourteenth

168. *Id.* at 678-79.
169. *See* discussion *infra* Section I.B.2.c.
170. *See Reed*, 404 U.S. at 72–73.
171. *Id.* at 71–72.
172. *Id.* at 72.
173. *Id.* (citing IDAHO CODE § 15–312).
174. *Id.*
175. *Id.* (citing IDAHO CODE § 15–314).
176. *Id.*

Amendment's command that no State deny the equal protection of laws to any person within its jurisdiction."[177]

At the time of the *Reed* decision, the notion of an intermediate level of scrutiny had yet to be developed.[178] Though Sally Reed's claim appeared to receive the rational basis test, the reviewing Court refused to apply the test's traditionally heightened deference to the state legislature.[179] Instead, the Court determined that the sex-based classification rendered by Section 15–314 was wholly arbitrary in light of its supposed purposes, thus violating the Fourteenth Amendment.[180] The Court began their analysis by acknowledging that the Fourteenth Amendment "does not deny to States the power to treat different classes of persons in different ways."[181] Instead, the Amendment sought to preclude any legislation that affords discriminatory treatment to different classes "on the basis of criteria wholly unrelated to the objective of that [legislation]."[182] In other words, the decision to draw a classification drawn between two or more classes must not be arbitrary in light of the legislation's stated objective.

In applying the facts of Sally and Cecil Reed's applications, the Court held that the difference in sex denoted by Section 15–314 bore no rational relation to the purported state objectives that the statute sought to promote.[183] Though the Court found that the state legislature held a legitimate objective in "reducing the workload on probate courts by eliminating one class of contests," it found no rational link between this objective and the mandatory preference of one sex over another.[184] Thus, the Court dismissed the Idaho Legislature's contentions that the mandatory preference for men over women was reasonable in light of this objective because the legislature "knew that men were as a rule more conversant with business affairs than were women" and thus more qualified to serve as an administrator of an estate.[185] This dismissal constituted an implicit rejection of

177. *Id.* at 74.

178. The modern form of "intermediate scrutiny" would not materialize until *Craig v. Boren* in 1976. *See* 429 U.S. 190, 197–198 (1976) (establishing the elements of an intermediate scrutiny claim); *see also infra* Sections I.B.1.; I.B.2.c.

179. *Reed*, 404 U.S. at 74–77.

180. *Id.* at 74, 76–77.

181. *Id.* at 75.

182. *Id.* at 76 ("A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" (citation omitted)).

183. *Id.* at 76–77.

184. *Id.* at 76.

185. *Id.*; *see* Brief for Respondent at 12, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133597, at *12.

the notion that gender may be used as a proxy to perpetuate archaic and arbitrary stereotypes regarding the roles of men and women in society.[186]

The importance of this case is largely drawn from the unanimous Court's final line: "By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause."[187] Despite the fact that the Court reached this determination under the guise of the rational basis test,[188] this final flourish set the stage for the rapid development of a new equal protection test designated for sex-based classifications, and within two years the Court would once again be tasked with determining how sex-based classifications fall within the scope of the Equal Protection Clause.[189]

b. Raising the Bar Against Sex-Based Discrimination in *Frontiero v. Richardson*

By January of 1973, the U.S. Supreme Court was faced with determining the validity of another statute that drew sex-based classifications, this time in the context of federal benefits allowances to armed service members.[190] In *Frontiero v. Richardson*, the Court assessed the language of 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, which stated in part that, while a serviceman could claim his spouse as a dependent for the purposes of receiving increased benefits regardless of any actual dependency, a servicewoman may not do so unless her spouse was actually dependent upon her for over one-half of his financial support.[191] Using their earlier decision in *Reed* to create a "stricter standard of review," the Court struck down the statutory scheme by holding that mere "administrative convenience" is never sufficient in justifying sex-based classifications under the Equal Protection Clause.[192]

Frontiero marks a significant development in the creation of the intermediate scrutiny test. Most importantly, the Supreme Court began its analysis by agreeing with the appellant's contention that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to [close] judicial

186. *See* Craig v. Boren, 429 U.S. 190, 198 (1976) (discussing evolving perceptions of the impact of the *Reed v. Reed* holding).

187. *Reed*, 404 U.S. at 77.

188. *Id.* at 75–76.

189. *See generally* Frontiero v. Richardson, 411 U.S. 677 (1973) (creating a "stricter standard of review" for sex-based classifications under the Equal Protection Clause).

190. *See id.* at 678–79.

191. *Id.*

192. *Id.* at 688, 690–91.

scrutiny."[193] The Court emphasized that such a proposition was implicitly supported by their unanimous decision in *Reed*.[194] In discussing the United States' "long and unfortunate history of sex discrimination," the Court determined that it was necessary to depart from traditional rational basis scrutiny in order to extinguish the "gross, stereotyped distinctions between the sexes" that litter U.S. statutory schemes.[195] The Court paid particular attention to the visibility and immutability of the sex characteristic, finding that "the imposition of special disabilities" on the sole basis of a characteristic that "frequently bears no relation to the ability to perform or contribute to society" stands in violation of basic tenets of justice and ordered liberty.[196] Through such analysis, the Court found that classifications based upon sex are inherently suspect and owed "strict judicial scrutiny."[197] After establishing that heightened scrutiny was required, the Court applied a form of "pseudo-strict" scrutiny in striking down the discriminatory statutory provisions.[198]

A notable difference in opinion arises in *Frontiero*'s concurrence, penned by Justice Lewis F. Powell, Jr. and joined by Chief Justice Burger and Justice Harry Blackmun. In their concurring opinion, the three justices questioned the efficacy of implementing the strict scrutiny test upon sex-based classifications.[199] The justices' hesitancy to extend a heightened form of review arose in light of the then pending Equal Rights Amendment of 1972.[200] This proposed amendment sought to constitutionally codify protections for women against sexual discrimination, and was gaining significant traction across the United States as it awaited state ratification.[201] The concurring justices opined that, in

193. *Id.* at 688.

194. *Id.* at 682.

195. *Id.* at 684–85. Notably, the majority opinion compared the position of women in society to those of Black Americans under the pre-Civil War Slave Codes. Justice William J. Brennan, Jr. drew the following comparison: "Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century later." *Id.* at 685.

196. *Id.* at 686.

197. *Id.* at 688.

198. *Id.* at 688, 690–91 (holding that the statutes sole purpose of "mere administrative convenience" was not a significant enough objective to justify dissimilar treatment between the sexes).

199. *See id.* at 691–92 (Powell, J., concurring).

200. *Id.* at 692 (Powell, J., concurring).

201. *See Equal Rights Amendment*, SMITHSONIAN AM. WOMEN'S HIST. MUSEUM, https://womenshistory.si.edu/spotlight/era#:~:text=In%201972%2C%20the%20Equal%20Rights,states%20for%20and%20against%20passage (last visited Feb. 21, 2024).

light of the ongoing functioning of the democratic process, the majority's suspect class designation essentially pre-empted the legislative process in violation of the separation of powers doctrine.[202] The justices urged that judicial restraint should be exercised over the issue in order to prevent the weakening of the democratic process.[203] In the years following the *Frontiero* decision, intense conservative backlash prevented the Equal Rights Amendment from gaining the thirty-eight state ratifications necessary for its enactment, and the Fourteenth Amendment remained the primary mechanism for challenging sex-based discrimination.[204]

c. Emergence of the Modern Intermediate Scrutiny Test in *Craig v. Boren*

In the wake of *Frontiero*, the U.S. Supreme Court struggled to define the degree of scrutiny to which sex-based classifications were entitled. Doubling back on its initial application of pseudo-strict scrutiny, the Supreme Court in *Stanton v. Stanton*[205] held that sex does not qualify as the sort of suspect classification entitled to strict scrutiny.[206] It was not until the Court's 1976 *Craig v. Boren* decision that the confusion was finally alleviated by the establishment of the modern intermediate scrutiny test.[207]

As briefly described in Section I.B.1., the primary dispute in *Craig v. Boren* surrounded an equal protection challenge against an Oklahoma statute that regulated the sale of "nonintoxicating" 3.2% beer to males and females under the ages of twenty-one and eighteen, respectively.[208] The Court held that the refusal to sell the nonintoxicating beer to men under the age of twenty-one, while simultaneously allowing women ages eighteen to twenty to purchase such beverages, amounted to unconstitutional "invidious discrimination" against males eighteen to twenty years of age.[209] In drawing such a conclusion, the Court consolidated their rationales from *Reed*, *Frontiero*, and other subsequent tests to create what is now known as the intermediate scrutiny test.[210]

202. *See Frontiero*, 411 U.S. at 692 (Powell, J., concurring).

203. *Id.*

204. *See* Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

205. 421 U.S. 7 (1975).

206. *See id.* at 13.

207. *See* Craig v. Boren, 429 U.S. 190, 218–19 (1976).

208. *Id.* at 192.

209. *Id.* at 208–10.

210. *Id.* at 197–98.

At the outset of their analysis, the *Craig* Court offered a reminder that the precedent established by the *Reed* decision controlled its judgment.[211] The Court then posited that previous cases established the functional parameters that a gender-based[212] classification must meet in order to survive a constitutional challenge, namely that: (1) the classification serves an "important governmental objective[]," and; (2) the classification is "substantially related" to that objective.[213] The Court also unambiguously affirmed that mere administrative convenience is never an important enough objective to justify drawing sex-based classifications, and that gender may not be used as a proxy for "archaic and overbroad generalizations" regarding the positions of men and women in society.[214] These tenets form much of the basis of the modern intermediate scrutiny test.[215]

In *Frontiero*, the Court bemoaned the "attitude of 'romantic paternalism'" that had long rationalized sex-based discrimination and, "in practical effect, put women, not on a pedestal, but in a cage."[216] Prior to the *Reed* holding, equal protection challenges raised against such paternalistic legislation would have easily failed under the exceedingly deferential rational basis test.[217] However, the holdings of *Reed*, *Frontiero*, and *Craig* each demonstrate how the development of the intermediate scrutiny test was used to foster the gradual rejection of sex-based discrimination, and provide a glimpse into what has become an ongoing effort to extinguish the sex stereotypes historically entrenched in the United States' "national consciousness."[218] The intermediate scrutiny test has proven its worth in providing formerly powerless classes with

211. *Id.* at 197.

212. The Court's use of the term "gender-based" is another example of how the terms sex and gender have been used interchangeably. *See id.* at 198–99.

213. *Id.* at 197–98.

214. *Id.* at 198.

215. Under the modern intermediate scrutiny test, sex based classifications "fail[ ] unless [they are] substantially related to a sufficiently important governmental interest." Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985)).

216. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

217. *See, e.g.*, State v. Hunter, 300 P.2d 455, 457–58 (Or. 1956) (upholding a state statute that criminalized women's participation in wrestling competitions); Eskridge v. Div. of Alcoholic Beverage Control, 105 A.2d 6, 9 (N.J. Super. Ct. App. Div. 1954) (upholding a municipal ordinance that forbade the sale of alcohol to women sitting at a bar); State v. Emery, 31 S.E.2d 858, 860 (N.C. 1944) (holding that a jury comprised of ten men and two women does not satisfy a statutory prerogative that all juries be comprised of "good and lawful men"); *In re* Mahaffay's Estate, 254 P. 875, 876 (Mo. 1927) (upholding a state statute that forbade a woman from depriving her husband of more than two-thirds of her estate "without the written consent of her husband").

218. *See Frontiero*, 411 U.S. at 684.

the mechanisms to challenge and trounce discriminatory legislation,[219] and likewise serves as a valuable tool for weighing interests that fall outside of the grasp of the near-predestined outcomes of the rational basis and strict scrutiny tests.

As demonstrated by recent equal protection claims raised by transgender individuals, the intermediate scrutiny test continues to serve as a valuable instrument in defeating sex and gender-based stereotypes.

C. *Recent Equal Protection Claims Raised by Transgender Individuals*

In the past twelve years, numerous federal courts have weighed in on the issues of transgender classifications in equal protection claims.[220] Though two decisions entertained the issue merely by analogy to Title VII considerations, their language would later serve as the cornerstone of the Fourth Circuit's explicit application of intermediate scrutiny to classifications drawn against transgender individuals.[221] A subsequent Eleventh Circuit opinion,[222] however, backstepped on the previous decisions' evolving interpretations of how sex and gender interact for the purposes of intermediate scrutiny analyses. So long as this tension proliferates among the circuits, the rights of transgender individuals to equal protection of the law is in jeopardy.

The following Sections provide the facts, holding, and rationales behind each of these decisions.

1. Turning the Handle of the Closet Door: The Eleventh Circuit's 2011 *Glenn* Decision

The past twelve years have witnessed a series of soaring highs and plummeting lows for the expansion of intermediate scrutiny to transgender individuals. The list of notable cases begins on a high note with the Eleventh Circuit's decision in 2011's *Glenn v. Brumby*. At the core of this matter rested Vandiver Elizabeth Glenn's termination from her position as an editor in the

219. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny to a statute that discriminated based upon a child's illegitimacy).

220. *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017) (assessing discrimination against transgender students in the context of Title IX and the Equal Protection Clause); Dodds v. U.S. Dept. of Educ., 845 F.3d 217, 218 (6th Cir. 2016) (assessing discrimination against a transgender student with special needs in the context of Title IX and an Administrative Procedure Act action).

221. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 617 n.15 (4th Cir. 2020).

222. *See* Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (stating that reading gender into the term "sex" is problematic and inappropriate, as they are not analogous).

Georgia General Assembly's Office of Legislative Council (OLC).[223] Glenn commenced an equal protection claim against Brumby, the head of OLC, alleging that her termination was based on both sex discrimination and her then diagnosed Gender Identity Disorder, now known as Gender Dysphoria.[224] In its analysis, the Eleventh Circuit applied the intermediate scrutiny test and determined that Glenn was wrongfully terminated.[225]

Glenn, assigned male at birth, was diagnosed with Gender Identity Disorder in 2005.[226] Shortly after her diagnosis, Glenn initiated the process of transitioning and began "living as a woman outside of the workplace" as a prerequisite step required by her doctor before sex reassignment surgery.[227] While presenting as a man,[228] Glenn was hired by OLC at the close of 2005.[229] Within a year of her hiring, Glenn informed her OLC supervisors of her transgender identity and her transition process.[230] On Halloween of 2006, OLC employees were permitted to work in costume.[231] Glenn attended work while presenting as a woman, and Brumby asked her to leave on account of her "inappropriate" appearance.[232] Upon informing her supervisor of her impending sex-reassignment surgery and her intent to present as a woman at work, Glenn's employment was terminated.[233] Brumby remarked that "[her] intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make [her] coworkers uncomfortable."[234]

At the district court level, Glenn was granted summary judgment on her sex discrimination claim.[235] On appeal, the Eleventh Circuit affirmed the district court's award of summary judgment.[236] Through its analysis, the court sought to determine whether "discriminating against someone on the basis of his or her

223. *See* Glenn v. Brumby, 663 F.3d 1312, 1313–14 (11th Cir. 2011).

224. *See id.*

225. *See id.* at 1320–21.

226. *Id.* at 1314.

227. *See id.*

228. *See* discussion *supra* Section I.A.1.

229. *See Glenn*, 663 F.3d at 1314.

230. *See id.*

231. *See id.*

232. *Id.* (stating that during the incident, the head of OLC made a number of anti-transgender remarks, including "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," and that a "man" wearing woman's clothing is "unnatural").

233. *Id.*

234. *Id.*

235. *Id.* at 1314–15.

236. *Id.* at 1321.

gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause."[237] The court acknowledged the confusion that arises from the seemingly interchangeable use of the terms sex and gender in prior jurisprudence,[238] but simultaneously emphasized the intermediate scrutiny test's importance to disassembling "fixed notions concerning the roles and abilities of males and females."[239]

Applying the rationale from *Price Waterhouse v. Hopkins*,[240] a 1989 Supreme Court Title VII case, the Eleventh Circuit found that discrimination on the basis of gender stereotyping constitutes sex discrimination.[241] Notably, the court mentioned that the very nature of the transgender identity contravenes gender stereotypes,[242] and that there is a "congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms."[243] Citing to a long list of formative intermediate scrutiny cases, the Eleventh Circuit in *Glenn* held that "governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody "the very stereotype the law condemns."[244]

In applying the intermediate scrutiny test, the Eleventh Circuit found that Brumby's decision to terminate Glenn's employment was based solely on discrimination against her gender non-conformity.[245] Before affirming the district court's judgment, the court bluntly stated that "Brumby ha[d] advanced

237. *Id.*

238. *Id.* at 1315 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–47 (1985)).

239. *Id.* at 1316, 1319 ("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.").

240. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (assessing a sex discrimination claim brought by a female partnership candidate who alleged that she was refused partnership status in her accounting firm due to sex discrimination). A plurality decision wrote that "[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* at 251 Two concurring opinions posited that an accused employer bears the burden of proving that "it would have reached the same [employment] decision . . . even in the absence of [constitutionally] protected conduct." *Id.* at 259 (White, J., concurring) (citations omitted).

241. *Glenn*, 663 F.3d at 1316 (quoting *Price Waterhouse*, 490 U.S. at 250–51).

242. *Id.*

243. *Id.*

244. *Id.* at 1320 (quoting J.E.B. v. Alabama, 511 U.S. 127, 138 (1994)).

245. *Id.*

no other reason that could qualify as a governmental purpose, much less an 'important' governmental purpose, and even less than that, a 'sufficiently important governmental purpose' that was achieved by firing Glenn because of her gender non-conformity."[246]

2. Cracking the Closet Door Open: The Sixth Circuit's 2018 *EEOC* Decision, and its 2020 Supreme Court Affirmation in *Bostock*

The next major step in the advancement of transgender protections arose in the Sixth Circuit and was later confirmed by the Supreme Court. This 2018 case, *Equal Employment Opportunity Commission v. R.G. &. G.R. Funeral Homes, Inc.*[247] stemmed from a Title VII wrongful termination suit, in which a transgender funeral home employee was fired after expressing her intent to transition.[248] While the Title VII private action claim did not necessitate the application of any Equal Protection Clause analyses, the Sixth Circuit provided valuable insight into the level of scrutiny afforded to classifications drawn against the transgender community.[249] The Supreme Court then consolidated the case with two other Title VII claims in *Bostock v. Clayton County, Georgia*, ultimately affirming the Sixth Circuit's judgment in favor of the employee.[250]

Aimee Stephens, a transgender woman who was assigned male at birth, served as a funeral director at R.G. & G.R. Funeral Homes for five years.[251] Throughout the duration of her employment, Stevens presented as male.[252] The Funeral Home required its employees to adhere to a strict dress code, including suits and ties for male employees and skirts and business jackets for female employees.[253] Male employees were provided with free suits and ties, and the Funeral Home replaced their male employee's suits as needed.[254] No such gratuities or clothing allowances were offered to female employees.[255]

In July of 2013, Stephens informed the Funeral Home of her lifelong struggle with a "gender identity disorder," and of her intention to "become the person that

246. *Id.* at 1321.

247. 884 F. 3d 560 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton Cnty., Ga., 140 S.Ct. 1731 (2020).

248. *Id.* at 566.

249. Though the Sixth Circuit did not apply an equal protection framework to Stephens's claim, the circuit court's assessment of gender and gender-based stereotyping is a close analogue to modern intermediate scrutiny analyses. *See id.* at 570–72.

250. *Bostock*, 140 S.Ct. at 1737.

251. *EEOC*, 884 F. 3d at 567.

252. *Id.*

253. *Id.* at 568.

254. *Id.*

255. *Id.*

her mind already is."[256] Stephens expressed her intention to receive gender affirming care in the form of sex reassignment surgery, and that she must first take the initial step of "liv[ing] and work[ing] full-time as a woman for one year."[257] Stephens' notification predated a planned vacation and included a statement that, upon her return, she would be representing herself as "her true self, Aimee Australia Stephens, in appropriate female business attire."[258] Stephens was terminated shortly thereafter, with the provision of a severance offer so long as she "agreed not to say anything or do anything."[259] In testimony before the trial court, the owner and operator of the Funeral Home admitted that Stephens was fired because "he (Stephens) was no longer going to represent himself as a man. He wanted to dress as a woman."[260]

Stephens filed a sex discrimination charge with the Equal Employment Opportunities Commission (EEOC), which in turn filed suit against the Funeral Home on Stephens's behalf.[261] The Eastern District of Michigan refused to find that transgender individuals are a protected class under Title VII.[262] However, the district court found merit in the EEOC's claim that firing an individual based upon a failure to conform to "sex or gender-based preferences, expectations, or stereotypes" constitutes sex discrimination.[263] The district court ultimately dismissed the charges against the Funeral Home on the grounds that the employer was precluded from Title VII enforcement under the Religious Freedom Restoration Act.[264]

On appeal, the Sixth Circuit reversed, finding that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination upon the basis of sex."[265] In its holding, the circuit court acknowledged that, through the enactment of Title VII, Congress "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[266] Much like the Eleventh Circuit in *Glenn*, the Sixth Circuit relied heavily upon *Price Waterhouse v. Hopkins* to hold that sex discrimination occurs when an individual

256. *Id.*
257. *Id.*
258. *Id.* at 569.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 569–70.
263. *Id.*
264. *See id.* at 569.
265. *Id.* at 571.
266. *Id.* at 572.

is punished for failing to conform to gender stereotypes.[267] For this same reason, the Sixth Circuit held that "[u]nder any circumstances, '[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination,'"[268] and that the Funeral Home's decision to terminate Stephens based on her gender non-conformity "falls squarely within" the realm of discrimination prohibited by Title VII.[269] The court then extended this rationale to find that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping,"[270] ultimately rendering judgment in favor of Stephens.[271]

The Funeral Home defendant appealed to the U.S. Supreme Court, which heard their consolidated claim in *Bostock*.[272] The Supreme Court's analysis rendered a "simple and momentous" decision[273]: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[274] The Court affirmed the Sixth Circuit's judgment,[275] finding that it is simply impossible to discriminate against a person for being transgender without discriminating on the basis of sex.[276] Notably, the Court referred to its decision in *Bostock* as nothing more than the "straightforward application of legal terms with plain and settled meanings."[277]

267. *Id.* at 571–72 ("[A] female employee who faced an adverse employment decision because she failed to 'walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, [or] wear jewelry,' could properly state a claim for sex discrimination under Title VII—even though she was not discriminated against for being a woman *per se*, but instead for failing to be womanly enough." (citation omitted)).

268. *Id.* at 572 (citing Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004)).

269. *Id.*

270. *Id.* at 576.

271. *Id.* at 596–97.

272. Bostock v. Clayton Cnty., 140 S.Ct. 1731, 1737 (2020) (summarizing the consolidation, the majority stated that "[f]ew facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status").

273. *Id.* at 1741.

274. *Id.* at 1737.

275. *Id.* at 1754.

276. *Id.* at 1741.

277. *Id.* at 1743.

3. Swinging the Closet Door Wide: The Fourth Circuit's 2020 *Grimm* Decision

A mere two months after the U.S. Supreme Court rendered its judgment in *Bostock*, the Fourth Circuit issued a remarkable opinion in which it determined that intermediate scrutiny is applicable to transgender classifications in equal protection claims on the basis of both sex-based discrimination and the quasi-suspect status of the transgender community.[278] In *Grimm v. Gloucester County School Board*, the Fourth Circuit granted summary judgment to a transgender plaintiff who alleged that his school had violated the Equal Protection Clause by implementing a discriminatory restroom policy and refusing to amend school records.[279] Aside from being one of the most recent implementations of intermediate scrutiny to transgender classifications by a federal court of appeals, the Fourth Circuit's decision in *Grimm* also provides unique rationales on how and why the transgender community should be afforded such protections.

Gavin Grimm, the plaintiff in this case, was assigned female at birth and publicly identified as female until the spring of his freshman year at Gloucester County High School.[280] After consulting with a psychologist, Grimm was diagnosed with gender dysphoria.[281] Grimm's psychologist issued a "treatment documentation letter" that encouraged the school to treat Grimm as a male in his daily life and allow him to use male restrooms.[282] Within the year, Grimm had begun "expressing his male identity in all aspects of his life," including changing his first name, using male pronouns, and using male restrooms in public.[283]

In response to his transition, Gloucester County High School initially provided Grimm with access to the gender-neutral restroom located in the school nurse's office as an alternative to the single-sex restrooms throughout the building.[284] However, this alternative created more problems than it solved; Grimm felt stigmatized by having to use a separate restroom and began experiencing anxiety and shame any time he travelled to the nurse's office due to his unique restroom policy, as compared to the rest of the student body.[285] Likewise, the location of the nurse's office within the building often caused him to arrive late to class, drawing further attention to his uniquely singular restroom

278. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608–13 (4th Cir. 2020).

279. *See id.* at 593–94.

280. *Id.* at 598.

281. *Id.*

282. *Id.* (stating that, alongside these measures, Grimm received a referral to begin hormone therapy).

283. *Id.*

284. *See id.*

285. *See id.*

requirement.[286] After meeting with school administrators, Grimm was given permission to use the male restrooms throughout the school.[287]

Although this policy was carried out for seven weeks "without incident,"[288] news of Grimm's arrangement caught the public ear.[289] After receiving complaints from parents and adults in numerous districts, communities, and states, the Gloucester County School Board debated the issue at a public meeting.[290] The twenty-four community members who spoke at the meeting strongly opposed allowing Grimm to use the school's male restrooms.[291] Throughout the course of the meeting, Grimm was accused of predatory behavior,[292] called a "freak,"[293] likened to a dog,[294] and repeatedly told that his gender identity is a "choice."[295] The School Board revoked Grimm's access to the male restrooms the next day and reinstated his private restroom policy, adding that any further use of the school's male restrooms by Grimm would result in disciplinary consequences.[296]

Grimm's transition process continued throughout the remainder of his time at Gloucester County High School.[297] During his junior year, Grimm received state identification reflecting that he was a male and underwent chest reconstructive surgery.[298] At this point, the Gloucester County Circuit Court determined that Grimm was a "fully functioning male" and authorized amending his birth certificate so as to include the correct gender marker.[299] The School Board, however, was unconvinced. Upon presentation of his amended birth

286. *See id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 599 (stating that neither Grimm nor his family were informed that the issue of his restroom accommodations would be discussed at the meeting and that Grimm and his parents were able to attend, but only after learning about the meeting's topic through Facebook).

291. *Id.*

292. *Id.* ("When we have a situation with a young man that says they want to identify themselves as a young lady and they go in . . . the ladies' room with ill intent, where does it end?" (citation omitted)).

293. *Id*.

294. *See id.* ("[M]ust we use tax dollars to install fire hydrants where you can publicly relieve yourselves?" (citation omitted)).

295. *Id.*

296. *See id.* at 600.

297. *Id.*

298. *Id.* at 601.

299. *Id.*

certificate, the School Board refused to update its records, claiming that the amended document was inauthentic.[300]

Grimm subsequently filed suit against the School Board, alleging that "both the restroom policy and the failure to amend his records violated [his] equal protection [rights]."[301] The district court granted Grimm summary judgment on both claims, and the School Board appealed. On appeal, the Fourth Circuit affirmed, applying intermediate scrutiny to each of Grimm's claims.[302] However, the court took a novel approach in reaching this standard. Rather than relying upon the Supreme Court's recent holding in *Bostock*,[303] the Fourth Circuit applied two independent rationales to determine that intermediate scrutiny was appropriate for Grimm's claims.

The Fourth Circuit first held that the School Board's restroom policy facially discriminated on the basis of sex, thus necessitating the application of intermediate scrutiny.[304] The language of the policy required that the school district limit the use of male and female restrooms "to the corresponding biological genders" based on the sex markers on each student's birth certificate.[305] The court in turn held that "when a 'School District decides which restroom a student may use based upon the sex listed on the student's birth certificate,' the policy necessarily rests on a sex classification."[306] The court then found that Grimm was independently subject to sex discrimination when the School Board viewed him as "failing to conform to the sex stereotype propagated by the [restroom p]olicy."[307] The court applied similar reasoning to "easily conclude that the Board's continued refusal to update [Grimm's] school records similarly violates [his] rights."[308]

The Fourth Circuit then posited an alternative holding, finding that heightened scrutiny was applicable due to the quasi-suspect nature of the transgender identity.[309] Citing persuasive support from numerous lower court

300. *Id.*

301. *Id.* at 606.

302. *See id.* at 613.

303. *See* discussion *supra* Section I.C.2.

304. *Grimm*, 972 F.3d at 608.

305. *Id.*

306. *Id.*

307. *Id.* at 608–09 (reiterating "a central tenet of equal protection in sex discrimination cases" that prohibits states from relying upon overbroad generalizations of the sexes).

308. *Id.* at 615.

309. *Id.* at 610.

and circuit court decisions,[310] the court applied the four factor quasi-suspect test to determine that transgender individuals are entitled to intermediate scrutiny.[311] Remarkably, the court began its analysis by positing that "one 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."[312]

Through its analysis, the Fourth Circuit held that transgender individuals satisfy all four factors of consideration in a typical quasi-suspect analysis.[313] First, the court cited to overwhelming evidence indicating discrimination against transgender individuals across nearly all facets of life, including the historic pathologizing of the transgender identity by the medical community, high rates of employment and housing discrimination, widespread harassment across a multitude of environments, and localized invidious targeting by state legislatures across the country.[314] Next, the court found that identifying as transgender "bears [no] relation to ability to perform or contribute to society," holding that "[i]mportantly, 'transgender' and 'impairment' are not synonymous."[315] Third, the court determined that the transgender community is comprised of a discrete group of individuals with similar and immutable characteristics, unified by natural traits "formulated [] at a very young age" that form the basis of their discriminatory treatment.[316] Finally, the court found that "[t]ransgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process."[317]

Both of the Fourth Circuit's holdings regarding the nature of the transgender identity subjected Grimm's constitutional challenge to intermediate scrutiny.[318] Through its application of the intermediate scrutiny test, the Fourth Circuit struck down both the restroom and school record policies due to the lack of substantial

310. *E.g.*, Karnoski v. Trump, 926 F.3d 1180, 1200 (9th Cir. 2019); Evancho v. Pine–Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); Adkins v. City of New York, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015); Highland Loc. Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016).

311. *Grimm*, at 611–13.

312. *Id.* at 610–11.

313. *Id.* at 611–13.

314. *Id.* at 611–12.

315. *Id.* at 612.

316. *Id.* at 612–13.

317. *Id.* at 613 ("Comprising approximately 0.6% of the adult population in the United States, transgender individuals are certainly a minority . . . . [T]ransgender persons are underrepresented in every branch of government.").

318. *Id.*

relation between the School Board's stated interests and the impact of its discriminatory actions.[319]

4. Slamming the Closet Door Shut: The Eleventh Circuit's 2022 *Adams* Decision

Even after all the successes achieved through *Glenn*, *Bostock*, and *Grimm*, uncertainty still looms over the transgender community's heads. On December 30, 2022, the Eleventh Circuit released their en banc judgment of *Adams v. School Board of St. John's County*, *Florida*,[320] in which the court held that a facially discriminatory school "biological sex" restroom policy did not unlawfully discriminate against transgender youth due to its substantial relation to maintaining the privacy interests of students.[321] The rationale of the Eleventh Circuit's holding contradicts not only each of the aforementioned transgender classification cases,[322] but also the recent developmental understandings of the natures of sex and gender identity.[323]

In many respects, the facts of the case before the Eleventh Circuit in *Adams* mirrored those of *Grimm*. The plaintiff, Drew Adams, was a transgender male who was assigned female at birth.[324] Adams began his transition after his eighth grade year and was identifying as a male by the time he entered high school in St. John's County.[325] Throughout high school, Adams's transition progressed; he began utilizing male public restrooms, underwent chest reconstructive surgery, began hormone therapy, was issued a driver's license identifying him as a male, and amended his birth certificate to represent his male identity.[326] Adams was forbidden from using the male restrooms at his high school on account of a "biological sex" restroom policy.[327] He subsequently brought equal protection and Title IX challenges against the St. John's County School Board, alleging discrimination on the bases of both sex and his transgender identity.[328] Both the

319. *Id.* at 615.

320. 57 F.4th 791 (11th Cir. 2022).

321. *Id.* at 801, 822. The term "biological sex" utilized by the St. John's County School Board does not directly correlate to the term "sex" as defined in Section I.A.1. Instead, the School Board assumed that biological sex is determined solely by chromosomal structure and anatomy at birth. *Id.*

322. *See* discussion *supra* Sections I.B; I.C.

323. *See supra* Section I.A.

324. *Adams*, 57 F.4th at 796.

325. *Id.* at 797.

326. *Id.* at 798.

327. *Id.*

328. *Id.* at 800.

trial court and an Eleventh Circuit panel found in Adams's favor.[329] However, the Eleventh Circuit granted a rehearing en banc, in which it reversed both holdings.[330]

Despite the apparent similarities between the facts of *Grimm* and *Adams*, the Eleventh Circuit's en banc decision in *Adams* determined that the School Board's biological sex restroom policy constituted neither unconstitutional sex discrimination nor discrimination against Adams's transgender identity.[331] The School Board's policy required that students use either gender-neutral restrooms, or the restrooms that corresponded with the biological sex listed on their birth certificate filed with the school.[332] Transgender students, while not required to use the restroom that aligned with their biological sex, could not use the restroom that conformed with their gender identity unless that identity corresponded with the sex indicated on the birth certificate filed with the school.[333] Quizzically, the St. John's County School Board refused to accept the validity of legally amended birth certificates from its students without accompaniment of a court order.[334]

The Eleventh Circuit first determined that the School Board's restroom policy satisfied the intermediate scrutiny test when viewed as a sex-based classification. Referring to "a long tradition" of separating sexes in public restrooms and the necessity of public schools to maintain health and public safety among their pupils,[335] the court found that the restroom policy was substantially related to the important government interest of protecting student privacy.[336] In the circuit court's analysis, it recognized a seemingly paradoxical logic that the sex-specific restroom policy was necessary in light of concerns for "gender fluidity" among the student body.[337] In light of the "sex-specific interest" presented by the School Board, the Eleventh Circuit held that Adams's gender

329. *See* Adams v. Sch. Bd. of St. John's Cnty., 318 F. Supp. 3d 1293 (M.D. Fla. 2018); Adams v. Sch. Bd. of St. John's Cnty., 968 F.3d 1286 (11th Cir. 2020).

330. *Adams*, 57 F.4th at 791.

331. *Id.* at 800.

332. Notably, the School Board indicated that determinations of an individual's "biological sex" are drawn via an assessment of the enrollment documentation submitted by a student at the time of their application to the school system. Therefore, for all intents and purposes, a transgender applicant who was assigned female at birth will be considered a biological male if they submit an amended birth certificate within their initial application to the school district. *Id.* at 801.

333. *Id.* at 802–03.

334. *Id.* at 802.

335. *Id.* at 801–02.

336. *Id.* at 803.

337. *Id.*

identity was "not dispositive for [the] adjudication of [his] equal protection claim."[338]

In a simultaneous holding, the Eleventh Circuit held that the restroom policy did not unconstitutionally discriminate against transgender students.[339] The Eleventh Circuit identified two flaws in the lower court's reasoning: (1) a "lack of identity" between the policy and transgender status, and; (2) a mischaracterization of the rationales upon which the restroom policy was founded.[340] In regard to the first flaw, the court held that the presence of transgender individuals within both biological sexes created a lack of any cohesive class identity necessary to find discrimination under an equal protection claim.[341] The court reasoned that, because transgender individuals could reasonably be found within both biological sexes, the restroom policy could not be viewed as discriminatory against transgender individuals.[342] Regarding this second holding, the Eleventh Circuit was unpersuaded by the district court's holding that the restroom policy treated Adams differently because he does not "act in conformity with the stereotypes associated with biological sex."[343] Instead, the en banc court held that the restroom policy "[did] not depend in any way on how students act or identify," and that its reliance on biological sex did not necessarily implicate stereotypes.[344] After further finding that "no evidence of purposeful discrimination against transgender" individuals was present, the court upheld the restroom policy.[345]

II. DEFENDING JUDICIAL APPLICATION OF INTERMEDIATE SCRUTINY FOR TRANSGENDER CLASSIFICATIONS IN EQUAL PROTECTION CLAIMS

In *McCulloch v Maryland*,[346] perhaps the most formative piece of jurisprudence in structuring the contemporary system of federal governance,[347] Chief Justice John Marshall defined the scope of federal power by stating, "Let

338. *Id.* at 808.

339. *Id.* at 811.

340. *Id.* at 809.

341. *Id.*; *see also* Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974) (holding that a "lack of identity" exists within an alleged sex-based classification when the benefits and detriments flowing from a particular policy effect individuals of both sexes).

342. *Adams*, 57 F.4th at 809.

343. *Id.* at 808.

344. *Id.* at 809.

345. *Id.* at 811.

346. 17 U.S. (4 Wheat) 316 (1819).

347. *See* Jeff Neal, McCulloch v. Maryland*: Two Centuries Later*, HARV. L. TODAY (Sep. 23, 2019), https://hls.harvard.edu/today/mcculloch-v-maryland-two-centuries-later/ (describing *McCulloch* as the case that "paved the way for the modern administrative state").

the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."[348] While the Chief Justice's attention was drawn to concerns primarily regarding the existence of incidental constitutional powers in *McCulloch*, the spirit of his words extends to all exercises of federal power, be they legislative or judicial.[349] Applying the Chief Justice's words to the context of the Fourteenth Amendment implies that the ends derived from equal protection challenges may only be considered legitimate if they are consistent with the letter and spirit of the Amendment itself: namely, ensuring that every individual be afforded "the equal protection of the laws."[350]

The gradual development of the intermediate scrutiny test, from its humble beginnings in *Reed* to its expansive and inclusive application in *Grimm*,[351] arguably demonstrates an ongoing judicial effort to render truly legitimate Fourteenth Amendment outcomes for victims of sex and gender discrimination, particularly for those individuals within the transgender community. The Eleventh Circuit's decision in *Adams*, however, shirks the "straightforward application of legal terms with plain and settled meanings" established by the Supreme Court in *Bostock* in favor of an ambiguous and factually unsound definition of biological sex.[352]

The present Part demonstrates the flaws in the *Adams* decision, and proposes that the Supreme Court adopt the standards set by *Glenn*, *Bostock*, and *Grimm* in assessing the application of intermediate scrutiny to transgender discrimination claims. Section II.A. addresses the flawed reasoning of the Eleventh Circuit's *Adams* decision, with particular attention paid to its four dissents. In contrast, Section II.B. demonstrates how the *Glenn*, *Bostock*, and *Grimm* holdings provide inclusive and legally sound mechanisms for expanding intermediate scrutiny to the transgender community through both contemporary understandings of gender and the allocation of quasi-suspect classifications.

348. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

349. Chief Justice Marshall's call for legitimacy is enshrined through the "balancing" nature of intermediate scrutiny, which seeks to avoid undue fatalism through legislative deference vel non. *See* Wexler, *supra* note 146, at 300; Sullivan, *supra* note 162, at 297.

350. *See* U.S. CONST. amend. XIV, § 1.

351. *See supra* Section I.C.4.

352. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020); Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 817 (11th Cir. 2022).

A. *The* Adams *Decision Represents a Backwards Step in the Development of Intermediate Scrutiny*

The *Adams* decision severs twelve years of growth in judicial understandings of how sex and gender correlate within intermediate scrutiny analyses. Though accompanied by four vigorous dissents, the Eleventh Circuit's majority holding in *Adams* questions many of the basic notions of stereotypes and gender discrimination established by its predecessor cases.[353] One of the chief concerns raised by the majority in *Adams* is the risk of cascading effects that could flow from departing from traditional interpretations of sex and gender, such as eroding the concepts of sex-separated sports, restrooms, and locker rooms.[354] Even putting this dubious reasoning aside, the majority fails to consider the ongoing and grave harms that befall transgender individuals as a result of discriminatory policies and dated understandings of gender and sexuality. This Section addresses *Adams*'s lengthy and passionate dissents, each of which acknowledges the flaws in the majority's reasoning and critique its departure from shifting norms of sex and gender.[355] Section II.A.1. discusses the majority's flawed reasoning that arose from the use of an outdated and underinclusive understanding of "biological sex."[356] Then Section II.A.2. addresses the insufficiency of the majority's assessment[357] regarding both the disparate treatment of transgender individuals under the restroom policy, as well as the School Board defendant's faulty "privacy interest."[358]

1. *Adams'* Outdated "Biological Sex" Policy

The first major flaw in the *Adams* majority's reasoning stems from its determination that a static classification drawn along the lines of biological sex is non-discriminatory.[359] Not only does this holding directly contradict

353. *See Adams*, 57 F.4th at 806 (questioning the applicability of *Bostock* to school restroom policies); *Id.* at 804–05 (questioning the validity of *Grimm*'s assessment of privacy interests and transgender rights).

354. *See id.* at 816–17 (reasoning that an extension of the definition of the term "sex" so as to include gender identity or transgender status under Title IX would "transform schools' living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities").

355. *See id.* at 821 (Wilson, J., dissenting); *see also id.* at 824 (Jordan, J., dissenting).

356. *See id.* at 809 (majority opinion) (holding that a policy based upon an individual's "biological sex" does not discriminate against transgender individuals).

357. *See id.* at 808–11.

358. *Id.* at 804.

359. *See id.* at 809.

Grimm,[360] it also facially discriminates against individuals whose sex assigned at birth and biological sex do not align. For the purposes of restroom access, the School Board grouped individuals into one of two narrowly defined categories determined by sex organs and chromosomes: namely biological boys and biological girls.[361] Under this restroom policy, an individual's biological sex is static, and legal amendments to an individual's biological sex will not be honored unless accompanied by a court order.[362]

As explained by Circuit Judge Charles R. Wilson's dissent, biological sex is not always determinable at birth.[363] Indeed, thousands of intersex individuals are born each year whose biological gender is not readily apparent at the moment of their birth.[364] These individuals comprise approximately 1.7% of the global population, making them more prevalent in the global population than pairs of identical twins.[365] For some individuals, the primary sex organs and biological markers relied upon by the School Board in *Adams* do not develop until later in their lives, and their biological sex designation may shift over time.[366]

The static biological sex classifications in *Adams* do not account for the intersex population, and the restroom policy essentially mandates that intersex individuals whose biological sex has changed over time use a restroom associated with the opposite biological sex.[367] While Adams's claim did not relate to intersex individuals, this does not negate the "plainly discriminatory" nature of the outdated sex-based classification.[368] Much like the policy in *Grimm*, the biological sex policy in *Adams* "privileges sex-assigned-at-birth over [a transgender individual's] medically confirmed, persistent and consistent gender identity."[369]

360. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608–09 (4th Cir. 2020) (identifying a "central tenet in sex discrimination cases" that prohibits states from relying upon overbroad generalizations of the sexes).

361. *See Adams*, 57 F.4th at 801.

362. *See id.* at 802.

363. *Id.* at 821–22 (Wilson, J., dissenting).

364. *Id.* at 822; *How Common is Intersex?*, INTERSEX SOC. OF N. AM., https://isna.org/faq/frequency/ (last visited Mar. 7, 2024).

365. *What is Intersex?*, INTERACT (Jan. 26, 2021), https://interactadvocates.org/faq/#howcommon.

366. *Adams*, 57 F.4th at 822 (Wilson, J., dissenting).

367. *See id.* at 823.

368. *Id.*

369. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610 (4th Cir. 2020).

2. The Misrepresentation of Issues and Interests in *Adams*

The next assignment of error advanced by the dissents in *Adams* lies within the fact that the biological sex policy treats similarly situated transgender individuals differently based upon the biological status indicated by their enrollment documentation.[370] Under the biological sex policy, determinations of an individual's sex are drawn via an assessment of the enrollment documentation submitted by a student at the time of their application to the school system.[371] Therefore, a transgender applicant who was assigned female at birth will be considered a biological male if they submit an amended birth certificate with their initial application to the school district. Even though this transgender student would present all the same theoretical privacy and safety concerns that the biological sex policy purports to alleviate, that student would nonetheless be allowed to use the male restroom.[372] Such a policy that treats similarly situated transgender individuals differently must fail under intermediate scrutiny if it is not substantially related to an important government interest.[373]

Given such disparate outcomes, the sufficiency of the "privacy interest" postulated by the School Board in *Adams* is called into question.[374] While the majority held that the restroom policy was substantially related to the important government interest of alleviating student privacy concerns, the dissents of Circuit Judges Wilson and Adalberto Jordan recognized that the supposed "privacy interest" presented by the School Board is a mere guise for the actual and impermissible interest of ensuring administrative convenience.[375] While the important interest in maintaining privacy is undisputed, the static nature of the School Board's biological sex policy undermines any claims that the policy is rooted in a concern of "male genitalia in the female restroom, or vice versa."[376] Judge Jordan's dissent reasons that "[t]he only thing left to justify the School Board's refusal to accept new or revised enrollment paperwork . . . is administrative convenience."[377] As determined by *Craig v. Boren*[378] and reiterated by Judge Jordan, administrative convenience can never satisfy intermediate scrutiny.[379]

370. *Adams*, 57 F.4th at 829 (Jordan, J., dissenting).
371. *See id.* at 824.
372. *See id.* at 826.
373. *See* Craig v. Boren, 429 U.S. 190, 197–98 (1976).
374. *Adams*, 57 F.4th at 823 (Wilson, J., dissenting).
375. *Id.* at 821; *Id.* at 824 (Jordan, J., dissenting).
376. *Id.* at 824 (Wilson, J., dissenting).
377. *Id.* at 829 (Jordan, J., dissenting).
378. *Craig*, 429 U.S. at 198.
379. *See Adams*, 57 F.4th at 829 (Jordan, J., dissenting).

B. *The Comprehensive Argument for Intermediate Scrutiny*

Though the *Adams* majority lauded the "unremarkable" nature of its opinion,[380] by shirking contemporary notions of gender identity and sex-based classifications the majority in turn created an overly complicated and paradoxical rationale that seeks to separate gender and sex for the purposes of intermediate scrutiny analyses.[381] Completely disregarding the lived experience of transgender individuals, the court's opinion was instead remarkable in all the wrong ways. Not only is the *Adams* system unworkable, but it also delegitimizes the primary purpose of non-discrimination sought by the Fourteenth Amendment.[382] This Section demonstrates how *Glenn*, *Bostock*, and *Grimm* provide two distinct and workable standards for applying intermediate scrutiny to transgender and gender-based classifications. This discussion includes: (1) a review of the intimate link between sex-based discrimination and the transgender identity; and (2) an application of the four-factor quasi-suspect classification test to show transgender individuals are members of a quasi-suspect class and thus entitled to intermediate scrutiny.

1. Classifications Based on Transgender Identity Constitute Sex-Based Classifications

One of the largest obstacles hindering the expansion of intermediate scrutiny to the transgender community is the question of whether a gender-based classification necessarily implicates an unconstitutional act of sex discrimination as prohibited by the Fourteenth Amendment. Traditional notions of sex, fixated upon biological distinctions between men and women, indicate that classifications drawn upon an individual's internalized sense of self should not implicate heightened scrutiny.[383] The *Adams* majority relied upon this same logic in making the following determination:

380. *Id.* at 796 (majority opinion).

381. *See id.* at 809 ("The bathroom policy does not depend in any way on how students act or identify. The bathroom policy separates bathrooms based on biological sex, which is not a stereotype. As this opinion has explained, the Supreme Court has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences.").

382. *See* Fitzpatrick & Shaw, *supra* note 7.

383. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility." (citations omitted)).

> Regardless of Adams's genuinely held belief about gender identity—which is not at issue—Adams's challenge to the restroom policy revolves around whether Adams, who was "determined solely by the accident of birth" to be a biological female—is allowed access to restrooms reserved for those who were "determined solely by the accident of birth" to be biologically male.[384]

While this reasoning may have held some weight during the genesis of the intermediate scrutiny test, the holdings of *Craig, Glenn*, *Bostock*, and *Grimm* each indicate that gender identity falls within the crux of the very type of discrimination that intermediate scrutiny seeks to abolish.

At the heart of the correlation between gender classifications and sex discrimination rests the Supreme Court's *Craig* decision. In establishing the framework of the modern intermediate scrutiny test, the Court in *Craig* simultaneously declared that archaic and overbroad generalizations regarding the roles and capabilities of the different sexes cannot justify discrimination along the lines of sex.[385] The Court demanded that "[i]n light of the weak congruence between [sex] and the characteristic or trait that [sex] purported to represent," legislatures either adopt gender-neutral policies or enact procedures that substantially relate to an important interest justifying sex-based discrimination.[386] This objection to perpetuating gender- and sex-based stereotypes forms the backbone of the modern intermediate scrutiny test, and its legacy is immediately apparent in challenges against transgender discrimination.[387]

In the decade following *Craig*, the Supreme Court repeatedly bolstered their antipathy toward the perpetuation of gender stereotypes. In *Cleburne*, the Court expanded upon its earlier reasoning in acknowledging that "[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women."[388] Shortly thereafter, in *Price Waterhouse v.*

384. *Adams*, 57 F.4th at 807; *see also id.* at 809 ("[T]he biological differences between males and females are the reasons intermediate scrutiny applies in sex-discrimination cases in the first place.").

385. Craig v. Boren, 429 U.S. 190, 198–99 (1976).

386. *Id.* at 199.

387. *See, e.g.*, Grimm.v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020) ("Many courts, including the Seventh and Eleventh Circuits, have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." (citing Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017))).

388. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

Hopkins[389] it held that discrimination on the basis of gender stereotyping equates to sex discrimination for the purposes of employment claims.[390] Each of these cases affirmed the application of intermediate scrutiny to discrimination based upon sex and gender stereotypes,[391] thus allowing the lower courts to bridge the gap between transgender discrimination and early interpretations of sex and gender.[392]

By the time *Glenn* reached the Eleventh Circuit in 2011, a sufficient legal framework had been established to justify its holding that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination [for equal protection purposes], whether it's described as being on the basis of sex or gender."[393] The Eleventh Circuit's reasoning was supported by a critical finding that "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[394] The Fourth Circuit reached a similar conclusion in its analysis of *Grimm* when they held that the transgender plaintiff was subject to sex-based discrimination because of his perceived "fail[ure] to conform to the sex stereotype propagated by the [challenged restroom p]olicy."[395] In each of these cases, the courts applied the intermediate scrutiny test.[396]

The Supreme Court tangentially discussed the equal protection issue in *Bostock* when it assessed transgender discrimination in the context of Title VII employment discrimination claims.[397] In that matter, the Court acknowledged that biological sex and transgender identity are distinct concepts.[398] However, a simultaneous pronouncement by the Court reached a parallel conclusion to the equal protection holding of the Eleventh Circuit in *Glenn*: "[D]iscrimination based on . . . transgender status necessarily entails discrimination based on sex."[399] Though the Court's conclusion was limited solely to Title VII discrimination claims, the similarities between its reasoning and that of the Eleventh and Fourth Circuits indicate a cohesiveness between the purposes of

389. 490 U.S. 228 (1989).

390. *See id.* at 250.

391. *See* Craig v. Boren, 429 U.S. 190, 197 (1976); *Cleburne*, 473 U.S. at 440–41; *Hopkins*, 409 U.S. at 258.

392. *See* discussion *supra* Section I.B.

393. Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011).

394. *Id.* at 1316.

395. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020).

396. *Glenn*, 663 F.3d at 1320; *Grimm*, 972 F.3d at 609.

397. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

398. *Id.* at 1746–47.

399. *Id.* at 1747.

intermediate scrutiny and Title VII: particularly, the elimination of sex-based discrimination.[400]

In *Grimm*, the Fourth Circuit posited the following concise rationale surrounding the extension of intermediate scrutiny to the transgender identity: "various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes."[401] This reasoning embodies the spirit of decades worth of development and research in the fields of gender and sex,[402] and provides courts with a workable understanding of how gender identity, gender stereotypes, and impermissible sex discrimination often interact in transgender discrimination claims.[403] The Supreme Court's rationale in *Bostock* directly mirrors this proposition; upon addressing the correlation between transgender discrimination and sex discrimination in Title VII claims, the majority identified that "the first cannot happen without the second."[404] If the Supreme Court is to determine whether the same holds true in Fourteenth Amendment equal protection claims, this parallel reasoning should serve as the cornerstone to its analysis.

The *Craig, Glenn*, *Bostock*, and *Grimm* cases thus indicate an intimate correlation between transgender discrimination and sex-based discrimination. This lineage establishes a logical and cohesive framework for assessing gender in the context of intermediate scrutiny, and the Supreme Court should look to such examples in addressing future transgender discrimination cases.

2. Transgender Individuals are Members of a Quasi-Suspect Class

Even if the Supreme Court is unpersuaded by the lower court determinations that transgender discrimination implicates sex-based classifications, the Court should still find that intermediate scrutiny applies to transgender discrimination claims on account of the quasi-suspect nature of the transgender identity.

400. *Id.*

401. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 608 (4th Cir. 2020) (citations omitted).

402. *See, e.g.*, Am. Psych. Ass'n, *Report of the APA Task Force*, *supra* note 68 (summarizing twentieth and twenty-first century developments in the study of the transgender identity).

403. *See* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." (citation omitted)).

404. *Bostock*, 140 S. Ct. at 1747.

Designations of quasi-suspect classifications are historically scarce; many arguably deserving classes of individuals have tried and failed to attain such an endowment.[405] However, growing trends among federal district courts[406] and courts of appeal[407] indicate a juridical willingness to extend this selective classification to the transgender community.

As a general function, quasi-suspect class analyses are used to "determine whether a 'new' classification requires heightened scrutiny."[408] Given the historically restrictive application of strict scrutiny to claims concerning race, alienage, or the burdening of a fundamental right,[409] the quasi-suspect class analysis offers an extra chance at protection to those disadvantaged classes which find themselves "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[410]

The Fourth Circuit's allocation of a quasi-suspect designation to the transgender community marks an immense leap in the extension of protections for transgender individuals.[411] The traditional judicial hesitancy to endow such status upon unrecognized groups has now been shirked by two federal courts of appeals, explicitly indicating judicial recognition of the need to provide additional safeguards against discriminatory conduct by state and federal actors.[412] A brief application of the transgender community to the four-factor

405. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 230–31 (1981) (setting aside a review of whether the mentally ill constitute a quasi-suspect class); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (refusing to grant a quasi-suspect classification to the mentally handicapped).

406. *See* Evancho v. Pine-Richland Sch. Dist, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); 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); M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d 704, 718–19 (D. Md. 2018); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); F.V. v. Barron, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018).

407. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610 (4th Cir. 2020); Karnoski v. Trump, 926 F.3d 1180, 1200 (9th Cir. 2019).

408. Evancho v. Pine-Richland Sch. Dist, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017).

409. *See* discussion *supra* Section I.B.1.

410. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).

411. *See Grimm*, 972 F.3d at 608 (citations omitted).

412. *See Grimm*, 972 F.3d at 610; Karnoski v. Trump, 926 F.3d 1180, 1200 (9th Cir. 2019). *But see Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (wherein the Tenth Circuit relied upon a since overruled Ninth Circuit decision, and found that transgender individuals are not a protected class for the purposes of equal protection claims. Although the Tenth

quasi-suspect class test clearly demonstrates that this class of individuals should be entitled to intermediate scrutiny.

Factor 1: History of discrimination. The first factor of a quasi-suspect analysis concerns evidence of historical discrimination against the proposed class.[413] This factor lends credence to the purpose of the Equal Protection Clause as a whole by seeking to identify and protect those individuals who have been historically subjected to "purposeful unequal treatment."[414] As expressed in Section I.A.2., transgender individuals face discriminatory treatment in nearly every facet of their lives. Historic interpretations of their identities as perverse consequences of mental illness have rendered a devastating cascade of effects, including exponentially high rates of housing, employment, and healthcare discrimination.[415]

Factor 2: Characteristics bearing relation to ability to contribute to society. As a general proposition, suspect and non-suspect classifications are often determined based on whether the challenged class faces discrimination on some "meaningful" basis.[416] For the purposes of equal protection, discrimination against a certain characteristic is not "meaningful" if that characteristic bears no relation to the individual's ability to "perform or contribute to society."[417] In these cases, courts have often found that such statutory classifications "often have the effect of invidiously relegating the entire class . . . to inferior legal status without regard to the actual capabilities of its individual members."[418] In recognition of this principle, the second factor of the quasi-suspect analysis assesses whether the discriminated class possesses any characteristics that bear a relation to the class members' ability to contribute to society.[419]

The transgender identity bears no relation to the ability to contribute to society. Though transgender individuals may experience gender dysphoria, this

Circuit acknowledged the effects that shifting understandings of gender may play upon its precedent case, the court refused to conduct such analysis based upon the conclusory nature of the plaintiff's claims).

413. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

414. *See Murgia*, 427 U.S. at 313.

415. *See Grimm*, 972 F.3d at 611–12; *see also* discussion *supra* Section I.A.2.

416. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985) ("Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.").

417. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ([W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

418. *Id.* at 687.

419. *Cleburne*, 473 U.S. at 440–41.

treatable condition does not affect all members of the class and does not necessarily impact one's ability to contribute to society.[420] Being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[421]

Factor 3: Presence of immutable or distinguishing characteristics. In order for a class to earn a suspect designation, they must share immutable or distinguishing characteristics that define them as a "discrete and insular group . . . in need of extraordinary protection from the majoritarian political process."[422] The transgender community is unified by a distinguishable and immutable characteristic: the existence of a sex-assigned-at-birth misaligned with their gender identity.[423] In *Grimm*, the Fourth Circuit acknowledged that, while this characteristic is "as natural and immutable as being cisgender," the nature of the characteristic itself inspires discriminatory treatment against the transgender community as a whole.[424]

Factor 4: Whether the class is politically powerless. The fourth and final factor of a quasi-suspect class analysis asks whether the proposed class is "a minority or politically powerless."[425] Like the first factor, the purpose of this analysis relates to the intent of the Equal Protection Clause as a whole: protecting the interests of disenfranchised minorities from invidious political processes.[426] While recent years have seen some traction in establishing transgender representation across the coordinate branches of government,[427] the transgender community remained widely unrepresented in the judiciary branch until 2010 when the first transgender judges assumed positions in state courts.[428] As noted

420. *Grimm*, 972 F.3d at 612.

421. *Id.*

422. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (citing United States v. Carolene Products Co., 304 U.S. 144, 152–153, n.4 (1938)).

423. *See Grimm*, 972 F.3d at 612–13.

424. *Id.*

425. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

426. *See* Fitzpatrick Shaw, *supra* note 7; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting) ("The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process.").

427. *See* Olafimihan Oshin, *14 Trans and Nonbinary Legislators Tell Biden They're Concerned About Title IX Change,* THE HILL (April 10, 2023), https://thehill.com/changing-america/respect/diversity-inclusion/3943241-14-trans-and-nonbinary-legislators-tell-biden-theyre-concerned-about-title-ix-change/.

428. *See* Barbara DiTullio, *First Two Openly Transgender Judges in the U.S. Appointed Last Month*, WOMEN'S L. PROJECT (Dec. 7, 2010), https://www.womenslawproject.org/2010/12/07/first-two-openly-transgender-judges-in-the-u-s-appointed-last-month/.

in *Grimm*, "[e]ven considering the [0.6%] of the population that is transgender, transgender persons are underrepresented in every branch of government."[429] The political powerlessness of the transgender community is further indicated by the slew of discriminatory legislation sweeping through the nation's state legislatures.[430]

The concept of quasi-suspect designations acknowledges that certain previously unrecognized classes must be afforded heightened scrutiny on account of their unique vulnerability to societal discrimination.[431] Taken together, the four factors of the quasi-suspect class test overwhelmingly favor the application of a quasi-suspect designation to the transgender community.[432] Applying such a designation would allow the transgender community to obtain intermediate scrutiny on any equal protection challenge based on transgender discrimination that they may raise.

CONCLUSION

While a Supreme Court expansion of intermediate scrutiny to the transgender community is firmly justified by appellate court case law,[433] this proposal is not without its critics. Heralds of judicial restraint and modesty posit that, in regard to those groups whose immutable and distinguishing characteristics are intimately affected by government action, the separation of powers necessitates judicial deference to the considerations and choices implemented by legislators.[434] Such deference was considered in *Cleburne*, in which the Supreme Court declined to extend a quasi-suspect designation to disabled individuals due to their internally diverse needs and considerations.[435] However, in the context of the transgender community, this position of deference

429. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613 (4th Cir. 2020); *see supra* Section I.A.2.

430. *See* ACLU, *supra* note 14.

431. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

432. *E.g.*, *Grimm*, 972 F.3d at 611 ("Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class. We consider four factors to determine whether a group of people constitutes a suspect or quasi-suspect class. . . . Each factor is readily satisfied here.").

433. *See supra* Section I.B.1.c.

434. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441–42 (1985) ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued").

435. *See id.* at 445–46.

is untenable. The doctrine of judicial restraint rests upon the implicit assumption that state and federal legislatures strive to enact constitutionally sound laws aimed at promoting the general welfare of their constituents.[436] But how can such an assumption hold any merit in the wake of an aggressive legislative attack on the rights and liberties of a vulnerable minority group?[437]

The exercise of judicial restraint in the expansion of civil liberties to particularly marginalized groups all too often results in egregiously erroneous decisions, and the consequences of such decisions are felt for generations afterwards.[438] Considering the growing conflagration of invidious legislation targeting the transgender community, any exercise of judicial hesitancy in affording transgender individuals with heightened protections under the Fourteenth Amendment's Equal Protection Clause would only serve to fan the flames of an existential crisis.

436. William J. Haun, *The Virtues of Judicial Self-Restraint*, 37 NAT'L AFFS. (Fall 2018) ("As the guarantor of the liberty to make laws, judicial self-restraint is more than a critique of "judicial activism" or "legislating from the bench." It is the conclusion of deep insights into human nature and the nature of law. Writings from Yale law professor Alexander Bickel, who informed Judge Bork's articulation of judicial self-restraint, demonstrate that the liberty to make laws is what defines a self-governing people. . . . Individual liberty therefore depends upon the liberty of a people to create a community in law that reflects their values.").

437. *See* discussion *supra* Section I.A.2. (discussing legislative enmity toward the transgender community); *see also* ACLU, *supra* note 14.

438. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (upholding segregation and the "separate but equal" doctrine), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) ("Any language *in Plessy v. Ferguson* contrary to this finding is rejected"); Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (upholding the exclusion and internment of Japanese-American citizens in the interest of preventing espionage); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'").