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BREAKING THE BINARY: DESEGREGATION OF BATHROOMS

Timothy J. Graves*

INTRODUCTION

Sex discrimination is prohibited in the United States by several laws and constitutional guarantees.¹ In recent years, the public bathroom has become a battleground for equal rights under these laws, both in the courts and the local legislature.² Some states have attempted to legislate access to sex-segregated bathrooms purportedly based on biology, defining sex in a myriad of ways, which exclude gender-diverse individuals.³ Meanwhile, the Equal Employment Opportunity Commission (EEOC) has held that denying access to a bathroom corresponding with gender identity constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964.⁴ While the EEOC's approach to bathroom access is a

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1. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)–(d) (2018); Educational Amendments Act of 1972, 20 U.S.C. § 1681 (2018); *see generally* U.S. CONST. amend. XIV, § 1.

2. *See* Marka B. Fleming & Gwendolyn McFadden-Wade, *The Legal Implications Under Federal Law when States Enact Biology-Based Transgender Bathroom Laws for Students and Employees*, 29 HASTINGS WOMEN'S L.J. 157, 163–70 (2018). The fight for bathroom access particularly affects transgender individuals. *Id.*

3. *Id.* at 163 (“[B]etween 2013 and 2017, approximately twenty-four states considered enacting transgender bathroom laws to restrict the use of public bathrooms to the individual’s biological sex.”). North Carolina is one of the most notable of those states. *Id.* In contrast, in 2018, only eight states and the District of Columbia had enacted gender identity-based laws governing public restrooms, all of which were narrowly written to cover education, employment, or a limited combination of the two, as opposed to providing broad discrimination protection. *Id.* at 160–61.

4. *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *7–8 (Apr. 1, 2015) (holding that requiring proof of medical procedures for permission to access sex-segregated restrooms or requiring the use of a single-user unisex restroom constitutes sex discrimination because it “isolate[s] and segregate[s] [one] from other persons of [their] gender” and “perpetuate[s] the sense that [one is]

step towards equal treatment, it fails to adequately acknowledge that the very segregation of bathrooms by sex is problematic—everyone is a mixture of multiple sex characteristics and, while anatomy may be an accurate proxy for non-intersex people who identify with the gender they were assigned at birth, there are many for whom sex-segregated bathrooms will never match their gender identity.⁵ For many, “male” and “female” do not accurately describe their gender identity.⁶ Gender identity is a person’s internal sense of their own gender of being male, female, another gender, or no gender.⁷ Among others, non-binary, intersex, and transgender individuals may fall somewhere between the binary options, or even outside of the limitations of the spectrum altogether.⁸ Despite the recent progressive movement in expanding gender markers on identity documents,⁹ the law continues to resist acknowledging an expansive perception of gender beyond the rigid, binary system, especially when it comes to bathroom access.¹⁰

not worthy of equal treatment and respect”).

5. See Shelby Hanssen, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 284–88 (2017) (detailing the relationship between “sex” and “gender” identity and describing the complexities of categorization by chromosomes, genitalia, or gender identity as it pertains to the non-binary, genderqueer, transgender, and intersex communities).

6. *Id.* at 286–87. “[S]ex is a ‘vast’ continuum that defies the constraints of the traditional male/female binary [T]he existence of such a varied spectrum of sex designations challenges the assumptions underlying gender binarism. In this light, limiting people to the categories of male or female is overly reductive.” *Id.*

7. *Adams v. Sch. Bd.*, 318 F. Supp. 3d 1293, 1298–99 (M.D. Fla. 2018).

8. Angie Martell, *Legal Issues Facing Transgender and Gender-Expansive Youth*, 96 MICH. B.J. 30, 30 (2017) (explaining “gender expansive” is a more positive term than “gender nonconforming” and that “a whole spectrum of gender identification” exists “between the binary biological sex categories of male and female.”); see, e.g., *Definition of Terms*, UC BERKELEY, <https://campusclimate.berkeley.edu/students/ejce/geneq/resources/lgbtq-resources/definition-terms> [<https://perma.cc/K5HN-RMBG>] (last visited Sept. 18, 2018). Agender, bigender, gender fluid, gender non-conforming, genderqueer, gender variant, intersex, pangender, transgender, and two-spirit individuals may identify outside the binary male and female options. *Id.* Gender identity is so wide-ranging that since 2014, social media giant Facebook has expanded the available gender options users can select from two to fifty-nine, including the opportunity to “fill in the blank.” *Facebook Users Now Have New Gender Option: Fill in the Blank*, NBC NEWS (Feb. 26, 2015, 6:08 PM), <https://www.nbcnews.com/tech/social-media/facebook-users-now-have-new-gender-option-fill-blank-n313716> [<https://perma.cc/N2GW-5S9C>].

9. Rachel Savage, *Nonbinary? Intersex? 11 U.S. States Issuing Third Gender IDs*, REUTERS (Jan. 31, 2019, 1:38 PM), <https://www.reuters.com/article/us-us-lgbt-lawmaking/nonbinary-intersex-11-us-states-issuing-third-gender-ids-idUSKCN1PP2N7> [<https://perma.cc/QM98-YU7J>].

10. Hanssen, *supra* note 5, at 289 (“Few courts have adopted an analytical approach reflecting the

This note discusses how the binary view of gender in relation to public bathroom segregation is insufficient to meet the diverse needs of the public and proposes the desegregation of bathrooms as the solution to promote gender equality and reduce gender-based social imbalances. This note will focus on the bathroom rights of individuals who identify outside of the binary options of male and female, viewed through the lens of how transgender people identifying within the binary have been treated by the courts. For the purposes of this note, the term non-binary will be used to refer to these individuals.¹¹ Part I provides a brief overview of recent bathroom legislation in the United States, the statutory and constitutional framework that has been applied to sex discrimination claims, and the courts' treatment of gender-based discrimination claims under each law. Part II analyzes gender-based discrimination claims in relation to public bathroom access under this framework in light of how courts have treated gender litigation and addresses widespread myths about privacy and safety concerns. Part III proposes the complete desegregation of bathrooms based on gender, considers which legal claim is the best avenue of implementing desegregation, delineates the benefits of such implementation, and addresses potential concerns raised by this proposal.

variety of sex designations consistent with contemporary gender theory or statistical realities.”); Martell, *supra* note 8, at 31 (“Historically, non-binary transgender people have largely been excluded from the discussion of transgender people, which has caused them to be further marginalized in legal circles.”); see also Patrick C. Brayer, *Gender Nonconforming Expression and Binary Thinking: Understanding How Implicit Bias Becomes Explicit in the Legal System, Considering the Shooting Death of Philando Castile*, 55 AM. CRIM. L. REV. ONLINE 44, 46–48 (2018) (describing “a number of setbacks in eliminating laws, policies, and regulations negatively impacting people who are transgender, gender fluid, and non-binary”).

Nonbinary gender identity is a novel legal concept. Gender binarism and resulting “dichotomous sexual tradition” dominate the current legal landscape. Scholars such as Saru Matambanadzo and Alice Domurat Dreger have commented on the evolution of legal and medical understandings of sex, as well as the interplay between the two. For much of history, one’s “medical” sex determined property and voting rights. Until recently, one’s sex determined whom one could marry. Currently, legal determinations of sex can still affect one’s life. The current legal landscape, by and large, does not provide identity options for non-normative gender identities.

Hanssen, *supra* note 5, at 288.

11. *Definition of Terms*, *supra* note 8.

I. Background

Bathrooms were not always envisioned as particular to sex,¹² but today the sex-segregated public restroom is so prevalent that Judge Niemeyer of the Fourth Circuit improperly characterized it as “commonplace and universally accepted” that public facilities be segregated by sex “[a]cross societies and throughout history.”¹³ This perception has contributed to the emergence of the “bathroom narrative,” which typecasts any proposed LGBTQIA+¹⁴ nondiscrimination bill as opening the bathroom door for sexual predators to victimize young girls and women under the guise of claiming to be transgender.¹⁵ Many states have reacted by considering “biology-based” bathroom legislation, closing the door to many whose gender identities do not align with how they are perceived by others.¹⁶ Such proposed statutes have been struck

12. Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 471–74 (2018). Public restrooms were not a common feature until after the 1870s and were for male use under the theory that men and women inhabited “separate spheres,” wherein women did not need access to public lavatories because they were meant to remain in the home. *Id.* The advent of sex-segregated public restrooms began as women entered the workforce in factories and had its roots in the perception of women as weak and vulnerable, requiring special protection in line with Victorian ideals of modesty and social morality. Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 54 (2007).

13. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part).

14. Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html> [<https://perma.cc/NUS3-TYK3>]. LGBTQIA+ stands for lesbian, gay, bisexual, trans, queer or questioning, intersex, and asexual. *Id.* “The ‘+’ symbol simply stands for all of the other sexualities, sexes, and genders that aren’t included in these few letters.” *Id.*

15. Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1383–87 (2017). The “bathroom narrative” has “hobbled” efforts to enact nondiscrimination bills at state and municipal levels throughout the United States. *Id.* at 1387. Despite the use of the “bathroom narrative” to prevent the passing of nondiscrimination bills, supporters maintain that including gender identity protection with sexuality protections in public accommodations is non-negotiable, and Americans overwhelmingly agree that LGBTQIA+ protections are needed and favorable. *Id.* at 1383, 1389.

16. Fleming & McFadden-Wade, *supra* note 2, at 163. For example, Kansas House Bill 2737 and Senate Bill 513 proposed a school-centered restriction on public restrooms, which defined sex as “being male or female . . . determined by a person’s chromosomes, and . . . identified at birth by a person’s anatomy.” *Id.* at 166. Some states, such as Indiana, have proposed criminalizing bathroom use inconsistent with these biological proscriptions. *Id.* at 167. However, this sort of definition of sex fails to account for individuals whose chromosomes or anatomy do not comport to a strictly binary system. *See* Hanssen, *supra* note 5, at 286–87 (“[O]ne in every one hundred people has atypical sex anatomy that

down—often in committee—before becoming law, with the exception of North Carolina’s House Bill 2 (HB2).¹⁷ HB2 required that government agencies within the state segregate all multiple-occupancy public restrooms by “biological sex,” which the statute defined as male or female as listed on a person’s birth certificate.¹⁸ In response to overwhelming negative backlash from the federal government and private companies, newly-elected Governor Roy Cooper, signed a bill that partially repealed HB2 in March 2017.¹⁹ The net result is that bathroom usage in the United States lies largely in the hands of the courts, which considers the rights of individuals related to federal sex discrimination claims on the basis of Title VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments Act of 1972, and the Equal Protection Clause of the Fourteenth Amendment.²⁰

differs from the ‘standard’ male or female. . . . There are at least eighteen documented sex designations [L]imiting people to the categories of male or female is overly reductive.”); *Intersex*, MEDLINEPLUS, <https://medlineplus.gov/ency/article/001669.htm> [<https://perma.cc/4Y4X-8JRU>] (last visited Sept. 23, 2018). Intersex anatomy may combine traditionally male and female anatomical characteristics in a variety of combinations irrespective of XX or XY chromosomal makeup and may even have differing chromosome patterns such as XO, XXY, and XXX. *Id.*

17. Fleming & McFadden-Wade, *supra* note 2, at 163–68. HB2 passed in March 2016 in reaction to an ordinance the city of Charlotte enacted the month before, which prevented discrimination against LGBT people on the municipal level. Riley Leonard, *Thailand’s Gender Equality Act: A Solution for the United States’ Transgender Bathroom Debate*, 35 WIS. INT’L L.J. 670, 677–78 (2018).

18. Fleming & McFadden-Wade, *supra* note 2, at 169. Government agencies included those under the control of the state council, local boards of education, the judicial and legislative branches of government, and other political subdivisions. *Id.*

19. *Id.* at 172. The Department of Justice under the Obama Administration filed suit against the state on the grounds that HB2 constituted a violation of Title IX and Title VII, prompting North Carolina to file suit against the federal government in return. *Id.* at 170–72. The state was ultimately boycotted by many companies and celebrities, including PayPal, Deutsche Bank, the National Basketball Association, and the National College Athletic Association; both lawsuits were eventually dropped. Mark Berman, *Justice Dept. Drops Federal Lawsuit over North Carolina’s ‘Bathroom Bill,’* WASH. POST (Apr. 14, 2017, 11:31 AM), <https://www.washingtonpost.com/news/post-nation/wp/2017/04/14/justice-dept-drops-federal-lawsuit-over-north-carolinas-bathroom-bill/> [<https://perma.cc/S76V-HZUY>]. Despite the repeal of the bathroom provisions, HB2 continues to prevent local governments—like Charlotte—from passing public accommodation nondiscrimination laws until December 2020 by providing that state legislature has sole control over such regulations. Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina Repeals ‘Bathroom Bill,’* CNN (Mar. 30, 2017, 9:36 PM), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> [<https://perma.cc/VQV6-8FJP>].

20. See Fleming & McFadden-Wade, *supra* note 2, at 172–73 (“Plaintiffs commonly assert that the law violates either Title IX and/or Title VII.”); Nathan Heffernan, *Potty Politics: G.G. ex rel. Grimm v. Gloucester County School Board, Title IX, and the Challenges Faced by Transgender Students Under the Trump Administration and Beyond*, 32 WIS. J.L. GENDER & SOC’Y 215, 221 (2017) (“The Equal

A. *Title VII*

Title VII of the Civil Rights Act of 1964 protects individuals from workplace discrimination on the basis of race, color, religion, sex, or national origin.²¹ The EEOC is the government agency responsible for interpreting and enforcing Title VII.²² Plaintiffs must establish that they (1) are a member of a protected class, (2) suffered adverse employment action, (3) were qualified for the position, and (4) were treated differently from those outside of the protected class to maintain a claim under Title VII.²³ In a landmark case for Title VII, *Price Waterhouse v. Hopkins*, the Supreme Court ruled that discrimination based on nonconformity to gender stereotypes constitutes sex discrimination.²⁴ The Supreme Court has never considered the question of what constitutes sex, a factor that has contributed to differing opinions from the lower courts as to whether transgender individuals constitute a protected class per se.²⁵ *Price Waterhouse* opened up a new window for protection of transgender people under Title VII by recognizing that treating people differently because of sex stereotypes violates the statute, and courts have

Protection Clause . . . has been repeatedly used to contest gender-based government action.”).

21. *Title VII and the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> [<https://perma.cc/9MSH-GMUQ>] (last visited Sept. 15, 2018).

22. *Id.*

23. *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004).

24. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”).

25. *See e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008). Following precedent in *Ulane v. Eastern Airlines*, the Tenth Circuit denied Title VII protection to transgender individuals as a separate class per se, stating that “[i]n light of the traditional binary conception of sex,” transgender status alone was not sufficient to state a claim, but a claim may still be brought if the discrimination is based on binary sex stereotypes. *Etsitty*, 502 F.3d at 1221–22. In contrast, the D.C. District Court ruled that discrimination because of transgender status was per se sex discrimination since it was “because of . . . sex.” *Schroer*, 577 F. Supp. 2d at 306. The *Schroer* court analogized exclusion of “transgender” from gender protections under Title VII to exclusion of “converts” from religious protections. *Id.*

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion.

Id.

repeatedly applied this analysis to protect transgender people in subsequent cases.²⁶ On October 8, 2019, the Supreme Court heard oral arguments for three cases that hold the potential to drastically change how Title VII is applied to cases involving sexual orientation and gender identity.²⁷

In addition to the differences in interpreting how Title VII applies to members of the LGBTQIA+ community, a rift has divided the executive branch between the EEOC in support of protection and the Department of Justice (DOJ) in opposition.²⁸ The DOJ under the Trump Administration argues the plain language meaning of “sex” does not include gender identity and policies relegating people to restroom use based on “biological” sex are applied to all employees equally and thus are non-discriminatory.²⁹ The DOJ has concluded that on balance these policies protect the majority of employees from the discomfort some claim to feel sharing common spaces with transgender people.³⁰

26. *Smith*, 378 F.3d at 572 (upholding a transgender woman’s claim of sex discrimination because, by embracing feminine mannerisms and appearance, she did not conform to masculine stereotypes); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1302 (N.D. Ga. 2010). Such cases focus on the discriminatory perspective that in the employer’s view, the transgender person’s existence violates stereotypes about how proper men and women should behave. *Id.*

27. Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 1, 2019, 2:58 PM), <https://www.scotusblog.com/2019/07/court-releases-october-calendar-2/> [https://perma.cc/8P98-KBKR]. The Court will rule on whether employment discrimination because of sex applies to sexual-orientation discrimination in the consolidated cases of *Bostock v. Clayton County* and *Altitude Express v. Zarda*. *Id.* The Court will determine whether employment discrimination laws prohibit discrimination against transgender people per se based on their transgender status or by sex stereotyping under *Price Waterhouse* precedent in *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*. *Id.*

28. Allison Bader, *Whose Bathroom Is It, Anyway?: The Legal Status of Transgender Bathroom Access Under Federal Employment Law*, 91 S. CAL. L. REV. 711, 741–42 (2018).

29. *Id.* at 742–44. The DOJ under the Trump Administration reversed position on several transgender policies put in place by the DOJ under the Obama Administration, such as interpreting Title VII to prohibit discrimination against transgender people in the workplace, interpreting Title IX to require equal access to restrooms for all students based on gender identity, and allowing transgender soldiers to openly serve in the military. Joseph Tanfani, *Reversing Obama Policy, Sessions Says Job Protections Don’t Cover Transgender People*, L.A. TIMES (Oct. 5, 2017, 1:30 PM), <http://www.latimes.com/politics/la-na-pol-trump-transgender-20171005-story.html> [https://perma.cc/E4YV-9QCQ].

30. Bader, *supra* note 28, at 743. Proponents of this position often cite safety concerns related to abuse by sexual predators, but statistics show that non-discrimination ordinances do not result in an increase in sexual assault. Brynn Tannehill, *Debunking Bathroom Myths*, HUFFINGTON POST (Nov. 28, 2015, 8:29 AM), https://www.huffingtonpost.com/brynn-tannehill/debunking-bathroom-myths_b_8670438.html [https://perma.cc/L4DV-323V]. In thirty-five years of non-discrimination

The EEOC, on the other hand, has taken the position that differential treatment based on gender identity is sex discrimination under *Price Waterhouse*'s broader interpretation and that a plain-language reading applies even beyond anatomy.³¹ The EEOC further observed that transgender employees are burdened by being unable to enjoy facilities consistent with their identities, as all cisgender employees are able to, and that the transgender community is exposed to higher levels of violence when using public bathrooms.³² By the same token, non-binary people are unable to enjoy facilities consistent with their identities while restrooms remain binarily sex-segregated.³³

B. Title IX

Title IX of the Educational Amendments Act of 1972 is modeled after Title VII and protects students against sex discrimination in educational settings.³⁴ Plaintiffs must establish that (1) they were excluded from participating in an educational program due to sex, (2) the educational program was receiving federal funding, and (3) the discrimination caused them harm to maintain a claim under Title IX.³⁵ Consistent with its approach to Title VII, the DOJ under the Trump Administration concluded that Title IX does not protect transgender students in regards to restroom access, and much like its approach to Title VII, this interpretation is out of line with the majority of federal district and circuit court opinions.³⁶

ordinances protecting bathroom access throughout the world, only one case has been found involving an individual abusing the ordinance to commit sexual assault. *Id.*

31. Bader, *supra* note 28, at 745–47.

32. *Id.* Studies show almost seventy percent of transgender people had negative interactions in bathrooms, fifty-four percent had experienced medical complications resulting from bathroom avoidance, and that using bathrooms that do not match gender identity causes psychological harm. *Id.* at 747–48.

33. *See id.* at 745–47.

34. Heffernan, *supra* note 20, at 219.

35. Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730, 747 (E.D. Va. 2018).

36. *See* Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter* (Feb. 22, 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [https://perma.cc/UW94-3Q7L]. The Department of Justice Civil Rights Division and the Department of Education Office for Civil Rights issued a joint “Dear Colleague” letter on February 22, 2017, rescinding previous guidance letters issued by the Department of Justice under the Obama

In 2016, the Fourth Circuit addressed gender identity under Title IX in the landmark case, *Grimm v. Gloucester County School Board*, in which a transgender boy was denied access to male restrooms at his high school and brought a claim against the school board seeking a preliminary injunction.³⁷ The district court declined to recognize Grimm as male and dismissed his claim, but the Fourth Circuit Court of Appeals reversed and remanded—primarily because of a now-rescinded guidance letter from the DOJ under the Obama Administration.³⁸ The Supreme Court granted certiorari, but when the guidance letter was revoked, the Court remanded the case back to the district court for reconsideration in light of this turn of events.³⁹ On August 9, 2019, the district court ruled in favor of Grimm, awarding him one dollar in damages, court costs, and an injunction requiring the school to update his records to indicate he is male.⁴⁰

C. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the Constitution states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴¹ In *United States v. Virginia*, the Supreme Court established that to defend

Administration in 2015 and 2016, which provided transgender students should be allowed to use the public facilities corresponding to their gender identity, on the grounds that legal analysis was lacking and inconsistent with the express language of Title IX. *Id.*

37. G.G. *ex rel.* *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016). Despite Grimm’s use of the male restrooms for seven weeks without incident, the school board denied his access to the facilities when community members outside the school complained, leading Grimm to file suit in pursuit of his rights under both Title IX and the Equal Protection Clause. *Id.* at 715–16.

38. *Id.* at 720 (holding the district court erred in finding no ambiguity in the text of Title IX in relation to how transgender students should be classified in a binary gender system—by gender deemed at birth or by gender identity—particularly in light of the guidance letter from the Department of Education and DOJ, given that the *Auer* principle maintains that agency interpretations should be given deference when under review by courts).

39. Bader, *supra* note 28, at 728–29. Other courts have noted that the rescission of the guidance does not negate claims by transgender students under Title IX. *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 327 (M.D. Pa. 2017) (“[I]t simply means that the 2016 Guidance cannot form the basis of a Title IX claim.”).

40. Katelyn Polantz & Caroline Kelly, *Judge Rules in Favor of Student in Virginia Transgender Bathroom Case*, CNN (Aug. 9, 2019, 7:34 PM), <https://www.cnn.com/2019/08/09/politics/student-virginia-wins-transgender-bathroom-case/index.html?no-st=1565415881> [<https://perma.cc/S8QT-H6ML>].

41. U.S. CONST. amend. XIV, § 1.

gender-based discriminatory conduct a party must demonstrate an “exceedingly persuasive” justification showing that an important government objective is served and the discriminatory practice employed is “substantially related” to achieving that goal.⁴² Prior precedent laid out in *Reed v. Reed* in 1971 stated that, under the Equal Protection Clause of the Fourteenth Amendment, laws could not treat individuals differently based only on criteria unrelated to the objective of the particular statute.⁴³

When addressing gender-based discrimination claims under the Equal Protection Clause, the Supreme Court uses the intermediate scrutiny test to determine constitutionality, as opposed to the strict scrutiny standard applied to race-based discrimination claims.⁴⁴ Although the Supreme Court has not yet addressed gender identity rights under the Equal Protection Clause, the trend among federal courts is to hold that the Equal Protection Clause does bar discrimination.⁴⁵

II. Analysis

The applicability of both Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments Act of 1972 to sex discrimination claims in relation to public bathroom access hinges on

42. *United States v. Virginia*, 518 U.S. 515, 539–40, 553–56, 571–72 (1996) (challenging the Virginia Military Institute’s policy of admitting only men as violating the Equal Protection Clause by denying female applicants to the program). Although the Court in *United States v. Virginia* rejected Virginia’s proposed plan of a separate program for women on the basis the proposed plan was not equal in nature and benefit to the original program, it did not reject the concept of a separate program outright as a correction to the violation. *Id.* at 550–53. It is unclear if this ambiguity constitutes an exclusion of the reasoning that “separate but equal” has no place in education from *Brown v. Board of Education* being applied to gender-based claims or not. See Marisa Pogofsky, *Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity*, 67 DEPAUL L. REV. 733, 755–56 (2018).

43. *Virginia*, 518 U.S. at 560–61.

44. Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 900–01 (2007). The Court has supported this distinction of scrutiny standards on the basis that race is immutable, the political powerlessness of racial minority groups, and the primary purpose of the Fourteenth Amendment in light of the Civil Rights era. Pogofsky, *supra* note 42, at 754–55.

45. Pogofsky, *supra* note 42, at 750. The Equal Protection Clause extends to gender expression and medical care. *Know Your Rights LGBTQ Rights*, ACLU <https://www.aclu.org/know-your-rights/transgender-people-and-law> [<https://perma.cc/QC6M-8VDM>] (last visited Sept. 23, 2018).

whether denying access to a sex-segregated restroom is a discriminatory practice under each statute.⁴⁶ As courts have found, defining sex is not as cut-and-dry as it may once have seemed.⁴⁷ Unlike Title VII and Title IX, the constitutionality of gender discrimination is not determined by statutory interpretation.⁴⁸ Instead, the constitutionality of gender discrimination rests on the scrupulous scrutiny of policies that potentially discriminate, which must be narrowly tailored to a compelling government interest when it comes to suspect classifications or substantially related to an important government interest for quasi-suspect classifications.⁴⁹

A. *Evaluating Statutory Claims Under Title VII and Title IX*

Reliance on the argument that Congress understood sex to be physiologically mandated at the time such statutes were enacted fails to account for the long history of awareness that gender does not always neatly fall into binary categories—the history of which legislators would have been aware when considering the bills.⁵⁰ The D.C. district court criticized this congressional intent approach as “an elevation of judge-supposed legislative intent over clear statutory

46. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.C. Cir. 2008); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).

47. See, e.g., *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (describing sex as the “anatomical and physiological processes that lead to or denote male or female,” which typically lead to a determination at birth based on external genitalia and gender as a “broader societal construct” encompassing how sex is defined in a cultural context); *Adams v. Sch. Bd.*, 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018) (listing external genitalia, internal sex organs, chromosomes, gonads, fetal and pubertal hormones, neurology, hypothalamic sex, and gender identity and role as components of gender).

48. See *Reed v. Reed*, 404 U.S. 71, 75–76 (1971).

49. *Id.* (“[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.”).

50. Brief for interACT: Advocates for Intersex Youth et al. as Amici Curiae Supporting Respondent at 19–23, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2016) (No. 16-273), 2017 WL 930053. Classical Jewish writings in the Mishnah, the Talmud, and legal codes make hundreds of mentions of six different sex categories. *Id.* at 19–20. Greco-Roman culture as well as medieval and Renaissance Europe recognized hermaphroditic third sexes in law and custom. *Id.* at 20–21. The Victorian medical community divided individuals into five sex classifications. *Id.* at 22. “[B]y the 1960s, the causes of specific intersex conditions . . . were already understood and documented [in the United States.]” *Id.* at 23.

text.”⁵¹ Moreover, courts that have attempted to apply this standard have necessarily wrestled with how to categorize gender when multiple physiological factors point to different conclusions and binary gender lines are blurred; this has led to drastically differing results.⁵²

As a practical matter, a ruling that would require public accommodations to make a determination of which binary sex an individual is a member of based on physiological elements would be nearly impossible to implement. It would require invasive inspections of physical gender markers, and scientific consensus now establishes that such markers are not the primary determinant of one’s true sex—which instead is gender identity.⁵³ Binary-based judgments of gender expression have already made clear that this sort of system will never work, as it results in biased and discriminatory judgments that determine access rights based on conformity to the established expectations of the gender binary.⁵⁴ Gender expression is the external appearance of gender as expressed by one’s behavior, clothing, and grooming choices; and it may or may not conform to society’s traditional social norms.⁵⁵

51. *Schroer*, 577 F. Supp. 2d at 307 (“This is no longer a tenable approach to statutory construction . . . Supreme Court decisions subsequent . . . have applied Title VII in ways Congress could not have contemplated.”).

52. *See, e.g., Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1114 (D. Colo. 2016) (holding a binary-only gender policy violated intersex individual’s rights when passport was denied); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (finding a transgender woman who had undergone gender-affirming surgery and changed her birth certificate to reflect her male gender invalidated her marriage); *Richards v. United States Tennis Ass’n*, 400 N.Y.S.2d 267, 272–73 (N.Y. Special Term 1977) (holding a transgender woman who had undergone gender-affirming surgery and was female by “all other known indicators of sex” besides chromosomally should not be barred from participating in women’s tennis tournaments).

53. *See* Brief for interACT: Advocates for Intersex Youth et al. as Amici Curiae Supporting Respondent, *supra* note 50, at 37–40.

54. *See, e.g., Nina Golgowski, Woman Says She was Accosted in Walmart Bathroom After Being Mistaken As Trans*, HUFFINGTON POST (May 18, 2016, 1:40 PM) https://www.huffingtonpost.com/entry/woman-allegedly-mistaken-as-transgender_us_573b3f95e4b0ef86171c1762 [https://perma.cc/6QNH-ELV2] (reporting a Connecticut woman was verbally abused in a Walmart bathroom when another patron assumed she was transgender).

55. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [https://perma.cc/EX4E-JKZ5] (last visited Aug. 1, 2019).

In enacting statutory protections for gender, Congress provided a wide ban on sex discrimination in all its forms rather than a specified list of prohibited acts that constituted discrimination.⁵⁶ Congress was more concerned with casting a broad net to catch and eradicate sex discrimination when it enacted Title IX to supplement Title VII protections in the educational sphere.⁵⁷ Even if Congress did not intend for these statutes to cover individuals outside of the gender binary, the Supreme Court has held that lack of specific intent is not necessarily determinative of statutory reach.⁵⁸ As Justice Scalia wrote in *Oncale v. Sundowner Offshore Services, Inc.*, “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”⁵⁹

The Code of Federal Regulations provides that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”⁶⁰ Unlike their classmates who identify with their assigned sex, non-binary youth are unable to enjoy the use of public facilities that affirm their gender identity.⁶¹ Students who are denied access to bathrooms consistent with their gender identity are not being provided with comparable facilities and are harmed by this inequality; many suffer from health complications related to holding

56. Brief of Amici Curiae National Women’s Law Center et al. Supporting Respondent at 13–18, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2016) (No. 16-273), 2017 WL 1057278.

57. *Id.* at 13–18. Principal sponsor Senator Birch Bayh described Title IX as “far-reaching” and with a reach specifically left open-ended in order to “root out, as thoroughly as possible . . . the social evil of sex discrimination in education.” 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“Congress intended to strike at the entire spectrum of disparate treatment . . . resulting from sex stereotypes.”).

58. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000); see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978) (“It is not for [the Court] to speculate . . . on whether Congress would have altered its stance had . . . specific events . . . been anticipated.”).

59. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that although the “principal evil” Congress was targeting when it enacted Title VII was not male-on-male sexual harassment, there is no justification for a categorical rule excluding same-sex harassment from coverage under the statute).

60. 34 C.F.R. § 106.33 (2018).

61. Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal at 9–10, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2016) (No. 15-2056), 2015 WL 6585237.

their urine for extended periods, such as bladder and kidney infections, which affect their ability to participate in school programs.⁶² They are not only denied full participation in school programs when they lose the “basic condition” of bathroom access, but are also deprived of “equal status, respect, and dignity.”⁶³

Moreover, the relegation of transgender and non-binary persons to separate unisex restrooms—as in Grimm’s case—inherently forces those individuals into the category of “other,” ostracizing them from their peers and reinforcing the assertion that they do not fit in by denying them identity recognition.⁶⁴ Marisa Pogovsky explains that there are common lessons to learn from an era when African-Americans were systematically excluded from common spaces by Jim Crow statutes that were often supported by reasoning similar to the bathroom narrative—the need to protect women from sexual assault or moral corruption from those who would abuse the grant of equal rights.⁶⁵ The Supreme Court has continuously repudiated rules that impermissibly discriminate by imposing physical separation of a group of people from places where they would otherwise be present to protect some individuals from perceived danger or discomfort.⁶⁶

62. Amici Curiae Brief of Scholars Who Study the Transgender Population Supporting Respondent at 14–15, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2016) (No. 16-273), 2017 WL 1057277 (reporting greater absenteeism, poorer performance in school, withdrawal from public spaces, physical health impacts such as bladder infections and kidney problems, and mental health impacts including increased risk of suicide). “Since gender conforming individuals . . . can simply use the facilities designated for those of their biological gender with whom they identify, the transgender individual will only achieve true equality once [they are] permitted the same liberty and personal dignity.” Elkind, *supra* note 44, at 921–22.

63. *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *10 (Apr. 1, 2015) (denying access to a bathroom corresponding with gender identity constitutes sex discrimination within the meaning of Title VII and deprives the employee of dignity and respect).

64. Elkind, *supra* note 44, at 927 (“Unisex itself is an instrument of discrimination . . . if society is composed only of those who enter the women’s room and those who enter the men’s room, requiring someone to use a third bathroom tells them they are outside society.”).

65. See also Pogofsky, *supra* note 42, at 753–54 (comparing sex segregation and gender discrimination against transgender persons with Jim Crow laws enforcing racial segregation in the Civil Rights Era).

66. Brief of Amicus Curiae NAACP Legal Defense and Education Fund, Inc. Supporting Appellant at 22–30, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2016) (No. 16-273), 2017 WL 956145 (describing the historical rejection of rules that segregate groups of people from recreational facilities, workplaces, and housing).

The position of the EEOC provides reprieve in employment under Title VII, but if the conciliation process fails to resolve the discrimination claim, the victims of gender discrimination in the workplace must rely on the federal courts within their jurisdiction.⁶⁷ Fortunately, many federal circuits now recognize that discrimination against transgender people is sex discrimination as a matter of law.⁶⁸ The EEOC supporters argue that *Price Waterhouse* and *Oncale* create an expansive framework for the protection of gender identity in the workplace.⁶⁹ Even the recent Supreme Court decision legalizing same-sex marriage, *Obergefell v. Hodges*, seemed to imply that equal rights in gender identity and expression should be recognized under federal law when the majority opened with, “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”⁷⁰

In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, a transgender woman brought suit after she was fired from her position at a funeral home after she announced her intention to begin transitioning from male to female presentation at work.⁷¹ The district court ruled that transgender status itself was not a protected class, but upheld the suit against a motion to dismiss on the basis of her failure to adhere to gender stereotypes.⁷²

67. See *Lusardi*, 2015 WL 1607756, at *8–10; *What You Can Expect After a Charge is Filed*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employers/process.cfm> [<https://perma.cc/S63K-232T>] (last visited Sept. 25, 2019). If the EEOC determines there is reasonable cause to believe discrimination occurred, the parties are first invited to resolve the matter in an informal process called conciliation. *Id.* Failing that, the EEOC may choose to pursue enforcement against the statutory violation by filing suit directly or may give the plaintiff a notice of right to sue, which allows them to file suit personally with their own finances and legal counsel. *Id.*

68. *Legal Developments on Gender Identity Discrimination as Sex Discrimination*, NAT’L CTR. FOR TRANSGENDER EQUALITY 1, 1 n.2 (May 2018), <https://mobile.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=3508> [<https://perma.cc/CC7S-5T9C>] (listing cases from the First, Sixth, Seventh, Ninth, and Eleventh Circuits holding discrimination against transgender people to be sex discrimination under federal law in addition to a host of district court cases across the country).

69. Bader, *supra* note 28, at 745.

70. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

71. *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 568–69 (6th Cir. 2018). The employee had worked at the funeral home from 2007 to 2013 without issue while presenting as a male. *Id.* at 567.

72. *Id.* at 569–70.

However, the district court ultimately granted summary judgment to the funeral home based on religious protections.⁷³ The Sixth Circuit reversed the district court's decision, holding that the transgender employee could state a claim not only under a theory of sex stereotypes, but also on the basis of transgender status per se, and that continuing to employ her did not substantially burden her employer's ability to practice his religion.⁷⁴ The Supreme Court will rule on the case to determine if transgender status—or more broadly, gender identity—is protected under federal sex discrimination laws.⁷⁵

B. Evaluating Constitutional Claims Under the Equal Protection Clause

Suspect classifications target groups that (1) share a distinguishing characteristic as a group that is considered immutable, (2) have historically faced discrimination because of that characteristic, (3) are politically powerless, and (4) are treated disparately based on something other than actual ability.⁷⁶ Transgender and non-binary people share a distinguishing characteristic of incongruence between their gender identity and the sex they were assigned at birth.⁷⁷ In 2013, psychologists confirmed a shift in their perspective on the treatment of those who do not identify with the sex they were deemed at birth, recognizing that gender identity is an immutable trait rather than a pathological disorder.⁷⁸

73. *Id.* at 570. The district court determined that enforcing Title VII against the employer would substantially burden his religious exercise, protected under the Religious Freedom Restoration Act, and that the EEOC had not proven that enforcement was the least restrictive way of achieving the interest of eliminating sex discrimination in the workplace. *Id.*

74. *Id.* at 574–75, 586–90, 600.

75. Howe, *supra* note 27.

76. *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (finding that classifications based on sex—in this case within the binary system—are suspect and subject to higher scrutiny).

77. See *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015) (“[T]ransgender status is a sufficiently discernible characteristic to define a discrete minority class . . . transgender people often face backlash in everyday life when their status is discovered.”).

78. *Gender Dysphoria*, AM. PSYCHIATRIC ASS'N 1, 1–2 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [<https://perma.cc/3MRF-RZUC>] (showing psychologists no longer view gender identity that differs from assigned sex as a pathological disorder and recognize distress is not inherent to cross-gender identification). The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders changed “gender identity disorder” to “gender dysphoria” to avoid the pathologizing

The National Transgender Discrimination Survey and the United States Transgender Survey show that people whose gender identity does not match the sexes they were deemed at birth historically face high levels of discrimination in public accommodations, from healthcare to employment to education.⁷⁹ Courts have found that minorities who represent a small percentage of the population tend to be politically powerless for the purposes of consideration as a suspect class.⁸⁰ Finally, gender identity bears no relation to productivity as an individual; yet those that identify outside of the sex they were assigned at birth continue to receive negative treatment.⁸¹

In discrimination claims under the Equal Protection Clause, government classification on the basis of sex is subject to intermediate scrutiny; therefore, the government must show the existence of an important government interest, the discriminatory practice substantially relates to the objective, and the objective actually motivated the classification to pass muster.⁸² Courts require classifications be “rationally related” to the state interest and prohibit “arbitrary or irrational” classifications, which reflect “a

implication that there is something inherently disordered about incongruence between gender identity and birth-assigned gender. *Id.*

79. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY AND LESBIAN TASK FORCE (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Exec_Summary.pdf [<https://perma.cc/2JNT-CDKF>]; Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey: Executive Summary*, NAT'L CTR. FOR TRANSGENDER EQUALITY (2015), <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf> [<https://perma.cc/86JR-8KFS>]. The majority of school-age respondents experienced verbal or physical abuse related to gender identity, thirty percent reported workplace mistreatment, nearly one-third were living in poverty, and their unemployment rate was three times higher than that of the U.S. population. James et al., *supra*. Many respondents reported mistreatment by health care professionals, not seeking healthcare out of fear of mistreatment, or being unable to afford healthcare when they needed it. *Id.* at 8. Additionally, nearly one-third of respondents reported experiencing homelessness, and nearly one-quarter experienced some form of housing discrimination. *Id.* One in ten reported being denied access to public restrooms in the past year, and more than half avoided using public restrooms out of fear. *Id.*

80. *Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (“[A]s a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group.”); *see also* *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989 (S.D. Ohio 2013) (“[L]ack of political power is caused by a number of factors, including small population size and dispersion.”).

81. *Adkins*, 143 F. Supp. 3d at 139 (“Some transgender people experience debilitating dysphoria while living as the gender they were assigned at birth, but this is the product of a long history of persecution forcing transgender people to live as those who they are not.”).

82. *United States v. Virginia*, 518 U.S. 515, 539–40, 554–56 (1996).

bare . . . desire to harm a politically unpopular group.”⁸³ Intermediate scrutiny places the burden on the government to prove that not only a particularly persuasive government interest exist that is served by the rule at issue, but that the means of achieving that goal have been tailored in a way that reduces potentially discriminatory effects as much as possible, and the means were actually motivated by that interest.⁸⁴ The existence of viable alternatives that would eliminate or greatly reduce the prejudicial effects of a particular statute bolsters the determination that it violates the Constitution.⁸⁵ While the government must find a sufficient argument to justify its discriminatory interpretation of sex, much is still left to judicial discretion.⁸⁶

The often-cited concern over safety in restrooms provides an unfounded argument for state interest in maintaining sex segregation in public restrooms, since it assumes that either transgender and non-binary people present a danger to their cisgender counterparts or cisgender people will pretend to be transgender to gain access to and commit crimes in common spaces.⁸⁷ In actuality, it is possible that the danger in relegating people to bathrooms that do not match their gender identity will result in violence against them.⁸⁸ Furthermore, such safety concerns are discriminatory because they are based on the antiquated notion that women are frail and should be afforded more protection.⁸⁹

83. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985).

84. RODNEY A. SMOLLA, 1 *LAW OF LAWYER ADVERTISING* § 2:4 (Thompson Reuters 2018) (“The requirements that the government demonstrate ‘important’ or ‘substantial’ justifications for its actions and that the government establish a ‘substantial nexus’ or a ‘narrow tailoring’ of ends to means are the touchstones of intermediate review.”). Intermediate scrutiny is a middle ground between the rational basis and strict scrutiny standards. *Id.* Courts tend to show deference and do not often strike down legislation under plain rational basis. *Id.* § 2:3. Strict scrutiny, on the other hand, is “so demanding that it once was understood as virtually impossible for the government to satisfy.” *Id.* § 2:5.

85. *Id.* § 2:4.

86. Catherine Jean Archibald, *De-Clothing - Sex-Based Classifications Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 8 (2009).

87. *See* Tannehill, *supra* note 30.

88. *See* James et al., *supra* note 79, at 14. Twelve percent of respondents reported being verbally harassed, one percent physically attacked, and one percent sexually assaulted when accessing a restroom in the past year. *Id.*

89. *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973) (noting that “[t]raditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism,’” and holding such “gross,

Another common concern of opponents is privacy, but multi-stall restroom facilities inherently afford the same privacy protections for anyone who decides to take advantage of them.⁹⁰ Moreover, courts have previously held that privacy concerns are not sufficient to overcome the interest in individual rights to prevent gender discrimination—as in the case of female journalists given access to male locker rooms in professional athletics, a situation far less integral to personal identity than gender identity and expression.⁹¹ Regardless, psychologists have seen no reported psychological harm from those who share a public restroom with transgender people in schools where inclusive policies are in place, whereas exclusive policies likely contribute to a forty percent suicide attempt rate in the transgender population, which is nine times that of the general U.S. population.⁹² As the Third Circuit found in *Doe v. Boyertown Area School District*, there is no recognized privacy right to not have to share common spaces with a group of people, even where subjective harm is claimed, because there is no objectively reasonable feeling of such harm—particularly where restrooms do afford a variety of different privacy protections for people.⁹³

stereotyped distinctions between the sexes” cannot be supported by public policy); *see also* *United Auto. Workers v. Johnson Controls*, 499 U.S. 187, 197–200 (1991) (holding employer policy of excluding all fertile female employees from particular jobs to protect the safety of potential pregnancies constituted discrimination because safety concerns did not justify disparate treatment).

90. Elkind, *supra* note 44, at 925.

91. *See* *Ludtke v. Kuhn*, 461 F. Supp. 86, 98 (S.D.N.Y. 1978) (“[P]rotecting ballplayer privacy may be fully served by much less sweeping means [that do not] . . . interfere with [the] fundamental right to pursue [one’s] profession . . . conforming to traditional notions of decency and propriety [is] clearly too insubstantial [an interest] to merit serious consideration [w]eighed against [the] right to be free of discrimination.”).

92. *See* Brief of Amici Curiae American Academy of Pediatrics, American Psychiatric Association, American College of Physicians, and 17 Additional Medical and Mental Health Organizations Supporting Respondent at 13–14, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2016) (No. 16-273), 2017 WL 1057281.

93. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018) (declining to recognize a constitutional right of privacy that extends to excluding the presence of students who do not share the same birth sex from bathrooms and locker rooms, especially where all students, whether transgender or not, who were uncomfortable with the privacy afforded by the multi-stall restrooms had the option of single-user facilities).

III. Proposal

The solution for equal treatment of non-binary persons in public accommodations is to demolish the binary concept of gender in the law. Adherence to this two-option perception is unnecessary and fails to recognize established scientific facts.⁹⁴ The desegregation of public accommodations is a necessary step towards equal gender identity recognition under the law and the elimination of binary-based discrimination against non-binary and binary individuals alike.⁹⁵ Challenges to biology-based bathroom policies for transgender people within the binary have been successful in federal district and circuit courts, but the current political climate makes it unlikely that the argument for total desegregation of public bathrooms is forthcoming despite its legal merits.⁹⁶

A. Agency Interpretation or Judicial Discretion?

The rollback of the Obama Administration's pro-equality guidance in schools, prisons, homeless shelters, and the military is a strong indicator that, at least under the Trump Administration, agency interpretation will disfavor a diverse reading of sex in agency regulatory actions.⁹⁷ Moreover, a memo leaked from the Department of Health and Human Services in October 2018 urged the "Big Four" agencies that enforce different portions of Title IX to adopt a uniform definition of sex as "male or female based on immutable biological traits identifiable by or before birth . . . listed on a person's birth certificate, as originally issued."⁹⁸ These Big Four agencies include

94. See Denise Grady, *Anatomy Does Not Determine Gender, Experts Say*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html> [<https://perma.cc/WQX3-Q9HD>].

95. See Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1234 (2017); Portuondo, *supra* note 12, at 517, 519.

96. See *infra* Section III.A.

97. Erica L. Green, Katie Benner & Robert Pear, *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/5NUK-7MWL>].

98. *Id.* The definition was expected to be formally presented to the DOJ before the end of 2018 and was considered "integral" to two proposed rules under review at the White House at the time, both of which were expected to be released in the fall of 2018 for public comment before final issuance. *Id.* The

the Departments of Education, Justice, Health and Human Services, and Labor.⁹⁹

Should the Supreme Court issue a ruling holding that bathroom segregation constitutes discrimination under the Equal Protection Clause, the definition of sex under Title IX and Title VII would consequently be interpreted to avoid conflict with that ruling.¹⁰⁰ Discrimination against non-binary individuals should constitute a suspect classification for the purposes of Fourteenth Amendment claims because: (1) they share a distinguishing characteristic of gender identity that diverges from sex assigned at birth, which research has shown to be an immutable trait with roots in genetics; (2) they face high levels of violence, unemployment, and homelessness due to discrimination; (3) they have little ability to protect themselves through use of the political process because they make up a small percentage of the population; and (4) their disparate treatment has no relationship to their actual ability.¹⁰¹ Even without suspect classification triggering strict scrutiny, the government interests that proponents cite in defense of biology-based bathroom policies fail to meet the standard required by Fourteenth Amendment gender jurisprudence under intermediate scrutiny, particularly when balanced against the constitutional interest of equal protection for minority groups that would otherwise be powerless.¹⁰²

Despite its plain language, the intermediate scrutiny test's wide latitude for judicial discretion makes any ruling highly contingent on

memo quickly resulted in protest rallies in cities such as New York and Washington, including outside the White House, with the viral "#WontBeErased" taking off on social media as gender-expansive persons resisted being legally defined out of existence. Sarah Mervosh & Christine Hauser, *At Rallies and Online, Transgender People Say They #WontBeErased*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html> [https://perma.cc/97FR-RTBH].

99. *Id.*

100. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (describing the canon of constitutional avoidance). "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.*

101. *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989 (S.D. Ohio 2013); Grady, *supra* note 94; *see Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *see also supra* Section II.B.

102. *See infra* Section III.B.

the makeup of the Court.¹⁰³ Research shows that judges tend to vote in line with their personal ideology, and that effect is more pronounced when the case is a close vote.¹⁰⁴ The case for the elimination of sex-segregated public bathrooms would likely be such a vote.¹⁰⁵ With the recent confirmations of firmly conservative Justices Gorsuch and Kavanaugh, and the retirement of Justice Kennedy—famously the median judge providing the swing vote in close cases—the Supreme Court is now made up of predominantly conservative judges who will likely vote conservatively.¹⁰⁶ That being said, according to the Martin-Quinn ideology score, which uses voting patterns to determine ideology, Chief Justice Roberts—now the median justice—has been slowly shifting closer to the center over the course of his tenure.¹⁰⁷ Like same-sex marriage, gender identity rights may be forced to wait until public opinion shifts more firmly in favor of a gender-expansive view.¹⁰⁸

103. See Jake J. Smith, *Supreme Court Justices Become Less Impartial and More Ideological When Casting the Swing Vote*, KELLOGGINSIGHT (Sept. 13, 2018), <https://insight.kellogg.northwestern.edu/article/supreme-court-justices-become-less-impartial-and-more-ideological-when-casting-the-swing-vote> [https://perma.cc/QCK4-MZ3N] (describing judges' tendency to vote according to their personal ideologies based on the research of Tom Clark, B. Pablo Montagnes, & Jörg L. Spenkuch). "A judge whom editorial writers depict as a mild conservative, or a hardline liberal, will often vote like one." *Id.*

104. *Id.*

[W]hen casting a pivotal vote, liberal justices are more likely to vote liberally while conservatives are more likely to vote conservatively, compared to when those same judges cast a non-pivotal vote.

....

... [T]he pattern becomes more pronounced for justices who are more ideologically extreme . . . the more liberal or conservative a justice is, the more frequently he or she votes in that direction when casting the deciding vote.

Id.

105. Jeannie Suk Gersen, *A Moment of Uncertainty for Transgender Rights*, NEW YORKER (Feb. 27, 2017), <https://www.newyorker.com/news/news-desk/a-moment-of-uncertainty-for-transgender-rights> [https://perma.cc/MZM8-2589].

106. Alvin Chang, *Brett Kavanaugh and the Supreme Court's Drastic Shift to the Right, Cartoonsplained*, VOX (Sept. 14, 2018, 11:12 AM), <https://www.vox.com/policy-and-politics/2018/7/9/17537808/supreme-court-brett-kavanaugh-right-cartoon> [https://perma.cc/W26C-54H4].

107. *Id.*

108. Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC (July 1, 2015), <https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/> [https://perma.cc/8J3N-86P3]. "Much as Americans like to imagine judges, particularly Supreme Court justices, as ahistorical applicators of a timeless code, the court is inevitably influenced by the world around it. As social mores have evolved, the justices' consensus has too." *Id.*

B. Balancing the Benefits of a Non-Binary System Against State Concerns

As discussed in Section II of this note, the most common concerns raised in opposition of equal bathroom rights are privacy and safety.¹⁰⁹ To survive intermediate scrutiny, these arguments must show that both (1) the discriminatory policy is substantially related to an important government interest and (2) there is a lack of viable alternative ways that protect that interest without discriminating against a group.¹¹⁰ Both privacy and safety fail to meet that standard.¹¹¹

Courts that recognize an interest in privacy in bathroom cases have historically been focused on a supposed heightened right to privacy from the opposite sex in the binary-gender system, with many courts specifically noting concern over exposure of unclothed body parts.¹¹² Public restrooms do not afford the same heightened level of privacy from members of the same binary sex as they do members of the opposite sex, nor have they been expected or required to; members of the public routinely use the facilities without regard to any perceived loss of privacy they endure from others in the restroom.¹¹³ Contrary to the courts' concerns, few users of public facilities disrobe outside of the relative privacy of bathroom stalls.¹¹⁴ Moreover, stall cubicles can be modified to provide additional privacy using floor-to-ceiling partitions and shiplap-cut edges to remove sightlines in the gaps, providing a viable non-discriminatory alternative.¹¹⁵

Fourth Circuit Judge Niemeyer described in a dissenting opinion the concern of privacy as linked to “sexual responses prompted by students’ exposure to the private body parts of students of the other

109. *See supra* Section II.B.

110. Smolla, *supra* note 84, § 2:3–5.

111. *See supra* Section III.B.

112. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 734–35 (4th Cir. 2016) (describing several cases that address privacy concerns from the Third, Fourth, Sixth, and Ninth Circuits).

113. Portuondo, *supra* note 12, at 502.

114. *Id.* at 508.

115. *Bathroom Privacy Ideas: Planning the Privacy in Your Bathroom*, SCRANTON PRODUCTS (Oct. 2, 2017), <https://www.scrantonproducts.com/bathroom-privacy-ideas/> [<https://perma.cc/2SKN-XJ88>].

biological sex.”¹¹⁶ Following this logic to its natural end, it presupposes that no users of public restrooms are sexually attracted to members of the same binary sex.¹¹⁷ The sexual response argument thus relies on heteronormative gender stereotypes that men are attracted to women and women are attracted to men.¹¹⁸ It also discounts the privacy rights with regard to sexual responses of those that do not identify as heterosexual; implying that the LGBTQIA+ community’s right to privacy in public restrooms is not as fundamental as Judge Niemeyer suggested the heterosexual community’s privacy right is.¹¹⁹

In *Virginia*, the Supreme Court dicta allowed separate facilities by resting on the “physical differences between men and women”—allowing biological differences to justify different facilities.¹²⁰ Functionally, the various anatomical structures at use in the public restroom do not require different equipment like we see in the private home bathroom and the single-user gender-neutral public toilet.¹²¹ However, not all people fall into the binary categories of physical differences; for example, intersex and medically-transitioning transgender individuals may have physical traits associated with both or neither category.¹²² Upholding enforcement of sex segregation under this framework would necessitate disclosure or physical inspection of each bathroom user prior to entry, a practice much more invasive to privacy.¹²³ Moreover, such a practice would continue to leave those with differing anatomical characteristics uncertain of the appropriate bathroom for their use and require surgical medical

116. *Grimm*, 822 F.3d at 735.

117. See Portuondo, *supra* note 12, at 503.

118. *Id.*

119. See *id.*

120. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

121. See Ian Spula, *An Unexpected Ally of Gender-Neutral Restrooms: Building Codes*, ARCHITECT (Sept. 30, 2017), https://www.architectmagazine.com/practice/an-unexpected-ally-in-gender-neutral-restrooms-building-codes_o [<https://perma.cc/Q3Q2-RDKZ>] (describing how the 2018 International Plumbing Code calls for all single-user restrooms to be designated for all-genderuse).

122. See *Intersex*, *supra* note 16.

123. See Brief for interACT: Advocates for Intersex Youth et al. as Amici Curiae Supporting Respondent, *supra* note 50, at 37–40.

transition for binary-identifying transgender individuals seeking to use the facilities consistent with their gender identity.¹²⁴

Safety concerns used to promote sex segregation of public restrooms suffer from the same logical fallacy that privacy concerns do. Those that raise concerns about violence in bathroom cases are specifically worried about the threat of sexual assault.¹²⁵ In relying on the reasoning that separation from members of the opposite binary sex promotes safety from sexual assault, proponents inherently discount the potential for same-sex violence and depend on incorrect gender stereotypes.¹²⁶

Moreover, separated bathrooms have not prevented sexual assaults in public bathrooms—sexual predators are not deterred by a sign on the door.¹²⁷ For transgender and non-binary individuals, being relegated to a biology-based restroom often increases the threat to safety, which is high even when using the bathrooms that correspond with their gender identities.¹²⁸ Segregated bathrooms may even increase the risk of assault across the board because they isolate victims and lessen the effect of safety in numbers, like parents have found when separated from their children who are too old to accompany them into the binary bathroom.¹²⁹

CONCLUSION

The limitations of a binary system will never meet the needs of the diverse gender spectrum.¹³⁰ Ending sex segregation of public restrooms in favor of multi-user, all-gender restrooms will eliminate

124. See *Intersex*, *supra* note 16; Jack Drescher & Jack Pula, *Expert Q&A: Gender Dysphoria*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a> [<https://perma.cc/BZN7-M2J7>] (last visited Nov. 3, 2018) (noting many transgender individuals choose not to undergo surgical transition for a variety of reasons).

125. Portuondo, *supra* note 12, at 512 n.268.

126. See *id.*

127. See *id.* at 512.

128. See Grant et al., *supra* note 79, at 14.

129. See Emily Peck, *We Don't Need Separate Bathrooms for Men and Women*, HUFFINGTON POST (Mar. 31, 2016, 5:26 PM), https://www.huffingtonpost.com/entry/gender-neutral-bathrooms_us_56fd6ccbe4b083f5c607262c [<https://perma.cc/T3HY-P4ND>].

130. See Hanssen, *supra* note 5, at 287.

the problems associated with enforcing any sort of biology-based policy while promoting equal protection for non-binary persons and ultimately breaking down gender stereotypes and social stigmas.¹³¹ With the Supreme Court leaning more and more conservatively and the Trump Administration rolling back previous protections for those falling outside of the traditional gender binary system, desegregation of public bathrooms is unlikely to be seen in the foreseeable future.¹³² While there may be jurisdiction-dependent changes at the state and lower circuit federal levels, nation-wide change will have to come from the people, much like the slow march of progress for same-sex marriage and sexuality recognition.¹³³

As public opinion shifts in favor of equal protection, courts will more likely find in favor of plaintiffs seeking redress of the failings of the binary system.¹³⁴ Ideally, this redress will come in the form of a definitive Supreme Court decision laying to rest sex segregation of public facilities because a system of separate facilities that ignores the diverse range of gender and the inherent complexity of sex characteristic combinations is inherently inadequate—it is failing the non-binary community.

131. See *supra* Part III.

132. See Chang, *supra* note 106; Green, Benner & Pear, *supra* note 97.

133. See Fleming & McFadden-Wade, *supra* note 2, at 160–61; Ball, *supra* note 108.

134. Ball, *supra* note 108.