Transcending Sex: Protecting Transgender Access Through Federal Intervention

“Right now, we’re experiencing a Dickensian time, where it’s the best of times and it’s the worst of times at once . . . We’re seeing a marked increase in the public awareness about transgender people and really incredible progress for trans rights, especially from a legal perspective. At the same time, we still represent and are part of a community that experiences incredibly high rates of unemployment, poverty and violence.”

I. INTRODUCTION

On November 6, 2018, Massachusetts became the first state to pass a statewide referendum protecting transgender rights. The ballot initiative, popularly known as Question 3, confirmed a 2016 legislative amendment to the Massachusetts General Laws that prohibits discrimination based on gender identity in places of public accommodation. While this law presents advancements for the protections of the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) community in Massachusetts, these protections are not reflected on a national scale.

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3. See Massachusetts Election Results, supra note 2 (presenting text of Question 3); S.B. 2407, 189th Gen. Ct., Reg. Sess. (Mass. 2016) (outlining amendments to existing Massachusetts code in effort for inclusivity). Though the referendum passed by a two-thirds margin, Question 3 faced significant opposition—groups such as “No on 3, Keep MA Safe” and “Mass Resistance” launched campaigns in an attempt to dissuade voters from affirming Senate Bill 2407 with appeals to the public’s pathos. See No On 3 Keep MA Safe, No On 3, Keep MA Safe, YOUTUBE (Sept. 19, 2018), https://www.youtube.com/watch?v=ZT4UZ_ILlIo (appealing to public’s sense of safety in effort to dissuade voters); see also Massachusetts Voters Overwhelmingly Say “Yes” to Transgender “Bathroom” Law. What Happened?, MASS RESISTANCE (Nov. 9, 2018), https://www.massresistance.org/docs/181d/NoTo3/election-analysis.html (analyzing ballot measure loss).
4. See Marisa Pogofsky, Comment, Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity, 67 DePaul L. Rev. 733, 738-40 (2018) (showing statistics reflecting anti-transgender society); see also Steinmetz, supra note 1 (examining national instances and statistics of violence against transgender individuals).
On March 23, 2016, the North Carolina legislature passed the Public Facilities Privacy & Security Act, which prohibited transgender people from using restrooms associated with their preferred gender in places of public accommodation, capturing national attention. The decision immediately prompted national backlash, and people on both sides of the issue were quick to issue statements regarding the law. North Carolina ultimately repealed the provision that limited the use of facilities based on biological sex, but retained a provision that preserved anti-transgender regulations by “prohibit[ing] state agencies and local governments from regulating, on their own, access to multiple occupancy bathrooms and facilities.”

Despite the national attention, politicians and legislators in many states have failed to enact progressive alternatives to bathroom bills. By 2017, the majority of states had either passed or proposed some form of a bathroom bill or other limitation on transgender rights in public places. For example, in 2015 the Kentucky Senate passed a bill prohibiting transgender students from using school restrooms that match their gender identity. See Kopan & Scott, supra.


See Allison Bader, Note, Whose Bathroom Is It, Anyway?: The Legal Status of Transgender Bathroom Access Under Federal Employment Law, 91 S. CAL. L. REV. 711, 723 (2018) (naming California and Vermont only states passing progressive bathroom policy). The term “bathroom bill” will be used in this Note to describe the “legislation that prohibits individuals from using bathrooms . . . that do not match their biological sex.” See id. at 713.

bathrooms that did not correspond to their biological sex. In contrast, California passed legislation designating all single-occupancy restrooms gender neutral.

Although passing state-level legislation protecting transgender people is a positive step, it does not offer the transgender community necessary protections on a national level. This Note will examine the potential for and likelihood of a federal bar against bathroom bills that purposefully discriminate against transgender people in places of public accommodation. Section II.A will examine the history of sex as a protected class and compare how the definitions of “sex” and “gender” have evolved over time. Section II.B will discuss how Title VII and Title IX of the Education Act of 1972 (Title IX) address sex discrimination and how challenges under these statutes create beneficial precedents for transgender litigants based on a body of jurisprudence defining the nuances of sex discrimination. Parts III and IV will discuss the possibility of creating federal discrimination protections for transgender people in public accommodations, specifically focusing on the obstacles to creating these protections on a national scale.

II. HISTORY

A. Protected Class Status and the Definition of Sex in Society and Antidiscrimination Laws

While issues of sex and gender identity have recently drawn national attention, the debate is not new; equal rights jurisprudence in the United States is constantly evolving. Traditionally, the United States recognizes race, color,
religion, national origin, sex, age, and genetic information as “suspect” or protected classes for purposes of antidiscrimination laws. By recognizing these classifications as suspect, the government identifies them as common bases of unlawful discrimination under the Equal Protection Clause, meaning that discrimination claims based on these classes must receive heightened scrutiny. More specifically, sex discrimination is subject to intermediate scrutiny. In order to survive intermediate scrutiny analysis, the law must further an important governmental interest through means that are substantially related to that interest. Politicians in Massachusetts have used public policy initiatives, such as Senate Bill 2407, to expand the definition of sex to include gender identity and sexual orientation as protected classes. Specifically, these initiatives in Massachusetts seek to include gender identity and sexual orientation as classes protected from discrimination in places of public accommodation and resort. Including gender identity and sexual orientation within the definition of sex would


19. See U.S. CONST. amend. XIV (guaranteeing equal protection for all people under law); see also Carolene Prods. Co., 304 U.S. at 152 n.4. Under the Fourteenth Amendment, no state can deny a person the “equal protection of the law.” See U.S. CONST. amend. XIV. Modern jurisprudence expands this to mean that, in order for a law to be constitutional under rational basis scrutiny, it must be rationally related to a legitimate government interest. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 728 (Rachel E. Barkow et al. eds., 5th ed. 2017). Higher levels of scrutiny apply when the law involves a suspect class or the case implicates the violation of a fundamental right. See id. at 727-28, 952; see also Carolene Prods. Co., 304 U.S. at 152 n.4. As the level of scrutiny increases, the government’s interest is more closely scrutinized for legitimacy and must be aimed at achieving an important outcome through necessary means. See CHEMERINSKY, supra, at 729-30, 954; see also Carolene Prods. Co., 304 U.S. at 152 n.4.


21. See id. at 197 (defining intermediate scrutiny).


23. See ch. 272, § 92A (prohibiting discrimination in places of accommodation or resort). Massachusetts seeks to include gender identity as a protected class in addition to Title VII’s prohibition of sex discrimination. See MASS. GEN. LAWS ch. 151B, § 4 (2019) (including gender identity as protected class); see also 42 U.S.C. § 2000e-2(a)(1) (stating federal protections from employment discrimination based on sex).
subject anti-transgender legislation—like discriminatory bathroom bills—to intermediate scrutiny.²⁴

The push to include gender identity under the umbrella term “sex” is rooted in discourse about the differences between biological sex, determined by the sex assigned at one’s birth, and gender, a self-determined identity not dependent on traditional sex markers.²⁵ Historically, the term “sex” encompassed both biological and performative characteristics.²⁶ Beginning in the mid-1950s, American society’s conception of “sex” shifted to a more nuanced understanding, which included separating the biological assignment of sex from the social performance of gender.²⁷ In turn, society’s new understanding of sex and gender roles caused courts to reconsider the breadth of sex discrimination protections.²⁸

A modern understanding of these terms completely divorces sex from gender identity, which has important legal ramifications when considering potential

²⁴ See Craig, 429 U.S. at 197 (subjecting sex discrimination to intermediate scrutiny under Equal Protection Clause).

²⁵ See Jillian Todd Weiss, Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?, 18 TEMP. POL. & C.R. L. REV. 573, 575, 580 (2009) (discussing courts’ shifting definition of “sex”). Traditionally, courts recognized sex as referring to anatomical differences between men and women because they concluded this understanding was closest to the legislature’s intent when it drafted these statutes. See id. at 575 (explaining court’s logic). Courts reasoned that legislators intentionally excluded explicit mention of gender identity under the term sex in the statute. See id. at 575-76 (explaining court’s logic). Nevertheless, contemporary jurisprudence does not define sex in this narrow manner and focuses less on the legislative intent and more on modern distinctions between gender and sex. See id. at 577 (explaining shift of court reasoning). Despite this shift in interpretation, courts were still at odds about whether discrimination on the basis of sex extended beyond the established gender binary. Compare Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221-22 (10th Cir. 2007) (ruling sex definition does not include anything outside traditional male and female classifications), with Smith v. City of Salem, 378 F.3d 566, 573, 575 (6th Cir. 2004) (confirming discrimination based on transgender gender nonconformity inherently sex discrimination). In Smith, the Sixth Circuit held that sex discrimination encompasses discrimination on the basis of both the biological differences between men and women and the failure to confirm to gender stereotypes, establishing a clear separation between sex and gender and applying the Price Waterhouse reasoning to transgender people. See Smith, 378 F.3d at 573.

²⁶ See Weiss, supra note 25, at 597-98 (discussing institution and development of “gender roles” and traditional definitions of sex). In the 1960s, scientific discussion about sex shifted to link biological assignment and social sex characteristics, leading to an understanding that biological sex influenced an individual’s social and economic lifestyle. See id. at 600. Despite this shift, the economic demands of World War II changed the gender landscape, and social scientists started to divorce sex from gender identity, challenging the idea that each sex inherently possesses certain characteristics and expressions of gender. See id. at 603-04.

²⁷ See id. at 603-05 (describing studies challenging traditional sex-gender binary definition). Margaret Mead, Simone De Beauvoir, and John Money conducted studies following World War II that produced results directly contradicting the structural-functional view of society. See id. at 604-05. All three scholars found a link between sex and gender, but none found that sex and gender were synonymous. See id. at 605. They concluded that masculinity and femininity are learned behaviors, not inherent characteristics of a person assigned to a particular biological sex at birth. See id. at 605-06. Scholars and sociologists use the term “gender role,” coined by Money, to define the psychological, behavioral, and social qualities that society assigns to sex. See id. at 605-08 (listing uses of “gender role” and “gender” by scholars and social scientists).

discrimination protections.29 States are split on the definition of sex for the purpose of employment and public accommodation: Some argue that sex refers to only biological qualities, while others assert that it includes gender identity.30 Both interpretations have a direct impact on protections for the transgender community; including gender identity within the definition of sex means that discrimination on the basis of sex already extends to protect the transgender community.31

Precedentially, sex discrimination prohibitions also prohibit discrimination based on sex-based stereotypes.32 In Price Waterhouse v. Hopkins, an employer passed over a female employee for a promotion because she did not act like a “traditional” female, despite being decisive, broadminded, and highly competent.33 Because Hopkins was often demanding of her team members and pushed them to meet deadlines, the company viewed her as harsh, brusque, and aggressive.34 The Court used a broad definition of sex to examine Hopkins’s Title VII claim, ruling that an employer cannot discriminate against an employee for not

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29. See Fleming & McFadden-Wade, supra note 7, at 159-60 (discussing legal considerations for enacting biology-based laws versus gender identity-based laws); Weiss, supra note 25, at 610 (introducing judges’ confusion over sex/gender divide).

30. See Fleming & McFadden-Wade, supra note 7, at 160, 163 (outlining state splits on inclusion of gender identity in sex discrimination); see also ANN OAKLEY, SEX, GENDER AND SOCIETY 115 (1972) (distinguishing between socio-cultural sex and biological sex). Because of the states’ opposing views of sex as it pertains to bathroom bills, federal courts are unable to interpret laws uniformly to allow or condemn regulations when legal questions of discrimination arise. See Fleming & McFadden-Wade, supra note 7, at 188 (highlighting inconsistency in state laws and judicial rulings). “[S]ex differences may be ‘natural’, but gender differences have their source in culture, not nature.” OAKLEY, supra, at 137.

31. See Fleming & McFadden-Wade, supra note 7, at 160-63 (noting different sex-based and gender-based public restroom laws by state); Weiss, supra note 25, at 637 (describing different judicial outcomes based on differing definitions of sex). Determining that sex discrimination includes gender identity discrimination would fit within the precedent set by Price Waterhouse v. Hopkins and increase protections for transgender people under Title VII. See 490 U.S. 228, 251 (1989). Treating sex and gender as distinct classifications aligns more with socio-cultural meanings of sex and gender. See OAKLEY, supra note 30, at 115. Though the Supreme Court’s recent holding in Bostock v. Clayton County held that discrimination based on transgender status was discrimination on the basis of sex for the purposes of Title VII, the Court’s decision was rooted in sex discrimination rather than discrimination on the basis of gender identity. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1746-47 (2020).

32. See Price Waterhouse, 490 U.S. at 251 (holding sex discrimination includes discrimination on basis of sex stereotyping).

33. See id. at 235 (summarizing reason for rejecting Hopkins for promotion). The Court recognized that the complaints about Hopkins’s aggressive or abrasive personality centered on the fact that this behavior is expected from men, not women. See id. One partner who advocated against promoting Hopkins, suggested that she “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” See id.

34. See id. at 234-35 (highlighting negative reviews of Hopkins by her coworkers). Virtually every complaint Hopkins received noted that she lacked interpersonal skills and that she was harsh and difficult to work with. See id. Nevertheless, the qualities discussed as Hopkins’s faults were celebrated in male candidates. See id. at 251. Coworkers accused her of “overcompensating for being a woman” and acting “macho.” See id. at 235.
acting “masculine” or “feminine” enough. Hopkins did not fit into traditionally female stereotypes, which made her an unappealing candidate to the partners evaluating her. While some commentators consider this ruling a victory for transgender rights, others argue that applying this reasoning to transgender discrimination requires too much of a logical leap.

B. Title VII of the Civil Rights Act and Title IX of the Education Act

Because Fourteenth Amendment protections only apply to government action, many litigants seek to create change by litigating against private action and using protections established in legislative acts. The original draft of the Civil Rights Act did not include sex as a protected trait; Congress only included it as a last-minute addition. Because it was nearly excluded, some commentators believe that Congress included sex as a suspect class in an effort to kill the Act in its entirety. Regardless, the final product included protections against sex discrimination to expand protections for people implicitly included in Title VII’s protections. For example, in Oncale v. Sundowner Offshore

35. See id. at 251 (emphasizing employers cannot evaluate employees based on sex classification stereotypes). The Court used a definition of sex that includes the social understanding of gender to hold that declining to promote Hopkins because her behavior and mannerisms did not comport with traditional female stereotypes constitutes sex discrimination under Title VII. See id. at 251, 258.

36. See Price Waterhouse, 490 U.S. at 235 (discussing suggestions employers made to Hopkins to improve chances of advancement).


38. See U.S. CONST. amend. XIV (establishing civil rights protections from government action); 42 U.S.C. § 2000e-2(a)(1) (applying anti-discrimination protections against private employers); 20 U.S.C. § 1681(a) (establishing civil rights protections against private actors in educational programs); see also infra Section II.B (describing sex discrimination cases using Title VII and Title IX).


40. See id. at 63-64 (claiming some believe “sex” added to Title VII to kill bill).

41. See id. (emphasizing addition of sex discrimination to Title VII). Some have speculated that, due to the late addition of discrimination on the basis of sex, “legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII,” thus leaving it for judicial determination. See id.; see also Adside, supra note 12, at 476 (delineating transgender rights not federally protected due to government inaction).

42. See Harrison, supra note 39, at 73-74 (discussing Title VII application to sexual harassment, gender stereotyping, gender identity, and transgender status); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (applying Title VII sex discrimination to sex stereotypes). Following Title VII’s passage, many people experiencing discrimination based on their sexual orientation attempted to assert Title VII protections, but courts summarily rejected them because they held that “sex” does not include discrimination based on sexual preference.
Services, Inc., the Court ruled that under Title VII, sex discrimination can include discrimination by one person against another of the same sex. The Court reasoned that the key issue under Title VII jurisprudence is whether an employer treats a member of one sex in a way that disadvantages them compared to the other sex. According to the Court, Title VII is not limited to the prohibitions that the legislators originally intended; rather, “it is ultimately the provisions of our laws . . . by which we are governed,” not the plain words of the Framers. Although this principle is not explicitly outlined in Title VII, the Court’s ruling in Oncale and Price Waterhouse caused lower courts to extend Title VII to include protection from discrimination based on sexual orientation. Despite this victory, circuit splits prevented uniform national recognition of these protections until the recent Supreme Court decision in Bostock v. Clayton County.

Title IX does not explicitly extend its protections to include gender identity, but lower courts continue to interpret the prohibition of sex discrimination to
include these protections. In *G.G. ex rel. Grimm v. Gloucester County School Board*, the Fourth Circuit held that the plain meaning of a Department of Education letter entitled students to use the restroom according to their gender identity, even when that identity does not match their biological sex at birth. The court concluded that the Department of Education’s interpretation was “not plainly erroneous or inconsistent with the text of the regulation” when considering existing federal guidelines regarding sex and gender, thus extending Title IX sex discrimination protections to transgender status and gender identity.

Similarly, in *Whitaker ex rel. Whitaker v. Kenosha Unified School District*, the Seventh Circuit upheld a preliminary injunction that allowed Whitaker to use the restroom corresponding to his gender identity rather than his assigned sex at

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49. See Harrison, *supra* note 39, at 90-91 (describing Department of Education provisions prohibit sex discrimination under Title IX). These prohibitions against sex discrimination have included protection for transgender status and gender identity under the Obama Administration’s guidance, though that guidance was rescinded by the Trump Administration. Compare 2016 Dear Colleague Letter, *supra* note 6, at 2 (holding sex discrimination to deny transgender student bathroom access), with 2017 Dear Colleague Letter, *supra* note 6, at 1 (rescinding 2016 Dear Colleague Letter). Maine was the first state to recognize this principle. See Pogofsky, *supra* note 4, at 744.

50. 822 F.3d 709 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239 (2017).

51. See *id.* at 722-23 (holding deference given to Department of Education interpretation of Title IX sex discrimination). The school board instituted a policy allowing students to use only the bathroom corresponding to their biological sex or single-stall restrooms. *See id.* at 716. A transgender student brought Equal Protection and Title IX claims against the school board, claiming its policy was discriminatory because it treated him differently than other similarly-situated students at his school. *See id.* at 715-17. The district court rejected the student’s arguments, ruling that Title IX prohibits sex discrimination, not “other concepts” such as gender identity. *See id.* at 717. The Department of Education’s regulations implementing Title IX say in plain language that the facilities provided for one sex should be comparable to the facilities provided for the other. *See id.* at 718. In January 2015, the Department of Education Office for Civil Rights issued a letter referencing a Title IX provision that stated, “[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.” *See Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec’y for Pol’y, U.S. Dep’t of Educ. Off. for C. R., to Emily T. Prince, Esq. (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [https://perma.cc/2RBP-8QML]. The Fourth Circuit reversed, enforcing the Department of Education’s interpretation. *See Grimm*, 822 F.3d at 723.

52. See *Grimm*, 822 F.3d at 722-23 (ensuring validity of Department of Education interpretation). In giving controlling weight to the Department of Education’s interpretation of its own rules, the court held that, absent a constitutional challenge to an agency’s rules, courts must defer to the agency’s existing rules. *See id.* at 723-24.

53. 858 F.3d 1034 (7th Cir. 2017).
The court applied the *Price Waterhouse* reasoning, equating discrimination based on sex stereotypes with discrimination based on gender identity.  

**C. Perception and Treatment of Transgender People in Modern Society**

**1. Sociological Effects of Transgender Discrimination**

Despite an increase in media attention, statistics reveal many transgender people still face “high rates of mistreatment and violence.” Conversations about transgender people often center on the danger they may pose to society and societal norms, especially to the safety of women and children. This common birth.  

54. See *id.* at 1042, 1055. Whitaker was a transgender student whose school denied him the use of the boys’ restrooms. See *id.* at 1040. A representative of the school told Whitaker that he could only use the gender neutral or female restrooms until he had fully medically transitioned from female to male. See *id.* at 1041. Though Whitaker transitioned publicly, legally changed his name, and provided his school with multiple letters from his pediatrician about his gender identity, the school would not permit him to use the boy’s restroom. See *id.* at 1040-41. Whitaker filed a motion for injunctive relief to prevent the enforcement of the school policy, claiming that the policy violated his rights under Title IX and the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 1042. The district court found for Whitaker and the school appealed. See *id.* The Seventh Circuit Court of Appeals affirmed the district court’s decision, stating that Whitaker proved the school policy would force him to suffer irreparable harm, that there was no other remedy for this injury, and that he had a reasonable likelihood of success based on his claim. See *id.* at 1044, 1055. The court ruled for Whitaker based on testimony from experts that the school would “significantly and negatively impact his mental health and wellbeing” if it continued to bar him from using the boys’ facilities. See *id.* at 1045. When the topic of gender-neutral alternatives arose, the court disregarded it by again highlighting that those alternatives would only further Whitaker’s feelings of otherness and isolation. See *id.* at 1045-46. The court also disregarded any suggestion of alternative remedies at law, asserting that monetary damages cannot account for “prospective harm,” especially when it is entirely preventable. See *id.* at 1046.

55. See *id.* at 1051-52 (expanding Title IX’s definition of sex discrimination to include gender identity). The court noted that *Price Waterhouse’s* prohibition against sex discrimination “encompasses both the biological differences between men and women, and gender discrimination . . . based on a failure to conform to stereotypical gender norms.” See *id.* at 1049 (quoting Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004)). The court applied these same policies to Title IX and stated that discrimination based on nonconformity to gender norms would not occur but for the plaintiff’s sex. See *id.*

56. See Pozofsky, supra note 4, at 738-39 (presenting statistics about gender identity discrimination). Although the United States is home to several high-profile transgender celebrities, statistics show that severe risks of injury are pervasive in the transgender community. See *id.* at 739. For example, according to a survey by the National Center for Transgender Equality, 47% of transgender adult respondents have been sexually assaulted and 8% reported being physically attacked; most transgender student respondents reported some form of violence, with 54% reporting verbal harassment, 24% reporting physical attacks, and 13% reporting sexual assault. See *id.* In a separate survey, Fenway Health determined that a majority of respondents had experienced discrimination in a place of public accommodation. See S.L. Reisner et al., FENWAY HEALTH, DISCRIMINATION AND HEALTH IN MASSACHUSETTS: A STATEWIDE SURVEY OF TRANSGENDER AND GENDER NONCONFORMING ADULTS 16 (2014), https://fenwayhealth.org/documents/the-fenway-institute/policy-briefs/The-Fenway-Institute-MTPC-Project-VOICE-Report-July-2014.pdf [https://perma.cc/4RQM-HKJP] (indicating prevalence of verbal harassment and physical assault in public accommodations). Transgender people are also four times more likely than the general population to report living in extreme poverty. Steinmetz, supra note 1 (exposing marginalization of transgender people). More than fifteen transgender people were murdered in 2015, and the National Coalition of Anti-Violence Programs reported that eleven of the twenty LGBTQ+ people murdered in 2014 were transgender women. See *id.*

fear is unfounded as many published articles and studies have found that the so-called predatory behavior of transgender people is nonexistent. Further, bills advocating for transgender inclusivity do not result in criminal activity or privacy violations in public restrooms. These unsubstantiated claims can create an undeserved and potentially dangerous anti-transgender bias.

The Diagnostic and Statistical Manual of Mental Disorders (DSM) no longer considers transgender status a mental health disorder, but transgender discrimination as well as the effects of gender dysphoria continue to have considerable effects on the psychological health of members of the transgender community. The American Psychiatric Association defines gender dysphoria as the conflict between a person’s assigned gender at birth, commonly referred to as sex, and the gender with which a person identifies. The Fenway Health Institute and the

[https://perma.cc/XRM9-6TDU] (detailing anti-transgender bias in media); see also, e.g., G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 716 (4th Cir. 2016) (describing concerns parents raised regarding transgender bathroom access). After multiple state legislatures proposed or passed bathroom bills in recent years, anti-transgender activists spoke out, claiming that allowing transgender people to use the bathroom matching their gender identity would grant male predators access to female bathrooms, causing risk to women and children. See Steinmetz, supra; see also Kopan & Scott, supra note 5 (describing North Carolina bathroom bill’s purpose); Kogan, supra note 10, at 1207 (summarizing opposing opinions); Samar, supra note 10, at 35 (discussing legislation similar to House Bill 2). The federal government has also issued guidance on the use of bathrooms by transgender students under Title IX. See generally 2016 Dear Colleague Letter, supra note 6 (including gender identity in Title IX protections against sex discrimination); 2017 Dear Colleague Letter, supra note 6 (rescinding 2016 Dear Colleague letter and corresponding definitions of sex). Although there was little evidence to support these claims, they helped create the myth of the transgender bathroom predator, causing fear and spreading anti-transgender and anti-LGBTQ+ propaganda. See Steinmetz, supra.


59. See Hasenbush et al., supra note 58, at 80 (concluding statistics show no evidence of link between criminal action and transgender inclusivity).


National Center of Transgender Equality conducted studies that report transgender people experience negative mental health symptoms following incidents of discrimination and that anti-transgender bias affects a transgender person’s prospective employment, medical treatment, and general ability to participate in society.65

2. Legal Discourse and Bostock v. Clayton County

The Supreme Court recently granted certiorari to and decided a high-profile case of alleged transgender bias in the workplace, resolving a circuit split on the issue.64 In October 2019, the Supreme Court heard oral arguments for R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC,65 a case in which a transgender woman alleged that she was fired from her job for living and identifying as a woman.66 Aimee Stephens, the plaintiff, argued that she lost her job because Harris discriminated against her based on her gender identity and transgender

(defining gender dysphoria clinically). Often the conflict between sex and gender can lead to discomfort, distress, or both. See id. For example, gender dysphoria includes the discomfort one might feel when they identify as male but retain secondary sex characteristics from being assigned female at birth. See id.

63. See GRANT ET AL., supra note 60, at 8, 10 (explaining mental and physical hardships come with anti-transgender bias and dysphoria); see also REISNER ET AL., supra note 56, at 19 (providing statistics connecting anti-transgender bias with negative emotional symptoms in transgender community). According to the Fenway Institute’s Massachusetts-focused study, 65% of transgender and gender nonconforming respondents reported discrimination because of their gender identity. See REISNER ET AL., supra note 56, at 16. Participants also reported high levels of negative emotional reactions due to discrimination in public accommodations. See id. at 19. The survey also reports that transgender and gender nonconforming people will often postpone medical treatment due to discrimination and discomfort. See id. at 20. The National Center for Transgender Equality and the National Gay and Lesbian Task Force published a joint study that reflects a national survey and reports high levels of suicide attempts, sexual harassment, and economic loss due to anti-transgender biases. See GRANT ET AL., supra note 60, at 10, 82-83. The study also reports that the unemployment rate among transgender people is double the rate of the general population, 90% of the people surveyed have reported harassment or mistreatment at work, and 47% of people surveyed reported adverse job outcomes because of their gender identity. See id. at 3. Further, participants in the study reported high rates of discrimination and disrespect, with 63% reporting serious acts of discrimination (“events that would have a major impact on a person’s quality of life and ability to sustain themselves financially or emotionally”) and 23% reporting catastrophic acts of discrimination (“having been impacted by at least three . . . major life-disturbing events due to bias”). See id. at 10.

64. See Weiss, supra note 25, at 575, 579-80 (affirming Court’s reluctance to narrowly define sex); see also Tucker Higgins, Supreme Court Clashes over Meaning of “Sex” in LGBT Discrimination Cases, CNBC (Oct 8, 2019, 3:41 PM), https://www.cnbc.com/2019/10/08/supreme-court-clashes-over-meaning-of-sex-in-lgbt-discrimination-cases.html [https://perma.cc/33KN-HZ3W] (reporting on Supreme Court accepting important LGBTQ+ case).


66. See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 569 (6th Cir. 2018) (describing facts of case), aff’d sub nom. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020). Aimee Stephens worked for Harris Funeral Homes (Harris) for approximately six years before her transition from male to female. See id. at 567-69. Ms. Stephens’s boss, Thomas Rost, fired her, claiming that her desire to dress in conformance with her gender identity was against God and, if he allowed that, he would be “complicit in supporting the idea that sex is a changeable social construct.” See id. at 569. Mr. Rost testified that this belief was the reason he fired Ms. Stephens. See id.
status.\textsuperscript{67} In contrast, Harris argued that including transgender status under the prohibition of sex discrimination would redefine “sex,” though some circuit courts had already suggested that Title VII did protect transgender employees.\textsuperscript{68} Despite the need for binding federal precedent to resolve the circuit split on the issue, the Court appeared hesitant during oral arguments to use this case to define all future litigation involving transgender and gender identity issues, claiming it might be better resolved by the legislature.\textsuperscript{69}

In June of 2020, the Supreme Court ruled in \textit{Bostock} that firing an employee because of their sexual orientation or transgender status is discrimination on the basis of sex under Title VII.\textsuperscript{70} In this consolidated decision that included \textit{R.G. & G.R. Harris Funeral Homes, Inc.}, Justice Gorsuch stated that Title VII forbids situations in which “sex plays a necessary and undisguisable role in the decision” to terminate someone’s employment.\textsuperscript{71} Additionally, the Court was adamant that Title VII applies to the individual rather than the collective, meaning that an employer who considers sex as a factor when making hiring or firing decisions still commits sex discrimination when the policy or practice affects both biological sexes.\textsuperscript{72}

\textsuperscript{67} See Transcript of Oral Argument at 3-4, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) (arguing discrimination against Ms. Stephens’s gender identity reason for termination). The EEOC’s first argument invoked \textit{Price Waterhouse}, claiming that Ms. Stephens was fired for failing to conform to sex stereotypes by presenting as a female employee. \textit{See id.} Next, the EEOC argued that Ms. Stephens’s boss fired her “for contravening a sex-specific expectation” that she would remain male for her entire life, which only applies to people assigned male at birth. \textit{See id.} at 4. Finally, the EEOC argued that Ms. Stephens was fired for changing her sex, which is discrimination on the basis of sex. \textit{See id.}; Brief for the Respondent at 15-19, R.G. & G.R. Harris Funeral Homes, 139 S. Ct. 1599 (No. 18-107) (summarizing respondent’s arguments). \textit{See generally supra} notes 26-27 and accompanying text (describing historical understanding and evolution of definition of sex).

\textsuperscript{68} See Weiss, supra note 25, at 579-80 (noting circuit court decisions and trends), Transcript of Oral Argument, supra note 67, at 28-29 (arguing inclusion of transgender under “sex” redefines sex). Harris attempted to persuade the Court to deny the discrimination claim by claiming that imposing a sex-specific dress code was a bona fide occupational qualification due to the nature of the work of a funeral home. \textit{See Transcript of Oral Argument, supra note 67, at 28, 31 (arguing no discrimination occurred because bona fide occupational qualification); 42 U.S.C. § 2000e-2(e)(1) (allowing discrimination so long as “reasonably necessary to the normal operation of that particular business”). Harris also argued against Ms. Stephens’s claim that sex-stereotyping is a form of sex discrimination, claiming that under her theory every “sex-specific policy[.] based on biological sex” would be considered illegal. \textit{See Transcript of Oral Argument, supra note 67, at 29; Brief for the Petitioner at 14-15, R.G. & G.R. Harris Funeral Homes, Inc., 139 S. Ct. 1599 (No. 18-107) (outlining arguments for petitioner).}

\textsuperscript{69} See Transcript of Oral Argument, supra note 67, at 24-25 (questioning whether legislature better positioned to change Title VII). At oral argument, the Justices asked the attorneys about the future impact of their decision. \textit{See id.} at 5-6.

\textsuperscript{70} See \textit{Bostock}, 140 S. Ct. at 1754 (holding employers commit sex discrimination when they fire based on sexual orientation or transgender status). In the majority opinion, Justice Gorsuch stated that firing an individual for being LGBTQ+ is essentially firing them because of traits and attributes that society expects in members of a different sex. \textit{See id.} at 1737.

\textsuperscript{71} \textit{See id.} at 1737-38 (holding Title VII forbids employers from considering sex when making employment decisions). The Court consolidated three similar cases into this decision. \textit{See id.} at 1731.

\textsuperscript{72} See \textit{Bostock v. Clayton Cnty.}, 140 S. Ct. 1731, 1741 (2020) (indicating overall company policy does not trump individual treatment). The Court stated:
While this decision is an incredible step forward for transgender rights, the Court was careful to only apply these protections to Title VII jurisprudence. Justice Gorsuch explicitly stated that the historic decision does not “prejudge” any other legal questions. Instead, he focused on a textual analysis, reading deeply into the words of Title VII and directly opposing the employer’s originalist arguments. The majority, in stark opposition to the dissent, reasoned that the broad language of the original statute opens itself to wider applications of sex discrimination. The Court explicitly limited this decision to Title VII but acknowledged the ruling’s potential wider implications and addressed the worry that the decision may “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination,” noting that it is not the Court’s place to make new legislation but to interpret existing statutes.

An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision. And it doesn’t matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred [under Title VII].

Id. The Court furthered this argument, stating that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex” because “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions.” See id.

73. See id. at 1753 (applying decision to Title VII only).
74. See id. The Court focused only on Title VII when making its decision, claiming that it cannot apply the holding to federal discrimination laws broadly because it has not heard arguments based on other similar statutes. See id.
75. See id. at 1737-38 (commencing textual analysis of Title VII). In analyzing the statute, the Court applied a “but-for” causation standard, ruling that Title VII prohibits employers from avoiding liability simply because there were other factors that contributed to the employment decision. See id. at 1739. As long as the employee’s sex was one consideration of the decision, it is a violation of Title VII. See id. This view directly opposes the originalist arguments that the three employers cite in their briefs. See id. at 1744-49. The Court combated all of these arguments by focusing on the broad language of the statute, summarizing by saying:

[T]o refuse enforcement just because . . . the parties before us happened to be unpopular at the time of the law’s passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.

Id. at 1751. The broad language of Title VII has opened up numerous unforeseeable applications. See id. at 1752.

76. See Bostock, 140 S. Ct. at 1753 (indicating broad language allows for wider interpretation). The language of Title VII is too broad for the Court to deny that sex discrimination can be widely interpreted. See id. Further, the Court implied that Congress’s drafting choices in 1964 were purposeful and focusing discrimination against individuals rather than between groups “virtually guaranteed that unexpected applications would emerge over time.” See id. The Court called this a legislative choice and bound itself to the language of the law, stating, “[j]udges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.” See id. at 1753-54.
77. See id. at 1753 (claiming broad language legislative choice). While the Court refused to apply its holding to other statutes, it implied that the statutory language was written for broader application. See id. at 1752-
III. ANALYSIS

*Bostock* does not definitively close the issue of gender identity recognition and rights, but it is a monumental decision for the transgender community both socially and legally. Although this decision makes strides toward acknowledging the separation of gender identity and expression from biological sex under Title VII, the Court did not interpret sex discrimination to explicitly protect against discrimination based on gender identity. Further, the Supreme Court has not definitively ruled that the holding in *Price Waterhouse*—that the use of sex stereotypes constitutes sex discrimination—is applicable to the transgender community, though it is logical to interpret it in that way. Without an obvious and purposeful decision from the Court, opponents of transgender rights will continue to marginalize the transgender community by arguing for interpreting Title VII protections as only applicable to those within the male-female binary.

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53. While the Court did not address similarly-written statutes like Title IX and Title II of the Civil Rights Act, this decision opens them up for discussion by the Court in later decisions. See id. at 1753.

78. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (refusing to definitively apply precedent beyond Title VII jurisprudence); see also Transcript of Oral Argument, supra note 67, at 24-25 (questioning whether issue better solved by Congress).

79. See *Bostock*, 140 S. Ct. at 1746-47 (applying Title VII sex discrimination without explicitly separating sex and gender); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (applying Title VII sex discrimination to sex stereotypes but still basing distinction in concept of sex); cf. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 722-23 (4th Cir. 2016) (deferring to interpretation of letter expanding Title IX to protect transgender and gender identity), vacated and remanded, 137 S. Ct. 1239 (2017); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (expanding Title IX’s definition of sex discrimination to include gender identity). The *Bostock* Court did not interpret the acts to include the term “gender identity”; it emphasized that it is expanding *Price Waterhouse*’s sex stereotype reasoning to protect being homosexual or transgender at work, but did not interpret Title VII to reflect that gender identity is protected under discrimination on the basis of sex. See *Bostock*, 140 S. Ct. at 1753; *Price Waterhouse*, 490 U.S. at 251. This is similar to the reasoning applied by circuit courts in Title IX cases involving transgender students. See *Grimm*, 822 F.3d at 722-23; *Whitaker*, 858 F.3d at 1049.

80. See *Bader*, supra note 8, at 735 (acknowledging circuit splits on interpreting sex stereotypes, including gender expression). But see *Bostock*, 140 S. Ct. at 1754 (holding Title VII sex discrimination includes transgender status). Though the court acknowledged that homosexuality and transgender status are “distinct concepts from sex,” the Court did not attempt to definitively name gender identity as its own protected class. See *Bostock*, 140 S. Ct. at 1746-47. Rather, the Court included gender identity under the umbrella of sex discrimination, keeping the two linked. See id. at 1753.

81. See, e.g., Brief for the Petitioner, supra note 68, at 20-21 (advancing argument against expansive understanding of distinctions between sex and gender under Title VII); Transcript of Oral Argument, supra note 67, at 27-29 (transcribing defendant’s argument about sex binary); see also Weiss, supra note 25, at 580 (outlining shifting traditional definition of “sex” in court history); *Etsitty v. Utah Transp Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007) (stating sex does not define anything outside traditional binary); *Ulane v. E. Airlines*, 742 F.2d 1081, 1086 (7th Cir. 1984) (holding Title VII does not protect transgender status without explicit mention).
A. Legal Implications of Bostock

While Bostock is itself historic, the Court’s explicit statement that it applies only to Title VII limits its influence. The Court condemned the actions of the employers in Bostock, but also stated that the holding will not affect issues such as sex-segregated bathrooms, locker rooms, and dress codes, which fall under the purview of other statutes that were not before the Court. By limiting the scope of the holding to Title VII, the Court diminished the potential power of its decision.

Despite its limitations, the Bostock decision has important consequences for society as a whole. By holding that discrimination based on transgender status and homosexuality falls under the umbrella of sex discrimination, the Court advanced a more expansive understanding of sex than what Title VII originally envisioned, which is a progressive move toward a modern jurisprudence that distinguishes between sex and gender. The Court’s decision in Bostock connected the idea of transgender identity as a “distinct concept” from biological sex with its holding in Price Waterhouse, which stated that sex discrimination includes discrimination based on noncompliance with sex stereotypes, by extending the “but-for” causation factor to include more nuanced views.

82. See Bostock, 140 S. Ct. at 1753 (acknowledging employers worry decision will exceed Title VII). Because the Court ruled based on the language of the statute, the defendant employers anticipated a wider application of the interpretation that would affect both federal and state laws that prohibit sex discrimination. See id.

83. See id. (refusing to expand holding to other statutes and laws).

84. See Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020) (limiting holding to Title VII cases). The Court purposefully constrained its decision to Title VII cases, claiming an inability to decide the validity of other sex discrimination laws without the “benefit of adversarial testing about the meaning of their terms.” See id. While the Court justified this by saying that it does not wish to prejudge cases, limiting its application to just one provision of the Civil Rights Act severely lessens the impact this decision could have for LGBTQ+ rights. See id.

85. See Adside, supra note 12, at 476 (noting previous congressional and Supreme Court inaction on transgender rights). In Bostock, the Supreme Court concluded that discrimination based on transgender status is encompassed within discrimination based on sex, rather than to definitively include gender identity within Title VII’s definition of sex. See Bostock, 140 S. Ct. at 1753-54. The argument that the Court could decide Bostock without deciding whether gender identity is included within Title VII’s definition of sex was advanced in Ms. Stephens’s brief in R.G. & G.R. Harris Funeral Homes, Inc., likely to make her argument more palatable to the Court. Brief for the Respondent, supra note 67, at 20-21 (arguing Court “need not decide” whether gender identity part of sex).

86. See Bostock, 140 S. Ct. at 1746-47; see also Fleming & McFadden-Wade, supra note 7, at 160 (stressing state and circuit splits over difference between sex and gender); Weiss, supra note 25, at 579-80 (claiming gender identity ripe for Supreme Court interpretation). By taking the first steps towards a distinction between sex and gender, the Court opened the door for future litigation and legislation based solely on discrimination against gender identity, which would solidify recognize gender identity as a protected class separate from biological sex. See Weiss, supra note 25, at 575, 579-80; see also Federal Court Decisions, supra note 37 (outlining individual state stances on sex discrimination). The Bostock decision stated that because the decision could be made on the basis of sex “referring only to the biological distinctions between male and female,” it did not need to reach the debate on whether gender identity is a protected class under Title VII. See Bostock, 140 S. Ct. at 1739.

87. See Bostock, 140 S. Ct. at 1746-48 (holding equal discrimination based on multiple “but-for” factors still discrimination); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1991) (applying Title VII sex
Decisions that the Court makes in the future regarding protections for the transgender community will affect millions.\textsuperscript{88} Although the Court’s opinion in \textit{Bostock} was limited in scope to Title VII, the decision implies that there is an opening for legislative efforts to include gender identity and sexual orientation within antidiscrimination laws, much like Massachusetts’s Senate Bill 2407 did.\textsuperscript{89}

While the transgender community should continue to use the court system to make progress toward federal protections, this strategy is unlikely to achieve the desired effect in a swift, specified manner because legal precedents are made piecemeal by circuit courts until there is a Supreme Court decision on the issue.\textsuperscript{90} It is unlikely the Supreme Court will rule for broad protections of gender identity under Title VII—in \textit{Bostock}, the Court explicitly refused to enter into the debate though the case seemed to set the stage for such a decision; the dissenting Justices also foreclosed this possibility.\textsuperscript{91} In addition, the Court’s desire to defer to the

discrimination protection to discrimination based on sex stereotypes); Transcript of Oral Argument, supra note 67, at 3, 19 (comparing situations in \textit{Price Waterhouse} and \textit{Bostock}). Justice Gorsuch stated that:


\begin{quote}
Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn’t work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here . . . The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer’s challenged adverse employment actions. But both of these premises are mistaken. Title VII’s plain terms and our precedents don’t care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally does not diminish but doubles its liability.
\end{quote}

\textit{Bostock}, 140 S. Ct. at 1747-48. Ms. Stephens and the EEOC relied on \textit{Price Waterhouse} to make their argument against Harris. See Transcript of Oral Argument, supra note 67, at 3-4. She claimed that part of the reason she was fired was because she, in her transgender status, did not comply with the “masculine” stereotype despite her proven ability to perform the position. See id.

\textsuperscript{88} See Bader, supra note 8, at 720-21 (highlighting lack of federal protections). If the Court were to make a definitive decision about gender identity protections, transgender people would no longer be beholden to legal protections on a state-by-state basis, with some states providing more protection than others. See id. Anti-transgender violence and discrimination is widespread in the United States. See Pogoński, supra note 4, at 738-40 (detailing statistics regarding transgender abuse and mistreatment); Steinmetz, supra note 1 (providing national statistics on violence against transgender individuals). After North Carolina’s bathroom bill and bills like it received national attention, societal fears of transgender people were augmented, despite statistics showing that there was no reason to fear transgender persons using bathrooms according to their gender identities. See Steinmetz, supra note 57; Hasenbush et al., supra note 58, at 80.

\textsuperscript{89} See \textit{Bostock}, 140 S. Ct. at 1753 (acknowledging larger implications of decision); Brief for the Respondent, supra note 67, at 20-21 (positing Court “need not decide” whether gender identity part of sex but implying it could); S.B. 2407, 189th Gen. Ct., Reg. Sess. (Mass. 2016) (extending protections to gender identity in Massachusetts); see also Adside, supra note 12, at 476 (acknowledging no national precedent about transgender discrimination implies space for one).

\textsuperscript{90} See Bader, supra note 8, at 735 (outlining current circuit splits on difference between gender identity and sex); see also \textit{Federal Court Decisions}, supra note 37 (showing circuit court gender identity laws).

\textsuperscript{91} See \textit{Bostock} v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) (refusing to resolve debate on gender identity under Title VII); id. at 1753 (acknowledging narrow decision); id. at 1756 (Alito, J., dissenting) (arguing no congressional inclusion of gender identity in Title VII); id. at 1823 & n.1 (Kavanaugh, J., dissenting) (presenting textualist arguments against recognizing gender identity discrimination under Title VII). A pattern in the Court’s
legislature on these matters during the oral arguments for *R.G. & G.R. Funeral Homes, Inc.* and its narrow decision in *Bostock* severely limit the potential for real, widespread policy changes through the courts. Instead, transgender activists must find an alternative method to achieve necessary federal protections.

### B. Separation of Sex and Gender Identity

Multiple circuit courts have adjudicated transgender issues with differing outcomes. Though litigation efforts have successfully molded precedent to allow for broad interpretations of gender identity, most litigation continues to define gender identity as a subcategory of sex. While these efforts are slowly building precedent that supports a more nuanced view of gender and sex, it would be more effective for the LGBTQ+ community if legislatures and courts defined gender identity outside the context of sex and extended protections to gender identity itself without relying on a specific, often conditional, sex-based inclusion of the transgender community.

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92. *See* *Adside*, supra note 12, at 476, 481 (noting lack of Court ruling). Despite attempts to extend existing protections against discrimination through litigation, there is no nationally applicable, uniform decision that explicitly extends protections to gender identity. *See* *id.* at 476; *see also* *Bostock*, 140 S. Ct. at 1754 (extending protections to transgender identity under discrimination on the basis of sex); *Bostock*, 140 S. Ct. at 1739 (refusing to decide question using gender identity).

93. *See* *Adside*, supra note 12, at 476, 481 (noting lack of Court ruling). Despite attempts to extend existing protections against discrimination through litigation, there is no nationally applicable, uniform decision that explicitly extends protections to gender identity. *See* *id.* at 476; *see also* *Bostock*, 140 S. Ct. at 1754 (extending protections to transgender identity under discrimination on the basis of sex); *Bostock*, 140 S. Ct. at 1739 (refusing to decide question using gender identity).

94. *See* *Bader*, supra note 8, at 735 (detailing circuit splits).

95. *See* *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (2017) (using broad interpretation of sex discrimination to include gender identity); *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 723 (2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (using broad interpretation of sex discrimination to include gender identity). Many of these cases, while important for establishing gender identity protections, use existing protections against sex-stereotype discrimination to secure those protections. *See* *Whitaker*, 858 F.3d at 1049; *see also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (using broad interpretation of sex discrimination to include sex stereotypes).

96. *See* *Fleming & McFadden-Wade*, supra note 7, at 160 (differentiating gender-based and biology-based laws). *Compare* Brief for the Respondent, supra note 67, at 15 (positing ruling cognizable under sex discrimination alone), *with* *Bostock*, 140 S. Ct. at 1739 (refusing to decide debate surrounding gender identity). Courts have interpreted biology-based laws inconsistently, which has led to varied outcomes for determining sex discrimination via Title IX and Title VII. *See* *Fleming & McFadden-Wade*, supra note 7, at 189, 190, 195 (explaining inconsistent judicial outcomes determining whether biology-based laws constitute impermissible sex discrimination). Because there is no preemptive federal law that explicitly addresses gender identity, states rely upon
Defining gender identity as a separate entity from sex is the next judicial step toward affirming LGBTQ+ identities and providing specific protections for the transgender community. Protections against sex discrimination can only go so far to protect transgender people, even considering the Court’s expansion of the definition of sex discrimination to include discrimination based on sex stereotypes in *Price Waterhouse*. This is because gender identity is not just a subset of sex stereotypes, but can also encompass gender dysphoria and societal discomfort.

Additionally, as our understanding of LGBTQ+ identities evolves, conflating sex with gender identity has led to continued confusion for the general population. The media often does not capture the nuance of the sex and gender debate, perpetuating the misunderstandings underlying bathroom bills and other anti-transgender legislation. Because the difference between an individual’s biological sex and their internalized sense of gender identity is a nuanced distinction, many transgender persons are mistreated and misunderstood. Drawing a legal distinction between sex and gender could potentially lead to a better general understanding of the nuances between those two identities as well as more efficient, effective protections for human rights.

97 See Smith v. City of Salem, 378 F.3d 566, 573, 575 (6th Cir. 2004) (establishing clear difference between sex and gender); see also Fleming & McFadden-Wade, supra note 7, at 197-98 (noting differentiation between sex and gender in laws reduces liabilities).

98 See Whitaker, 858 F.3d at 1049 (noting courts have used *Price Waterhouse* to protect transgender students); Grimm, 822 F.3d at 718 n.5, 723 (deferring to agency interpretation using sex discrimination protections to protect transgender students). *Whitaker* specifically cites to *Price Waterhouse* in support of its ultimate ruling for *Whitaker*. See *Whitaker*, 858 F.3d at 1049; *Price Waterhouse*, 490 U.S. at 251. Both *Whitaker* and *Grimm* have to rely on expanded definitions of sex discrimination rather than being protected under Title VII solely due to their gender identity. See *Whitaker*, 858 F.3d at 1049; *Grimm*, 822 F.3d at 718 n.5, 723.


100 See Steinmetz, supra note 57 (outlining media fears around transgender bias). The general fear of men entering women’s bathrooms with predatory intent is rooted in the binary definition of sex. See id. Anti-transgender bias spreads misinformation as to who actually uses the bathrooms. See id.

101 See id. (concluding misunderstanding fuels anti-transgender bias); Oral Argument, supra note 67, at 10 (questioning attorneys on transgender use of bathrooms).

102 See Pogofsky, supra note 4, at 738-40 (outlining anti-transgender bias). Despite recent social developments that allow greater access to information, the general public still mistreats and misunderstands the transgender community. See id. at 739 (discussing mistreatment of and around transgender community); see also Steinmetz, supra note 1 (delineating statistics of violence against transgender individuals).

103 See supra notes 96-97 and accompanying text (explaining distinctions between sex and gender useful to obtain protections for transgender community); GRANT ET AL., supra note 60, at 2 (describing harms of anti-transgender bias). Because courts have inconsistently held whether biology-based laws constitute impermissible sex discrimination, utilizing a distinction between sex and gender could promote more concrete protections. See supra note 96.
C. Transgender Advocates Are More Likely to Prevail Through Legislation

LGBTQ+ litigants and advocates have historically pursued antidiscrimination protections through the courts. Antidiscrimination protection through new federal legislation, however, may be a more beneficial route. The passage of the Civil Rights Act of 1964 and the Supreme Court’s subsequent ruling in Craig v. Boren in 1976, which held that a statute’s gender classifications violated the Equal Protection Clause, are an example of a legislation and litigation strategy, which may provide a template for transgender activists to utilize in their fight for legal protection. Because Congress prohibited sex discrimination in Title VII and Title IX, and in Craig, the Court held that a statute made an unconstitutional sex classification in violation of the Fourteenth Amendment, it reinforced the idea that discrimination and classifications on the basis of sex are prohibited. Transgender activists and community members may pursue a similar course of action with national gender identity protections, using legislation and complementary litigation to achieve greater protection.

To the benefit of transgender individuals, Congress has shown an interest in protecting the rights of all U.S. citizens—including transgender people—with its past legislative efforts. Additionally, through the Department of Education and other administrative agencies, President Obama expanded the interpretation of the plain words of Title IX to include gender identity and transgender status
within Title IX’s protections. The same method of expanding protections—using both new legislation and the interpretation of existing legislation—could be applied to protecting gender identity and transgender rights.

The overall goal of these strategies should be to provide more expansive protections against discrimination for transgender people. The Equal Protection Clause may provide additional avenues for litigation and relief if gender identity is recognized as a suspect class. Fourteenth Amendment claims typically entail an initial determination that the classification being made—here, classification based on gender identity—burdens a “discrete and insular minority” that needs to be protected. The result is a vicious cycle: Without an initial determination that gender identity is a suspect class, the Equal Protection Clause cannot prevent legislation that unfairly classifies and affects members of that class, such as bathroom bills. Therefore, to reach the most expansive protections,

110. See 2016 Dear Colleague Letter, supra note 6, at 2 (asserting Title IX encompasses discrimination based on gender identity and transgender status); 2017 Dear Colleague Letter, supra note 6, at 2 (rescinding 2016 Dear Colleague letter). Through his letter, President Obama expanded the regulation against sex discrimination in school facilities to include gender identity. See 2016 Dear Colleague Letter, supra note 6, at 2. Although the Trump Administration’s 2017 Dear Colleague Letter reversed this determination, thereby foregoing protections for transgender students, the Obama Administration’s letter demonstrates the beneficial changes that the executive branch can achieve in this area. See 2017 Dear Colleague Letter, supra note 6, at 2 (stating administration rescinding previous guidance to consider legal issues further); 2016 Dear Colleague Letter, supra note 6, at 2 (expanding definition of sex discrimination in schools).

111. See 42 U.S.C. § 2000e-2(a)(1) (establishing protections for listed suspect classes in workplaces); 20 U.S.C. § 1681(a) (establishing protections for listed suspect classes in schools); cf. 2016 Dear Colleague Letter, supra note 6, at 2 (providing example of beneficial interpretation of Title IX); supra notes 106-07 (describing expansion of prohibition against sex discrimination). Legislative measures like these worked to solidify and ensure protections for underserved and suspect classes under federal law. See, e.g., 42 U.S.C. § 2000e; 20 U.S.C. § 1681(a).

112. See Adside, supra note 12, at 474-75 (describing ordinary source of legislative protection against discrimination); 42 U.S.C. § 2000e-2(a)(1); 20 U.S.C. § 1681(a); see also U.S. CONST. amend. XIV, § 1 (providing federal protections). Ultimately, to fully protect gender identity and recognize it as a suspect class, Congress must provide protection first. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding government has right to scrutinize discriminatory action). Once Congress has recognized gender identity as a suspect class, the Supreme Court can apply heightened scrutiny under the Fourteenth Amendment. See id.; Car- olene Prods. Co., 304 U.S. at 152 n.4 (suggesting government protections for minority classes); Chemerinsky, supra note 19, at 729-30 (describing heightened scrutiny).

113. See Cleburne, 473 U.S. at 439-40 (discussing government scrutiny in face of distinguished classes); see also U.S. CONST. amend. XIV, § 1. The Court determined that, for certain classes, the Court has the right to scrutinize discriminatory practices to the level they see fit. See Cleburne, 473 U.S. at 439-40.

114. See Carolene Prods. Co., 304 U.S. at 152 n.4 (suggesting certain suspect classes need higher level of scrutiny). To protect unfairly disadvantaged parties from discrimination because of classifications based on immutable characteristics, the Equal Protection Clause of the Fourteenth Amendment requires that government actors act with a certain level of care in tailoring programs to the interest they claim. See Adside, supra note 12, at 474-75 (defining protected classes with immutable characteristics); Chemerinsky, supra note 19, at 727-28 (setting forth reasons for application of heightened scrutiny). To be entitled to that care, the person must be determined to be a member of a “suspect class.” See Adside, supra note 12, at 463. Transgender identity itself is not a suspect class. See id. at 464.

115. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (explaining equal protection dependent on judicial or legislative determination); Adside, supra note 12, at 463 (describing requirements for application of heightened scrutiny).
LGBTQ+ activists must continue to lobby for legislation that recognizes and protects gender identity.116

D. Further Complication and Politicization

The contradicting positions of the Obama and Trump Administrations through their contrasting federal guidance on the interpretation of Title IX with regard to transgender students in schools demonstrates the current politicization of the issue of transgender rights.117 Lawmakers are also concerned about public backlash to their positions on transgender rights and transgender-related bills are often controversial.118

State governments have the ability to pass legislation expanding or restricting transgender rights as long as said laws do not discriminate against members of a suspect class.119 As previously mentioned, gender identity is not constitutionally protected under the umbrella of sex discrimination or as a stand-alone suspect classification.120 The fact that state legislatures are free to exercise their powers in such a manner when engaging with gender identity engendered the bathroom bill controversy in the first place.121

This Note advocates for the recognition of gender identity as a suspect class through a combination of legislation and litigation as a potential solution to bring about more protection against discrimination for transgender people.122

116. See Adside, supra note 12, at 463 (setting forth benefits and requirements for heightened scrutiny); id. at 476 (presenting other legislative solutions to protect gender identity).

117. See Kogan, supra note 6, at 1207 (examining opposing political stances on transgender legislation). Compare 2016 Dear Colleague Letter, supra note 6, at 2 (announcing Obama Administration’s position), with 2017 Dear Colleague Letter, supra note 6, at 1-2 (denouncing previous administration’s position). The Trump Administration published its letter within one year of the Obama Administration’s 2016 Dear Colleague Letter, and approximately one month after President Trump took office. See 2017 Dear Colleague Letter, supra note 6, at 1 (publishing Trump Administration’s position). In withdrawing the Obama Administration’s letter, the Trump Administration cited issues of legal analysis, but did not provide a counterargument. See id. at 2 (outlining Trump Administration’s reasoning). It also criticized the procedure of the 2016 Dear Colleague Letter, claiming that there was no formal rulemaking process that defined “sex” as including gender identity, and therefore the letter could not be valid. See id. at 2 (expanding upon Trump Administration’s reasoning).

118. See Bader, supra note 8, at 729 (countering discriminatory bathroom bills with other states’ more progressive policies); see also Kopan & Scott, supra note 5 (marking North Carolina’s House Bill 2 controversial); Kralik, supra note 9 (cataloguing states considering anti-transgender bathroom laws following North Carolina’s House Bill 2).

119. See Adside, supra note 12, at 467-68 (discussing state legislation options). In allowing the states to legislate on gender identity, the state can “weigh their interest in safeguarding their citizen’s privacy and safety against the interests of transgender individuals to use their preferred restrooms.” See id. at 467. Discrimination against members of a suspect class is prohibited by the Equal Protection Clause. See id. at 463.

120. See Fleming & McFadden-Wade, supra note 7, at 188 (highlighting circuit court splits about gender identity and sex). The closest that the Court has been to protecting gender identity is through prohibiting sex stereotypes in Price Waterhouse. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding discrimination for failure to fulfill sex stereotype constitutes sex discrimination); see also Adside, supra note 12, at 470-71 (describing how sex stereotyping reasoning applies to transgender discrimination).

121. See supra note 10 and accompanying text (describing recent anti-transgender legislation).

122. See supra note 113 (advocating for suspect class recognition of gender identity).
Nevertheless, a prevailing issue with relying on the Supreme Court to influence policy is that this method is entirely reliant on the composition of the Court, the methods of judicial interpretation the Court applies, and the federal courts’ interpretation of federal statutes. For instance, the current composition of the Court leans heavily conservative, which means the Court may eventually overturn Bostock or further interpret it in a way that strips protections from the transgender community. Notwithstanding Bostock, any legislation that Congress passes would still need to survive the Court’s scrutiny, and the unanimous decision that activists hope for is unlikely if the Court leans strongly to one ideological side.

IV. CONCLUSION

Controversial bathroom bills like North Carolina’s House Bill 2 should be considered unconstitutional under current jurisprudence. While it is perhaps easiest to reach this conclusion through the Fourteenth Amendment, most transgender jurisprudence uses Title VII, Title IX, and other prohibitions against private discrimination. Though it is unlikely that most states will adopt legislation similar to Massachusetts’s Senate Bill 2407, the Supreme Court has been instrumental in defining sex discrimination broadly, which allows for progress in combatting anti-transgender discrimination.

Despite the progress made to connect sex discrimination with gender identity, it would be more effective for the Court to divorce its understanding of the two concepts from each other. This separation will likely lead to a longer road to full protections, but will ultimately lead to a greater understanding of the two concepts without the need for a convoluted interpretation that relies on the courts. Instead, a separation of the sex and gender identity would open the door for legislative remedies like Massachusetts Senate Bill 2407 to be adopted nationwide. Until there is a legislative remedy, the circuit courts will remain split, and there will be no national consensus on the issue, leading to insufficient protection for transgender people against discrimination.

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123. See Higgins, supra note 64.
124. See id. (acknowledging conservative arguments presented to the Court). Even though Justice Gorsuch discussed the seemingly broad nature of Title VII, the ruling was much narrower than LGBTQ+ advocates wanted. See id. (highlighting narrow ruling); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020) (limiting holding to Title VII).
125. See Higgins, supra note 64 (noting ideological division in current Court composition).