

## A COUNTERFACTUAL HISTORY OF TRANSGENDER STUDENTS' RIGHTS

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### ABSTRACT

*Disputes about transgender students' rights are growing in number and prominence. In spring 2017, when the Trump Administration rescinded the Obama Administration's guidance that had protected transgender students, the Supreme Court cancelled oral argument in Gloucester County v. G.G., the case it was scheduled to hear on this topic, vacated the lower court's opinion, and remanded the case. But what if that hadn't happened? Specifically, what if Hillary Clinton had been elected president, the guidance had remained in place, and the Court had heard oral argument as originally scheduled in Gloucester County? This piece employs the approach of counterfactual history, presenting what I believe would have been the Court's decision in Gloucester County in an alternate reality: The Supreme Court would have sided with student Gavin Grimm on administrative law grounds*

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\* Vice Dean for Academic Affairs & Professor of Law, Michigan State University College of Law. I appreciate the insights of scholars Erin Buzuvis, Suzanne Eckes, and Catherine Archibald, as well as the research assistance provided by wonderful MSU Law librarians Jane Meland and Daryl Thompson, and the superb editorial assistance provided by the *University of Pennsylvania Journal of Constitutional Law Online* staff. Additionally, my spring 2017 Education Law students have my gratitude for influencing my thinking about these issues and ultimately inspiring this essay; I designed my Education Law seminar that semester so that the students wrote mock opinions in *Gloucester County*. The class and I agreed in January that we would freeze time and play out the case, no matter what happened after the inauguration. Thus, while the Trump Administration rolled back the 2015 guidance, in our classroom the guidance remained in place. While the real Court vacated certiorari and remanded the case, we pretended that the March 28 arguments were proceeding as scheduled. Sheryl Gay Stolberg, *Bathroom Case Puts Transgender Student on National Stage*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/gavin-grimm-transgender-rights-bathroom.html>. At the end of the semester, my students presented their conclusions through a mock conference of the justices. Gavin Grimm prevailed by a vote of 5-3, or 5-4 when we included Justice Scalia whose seat had remained empty since his death on February 13, 2016 (but whom we included because there were eighteen students in the class and this way each justice was randomly assigned to two students in early January). Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>. Justice Neil Gorsuch was not represented in our class. He was nominated for the Court on January 31, 2017 and confirmed on April 7, 2017. Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>; Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

*with Justice Kennedy, the swing vote, giving the liberal justices their fifth vote. Continuing in this parallel universe, I take what surely would have been an initial reaction by transgender advocates—that the decision was “the Brown v. Board of transgender rights”—and test the limits of that statement. Finally, I return to the present day, reflecting on what we can learn from the counterfactual history, considering how that knowledge can inform our understanding of what happened and why, discussing the current and emerging litigation in this area, and analyzing the importance of policy choices at the state and local level.*

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## INTRODUCTION

On March 6, 2017, twenty-two days before the Supreme Court was scheduled to hear arguments in *Gloucester County v. G.G.* about whether transgender student Gavin Grimm had a right to enter the public school bathroom that is consistent with his gender identity, the Court cancelled oral argument and remanded the case to the Fourth Circuit.<sup>1</sup> Such an abrupt change of course so late in the game is unusual. So, why did this happen, and was the outcome inevitable?

To make a long story short, in January 2015 and May 2016, the Obama Administration's Departments of Education and Justice issued first a policy letter (from Education) and then a significant guidance (from Education and Justice) that created new federal legal protections for transgender students—notably, requiring schools to use the names and pronouns consistent with students' gender identity, mandating access to sex-segregated activities and facilities consistent with students' gender identity, and emphasizing the impermissibility of gender-based harassment.<sup>2</sup> Then, in the November 2016 presidential election, Donald Trump prevailed over Hillary Clinton. On February 22, 2017, roughly one month into the Trump Administration, the Departments of Education and Justice rescinded both the 2015 letter and 2016 guidance, stating that those documents “do not . . . contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.”<sup>3</sup> Thus, federal law no longer protected transgender students because of their gender identity. This change in federal policy brought to a close multi-state, high profile challenges to the guidance that were under way in Texas and Nebraska.<sup>4</sup>

The change in policy also mooted the administrative law question that

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<sup>1</sup> 137 S. Ct. 1239, 1239 (2017).

<sup>2</sup> “Dear Colleague” Letter from Catherine E. Lhamon, Asst. Sec’y for C.R. & Vanita Gupta, Principal Deputy Asst. Att’y Gen. for C.R. (May 13, 2016); Andrew Mytelka, *Trump Administration Rescinds Obama-Era Guidance on Transgender Students*, CHRON. HIGHER EDUC. (Feb. 22, 2017, 11:00 PM), <https://www.chronicle.com/blogs/ticker/trump-administration-rescinds-obama-era-guidance-on-transgender-students/117025>.

<sup>3</sup> “Dear Colleague” Letter from Sandra Battle, Acting Asst. Sec’y for C.R., & T.E. Wheeler, II, Acting Asst. Att’y Gen. for C.R. (Feb. 22, 2017). The 2017 guidance was one of the Trump Administration’s first forays into education policy. It was issued one month after the new President took office and roughly two weeks after the Senate confirmed Attorney General Jeff Sessions and Secretary of Education Betsy DeVos. Mytelka, *supra* note 2.

<sup>4</sup> *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), *order clarified by Order*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016); Plaintiffs’ Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), *Texas v. United States*, No. 7:16-CV-00054-O (N.D. Tex. Mar. 3, 2017); *Texas v. United States*, 679 F. App’x 320 (5th Cir. 2017); *Nebraska v. United States*, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016) (dismissing without prejudice); Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL’Y 1 (2016).

was central to *Gloucester County* and so the Court invited the parties' thoughts about how to proceed. Ultimately, the Court decided to vacate the Fourth Circuit's holding (which had been based on administrative law principles including deference to the now-repealed guidance) and ask the Fourth Circuit to consider the Title IX statutory interpretation question.<sup>5</sup> On remand to the Fourth Circuit during spring and summer 2017, the parties raised and briefed the issue of mootness due to Gavin Grimm's June 2017 high school graduation, in addition to continuing to engage the substantive Title IX and Equal Protection questions. On August 2, 2017, the mootness question led the Fourth Circuit to remand the case to the district court for further development of the record on that topic, rather than proceeding with the appellate oral argument that had been set for September 12, 2017.

What if the presidential election had gone the other way, though, and a Clinton Administration had been implementing policy in education and other areas? Would the Supreme Court have heard Gavin Grimm's case as originally planned? If so, how would the Court have decided it?

It is human nature to ask "what if," and the serious exploration of other possible courses of events is counterfactual history.<sup>6</sup> Over time, this genre has included much speculation about war, peace, and the alignment of nations, and some of its most prominent authors have included Winston Churchill, Philip K. Dick, G.K. Chesterton, and Vita Sackville-West. In legal scholarship, the many prominent law professors who have contributed to books such as *What Brown v. Board of Education Should Have Said*<sup>7</sup> and *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*<sup>8</sup> have imported this approach to our discipline. That is not to say that the approach is without problems—indeed, in a 2014 article in *The New Republic*, law professor Cass Sunstein agreed with noted historian Dr. Richard Evans that "[w]e can . . . dismiss counterfactual history when it is based on false historical claims [about other known events], wildly elaborate causal chains, or all-bets-are-off changes."<sup>9</sup> However, if counterfactual history does not suffer from these shortcomings, Sunstein continued, it can be "legitimate, and even instructive, to ask how things might have turned out . . . otherwise" because it ultimately lets us test our explanation about

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<sup>5</sup> Thankfully this was less cryptic than the usual "grant, vacate, remand" order entered by the Supreme Court. Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513, 513.

<sup>6</sup> Cass R. Sunstein, *What if Counterfactuals Never Existed?*, NEW REPUBLIC (Sept. 20, 2014), <https://newrepublic.com/article/119357/altered-pasts-reviewed-cass-r-sunstein> [hereinafter, Sunstein, *Counterfactuals*].

<sup>7</sup> *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (Jack Balkin ed., 2002).

<sup>8</sup> *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

<sup>9</sup> Sunstein, *Counterfactuals*, *supra* note 6.

what happened and why.<sup>10</sup> It also illuminates other outcomes and lets us consider alternative ways to pursue them if they are desirable or to avoid them if they are not.

Thus, assuming a fairly straightforward causal chain—that Hillary Clinton prevailed in the November 2016 presidential election,<sup>11</sup> the Obama Administration’s 2015 policy letter and 2016 significant guidance regarding transgender students remained in place, and *Gloucester County* was argued in the Supreme Court as already briefed and originally scheduled—Part I presents a counterfactual history of *Gloucester County*, including a description of the Court’s “decision” in Gavin Grimm’s favor and an initial analysis of the same. Part II then returns to the present reality and explores what this counterfactual history can teach us.<sup>12</sup> Ultimately, this piece provides the following new insights: First, the presidential election controlled the Court’s disposition of *Gloucester County*. Second, the current Court would have been likely to decide *Gloucester County* in favor of transgender students on administrative law grounds, although this is dependent on Justice Kennedy; additionally, Justice Kennedy’s “equal dignity” jurisprudence gives lawyers and federal judges much to work with in the Equal Protection Clause arena in other transgender cases. Third, efforts to protect transgender students at the state and local level have become even more important since the Trump Administration’s policy took effect and repealed federal protections.

#### I. JUNE 30, 2017, REIMAGINED

Today, the Supreme Court held by a vote of 5-3 that transgender boy Gavin Grimm other transgender students across the nation may use the public school bathrooms consistent with their gender identity. School districts, students, and activists on both sides have eagerly awaited a decision in this case since it was argued on March 28.<sup>13</sup> So, what did the Justices

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<sup>10</sup> *Id.*

<sup>11</sup> Neil H. Buchanan, *What Would Trump Have Done if Hillary Had Won?*, NEWSWEEK (May 7, 2017, 12:10 AM), <http://www.newsweek.com/neil-buchanan-what-would-trump-have-done-if-hillary-had-won-594652> (writing a counterfactual piece assuming that Clinton had won the election and reflecting on her first 100 days in office).

<sup>12</sup> Notably, this piece makes an argument about how the Court *would* have decided this case—not how it should have. That said, readers may wish to consult the rich and active literature about agency deference as well as sex and gender, for example KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* (2016); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016) [hereinafter Sunstein, *Branch*]; Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Sonja K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389; Erin Buzuvis, “*On the Basis of Sex*”: *Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC’Y 219 (2013); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001).

<sup>13</sup> This is the date for which oral argument had been set.

have to say? And is *Gloucester County* is, as some have said, “the transgender movement’s *Brown v. Board of Education*”?

#### A. *How Gloucester County Came to the Supreme Court*

The facts of this case and the procedural history are relatively straightforward: Gavin Grimm was classified as female at birth, thought of himself as male roughly from the age of twelve, was diagnosed with gender dysphoria around age fourteen, and then sought to live as a boy.<sup>14</sup> For about seven weeks during his sophomore year of high school, Gloucester High School permitted him to use the boys’ bathroom.<sup>15</sup> This practice was discontinued when the school board, in response to some parents’ objections to Grimm’s use of the boys’ bathroom, adopted a policy that required students to use the bathrooms consistent with their biological sex.<sup>16</sup> Grimm’s options then were to use either the girls’ bathroom or one of three single-stall, gender-neutral bathrooms in the school.<sup>17</sup> Grimm’s parents sued the school district, alleging violations of Title IX and the Equal Protection Clause and seeking a preliminary injunction to stay the school district’s policy.<sup>18</sup>

The district court granted the school district’s motion to dismiss the Title IX claim, focusing on the lack of ambiguity in the term “sex,” and thus the “plainly erroneous” position taken by the Obama administration that required transgender students to be allowed to use school bathrooms consistent with their gender identity. This position, the district court concluded, was “inconsistent with the regulation” and, if permitted, would be “‘a new regulation’ through the use of a mere letter and guidance” rather than the notice and comment process required by the Administrative Procedures Act.<sup>19</sup> The district court also denied Grimm’s motion for preliminary injunction on the Equal Protection Clause claim, finding that the balance of hardships (Grimm’s “claims of stigma and distress” and “the privacy interests of the other students protected by separate restrooms”) weighed in favor of the other students, and thus the school district.<sup>20</sup>

On appeal, the Fourth Circuit reversed, holding that the district court “did not accord appropriate deference to the relevant Department of Edu-

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<sup>14</sup> G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 739–40 (E.D. Va. 2015), *rev’d in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), *vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017).

<sup>15</sup> *Id.* at 740.

<sup>16</sup> *Id.* at 740–41.

<sup>17</sup> *Id.* at 741.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 746.

<sup>20</sup> *Id.* at 750.

cation regulations” and that it “used the wrong evidentiary standard in assessing [the] motion for a preliminary injunction.”<sup>21</sup> More specifically, the Fourth Circuit rejected the district court’s conclusions regarding ambiguity and plain error, stating that the regulation’s definition of “sex” is ambiguous. It also concluded the evidentiary standard was inappropriately high.<sup>22</sup>

### B. *The Court’s Decision*<sup>23</sup>

Oral argument in *Gloucester County* took place on March 28, 2017, and the Court released its opinion as is customary<sup>24</sup> at the end of June, holding in favor of student Gavin Grimm 5-3 and grounding its opinion in administrative law principles.

When the Court granted certiorari on October 28, 2016, it agreed to consider two questions: (1) the Departments’ interpretation of “sex” in Title IX as including “gender identity” for the purposes of public school bathrooms, and (2) the appropriate degree of deference to an agency letter under the much-disputed “*Auer* doctrine”—the rule that courts defer to an agency’s interpretation of its own regulation unless “plainly erroneous or inconsistent with the regulation.”<sup>25</sup> Like many cases over the past year and a half, *Gloucester County* was decided by only eight justices. (After Justice Scalia’s unexpected death in February 2016, President Obama’s nomination of Justice Merrick Garland was unsuccessful,<sup>26</sup> and even after President Clinton re-nominated Garland, the Senate did not confirm him until April.<sup>27</sup> Justice Garland chose not to participate in deciding any cases argued before he joined the Court, including *Gloucester County*, although if he had participated it is assumed he would have joined the majority, leading to a 6-3

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<sup>21</sup> G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), *vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017).

<sup>22</sup> *Id.* at 719–22, 725–26.

<sup>23</sup> Yes, gentle readers, this is the point at which the text departs from reality (with the exception of the first two introductory sentences in Part I). Please note that the quotations and citations in this section, however, are authentic unless noted otherwise.

<sup>24</sup> Casey C. Sullivan, *6 Most Important Supreme Court Decisions of 2016*, FINDLAW (Jan. 4, 2017, 5:57 AM), [http://blogs.findlaw.com/supreme\\_court/2017/01/6-most-important-supreme-court-decisions-of-2016-1.html](http://blogs.findlaw.com/supreme_court/2017/01/6-most-important-supreme-court-decisions-of-2016-1.html) (“It’s somewhat unnatural to look at Supreme Court cases by calendar year. The Court, after all, organizes itself around terms that stretch from October of one year to June of the next, with most of the major decisions coming out in June. That means that almost all of this year’s most impactful opinions come from last term.”).

<sup>25</sup> *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

<sup>26</sup> Garland was nominated for the Court by President Obama after Justice Scalia’s unexpected death, but the Senate refused to grant him a hearing so the seat remained open for the remainder of Obama’s term. See Sarah Lyall, *Liberals Are Still Angry, but Merrick Garland Has Reached Acceptance*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html>.

<sup>27</sup> A counterfactual “Justice Garland” is borrowed from Neil H. Buchanan, *supra* note 11.



decision.<sup>28)</sup>

In the decision released just days ago, Justice Kagan wrote for the majority.<sup>29</sup> Consistent with her background as an administrative law scholar,<sup>30</sup> Justice Kagan's opinion engaged the deference question head-on. The Court held that the policy letter and the significant guidance were entitled to substantial deference because of the high level of the government officials involved.<sup>31</sup> Furthermore, the Court held under *Auer* that the agency's interpretation was not "plainly erroneous or inconsistent with the regulation" given Title IX's silence—and thus ambiguity—on the matter of how to determine the "sex" of transgender students for purposes of restroom access.<sup>32</sup> At a more general level, the Court's opinion echoed Justice Kagan's earlier comments in dissent in the 2015 decision *Michigan v. E.P.A.*<sup>33</sup> and law professor Cass Sunstein's argument that agency deference is important because "most of the time, the executive branch knows incalculably more

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<sup>28</sup> See Dave Boyer, *Obama Loses Merrick Garland Battle—but Reshapes Federal Courts for Decades to Come*, WASH. TIMES (Dec. 25, 2016), <https://www.washington-times.com/news/2016/dec/25/obama-loses-merrick-garland-battle-but-reshapes-fe/> (discussing Garland's likely alliance with the Court's "liberal bloc" and Obama appointees' tendency to give great deference to government agencies). Although justices have not participated in deciding cases that were argued before they joined the Court (with Justices Kennedy and Alito most recently being in this position), there is no bar to a justice doing so. See Tony Mauro, *How a New Supreme Court Justice Could Hit the Ground Running—Or Not*, LAW.COM (Jan. 11, 2017), <https://www.law.com/almID/1202776610089/>.

<sup>29</sup> Prominent administrative law scholar Kristin Hickman writes, "[N]one of Justices Kennedy, Breyer, Ginsburg, Kagan, or Sotomayor has joined in any of the calls to reconsider the validity of the *Auer* standard. Among that group, some obviously care little about the nuances of judicial deference doctrine, while others will simply have a completely different view of separation of powers principles from Justices Scalia and Thomas." Kristin E. Hickman, *Contemplating a Weaker Auer Standard*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 23, 2016), <http://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman/>.

<sup>30</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372–83 (2001); Barron & Kagan, *supra* note 12.

<sup>31</sup> Kagan, *supra* note 30; Barron & Kagan, *supra* note 12. I am indebted to Gabrielle Fournier, MSU Law Class of 2017, and Morgan Lear, MSU Law Class of 2018, for this idea. Furthermore, in their unpublished papers in my seminar, Lear thoughtfully argued that Kagan would be especially likely to extend deference because James Ferg-Cadima, as Acting Deputy Assistant Secretary for Policy, is not a mid-level bureaucrat but rather a high-level official due to his responsibility for OCR's Title IX-related policies, and Fournier convincingly argued that the involvement of individuals at high levels in the Obama Administration in transgender student policies would support a greater level of deference, from Kagan's perspective.

<sup>32</sup> *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

<sup>33</sup> 135 S. Ct. 2699, 2718 (2015) (arguing that courts should defer to agencies' regulatory choices on matters where the statute is silent).

than other branches, and when it does not know something, it is in an excellent position to find out.”<sup>34</sup> Justices Breyer,<sup>35</sup> Kennedy,<sup>36</sup> Ginsburg, and Sotomayor<sup>37</sup> joined the majority opinion. Justice Ginsburg wrote separately to engage the Title IX issue and thus situate this case in the trajectory of battles for sex and gender equality.<sup>38</sup>

Justice Kennedy also wrote separately, building on his approach in the same-sex marriage cases *United States v. Windsor*<sup>39</sup> and *Obergefell v. Hodges*<sup>40</sup> and emphasizing the importance of the dignity principles involved.<sup>41</sup> As usual, Justice Kennedy was expected to be the swing vote and scholars and commentators speculated about whether he would continue

<sup>34</sup> Sunstein, *Branch*, *supra* note 12, at 1613 (“With respect to the acquisition of information, the executive branch is usually in a far better position than the legislative and judicial branches. It has a large stock of specialists, often operating in teams, and the teams often have an impressive degree of epistemic diversity. Some of those specialists have spent many years studying and working on the subject. Of course, the executive branch’s capacity to obtain information is far from perfect.”)

<sup>35</sup> Breyer has long been deferential to administrative agencies. *See, e.g.*, Christensen v. Harris Cty., 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting); STEPHEN BREYER, REGULATION AND ITS REFORM (1982); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. 755 (1995); Lisa Heinzerling, *Justice Breyer’s Hard Look*, 8 ADMIN. L.J. 767 (1995); Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. 747 (1995) (discussing Justice Breyer’s pattern of giving great deference to administrative agencies). My argument benefits greatly from the research of Brenna Jardine, MSU Law Class of 2017, on this point.

<sup>36</sup> Justice Kennedy joined the majority in *Auer* and subsequently upheld it, writing for the majority in *Gonzales v. Oregon*, 546 U.S. 243 (2006) and *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326 (2013). I am thankful to Alicia Abella, MSU Law Class of 2017, and Kaitlin Klemp, MSU Law Class of 2018, for influencing my thinking on Kennedy’s approach.

<sup>37</sup> Brianna Ventura, MSU-Law Class of 2018, persuaded me that as much as Justice Sotomayor would be drawn to the practical impact of this policy and decision on students and the equality issues, she would be likely to decide it on administrative law grounds. *Cf. Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015).

<sup>38</sup> It is difficult to imagine that Justice Ginsburg, feminist icon and author of *United States v. Virginia*, 518 U.S. 515 (1996), would not want to situate this case in its historical context. The 2004 Columbia University symposium “Celebration of the Tenth Anniversary of Justice Ruth Bader Ginsburg’s Appointment to the Supreme Court of the United States” contains many pieces that analyze Justice Ginsburg’s commitment to the equality of women and other historically marginalized groups. *See, e.g.*, Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg’s Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39 (2004); *see also* Jeffrey Toobin, *Heavyweight: How Ruth Bader Ginsburg Has Moved the Supreme Court*, NEW YORKER (Mar. 11, 2013), <https://www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg>.

<sup>39</sup> 133 S. Ct. 2675 (2013).

<sup>40</sup> 135 S. Ct. 2584 (2015).

<sup>41</sup> The conventional wisdom seemed to be that Justices Kagan, Breyer, Ginsburg, and Sotomayor would side with the student, while Justice Kennedy would be the swing vote. *See, e.g.*, Steve Sanders, *Why the Supreme Court Should Dismiss the Gavin Grimm Case*, ACSBLOG (Feb. 27, 2017), <https://www.acslaw.org/acsblog/why-the-supreme-court-should-dismiss-the-gavin-grimm-case>. I agree with this, and ultimately I am convinced that, given Justice Kennedy’s leading role and rhetoric in *Obergefell* especially, that he would have viewed this as, first and foremost, an anti-discrimination case and sided with the four justices noted above. *See generally* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015).

his recent pattern of siding with the sexual orientation minority group, extending that pattern to include gender identity, or whether he would be swayed by the defendants' arguments about the appropriate structure and allocation of power within government.<sup>42</sup>

There are a number of ways to explain Justice Kennedy's outcome. For example, some speculate that Justice Kennedy's opinions in sexual orientation cases are explained by wanting to be on the "right side of history,"<sup>43</sup> which is consistent with the gender identity issue in *Gloucester County* because younger adults are more supportive of transgender rights and acceptance of transgender individuals in general appears to be moving relatively quickly, although public opinion research has only recently begun tracking opinions about transgender identity and rights.<sup>44</sup> Relatedly, the outcome also is consistent with commentator William Marks' and law professor Suzanna Sherry's hypothesis that Justice Kennedy's outcomes in

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<sup>42</sup> See, e.g., Will Marks, *Whose Majority Is It Anyway? Elite Signaling and Future Public Preferences*, 4 J.L. (1 NEW VOICES) 13, 22–24 (2014); Sanders, *supra* note 41; Eric Sasson, *The LGBT Movement's Supreme Court Hero: Anthony Kennedy*, NEW REPUBLIC (June 26, 2015), <https://newrepublic.com/article/122182/lgbt-movements-supreme-court-hero-anthony-kennedy>.

Additionally, prominent administrative law scholar Kristin Hickman wrote in September 2016 that she did not expect the Court to overturn *Auer* in *Gloucester County*—in addition to counting the justices, Hickman commented "overturning a standard of review that dates back more than seventy years and has been applied in hundreds of cases is not something the Court is likely to take lightly." Hickman, *supra* note 29.

<sup>43</sup> Michael Klarman, Opinion, *Gay Rights May Get Its Brown v. Board of Education*, N.Y. TIMES (Oct. 11, 2012), <http://www.nytimes.com/2012/10/12/opinion/gay-rights-may-get-its-brown-v-board-of-education.html> ("Justice Kennedy's opinions often suggest that he wants to be on the right side of history, which matters greatly here because the future of gay marriage in America is so clear.")

<sup>44</sup> ANDREW FLORES, TAYLOR N.T. BROWN & ANDREW S. PARK, WILLIAMS INST., PUBLIC SUPPORT FOR TRANSGENDER RIGHTS: A TWENTY-THREE COUNTRY SURVEY 8 (2016). For example, in a 2016 poll conducted in Arizona, roughly 32% of respondents age 51 or older said transgender individuals should be able to use the bathroom of the gender with which they identify, compared to 45% of the group aged 36–50 and 51% of those aged 18–35. Alia Beard Rau, *Poll: Education, Age, Influence Stance on Transgender Bathroom Issue*, AZCENTRAL (Oct. 23, 2016, 6:03 AM), <https://www.azcentral.com/story/news/politics/arizona/2016/10/23/poll-arizona-bathroom-access-transgender/92483910/>; see also Frank Newport, *Disentangling Attitudes Toward Transgender Bathroom Use*, GALLUP (May 20, 2016), <http://news.gallup.com/opinion/polling-matters/191774/disentangling-attitudes-toward-transgender-bathroom.aspx?version=print> (stating that the American public has yet to form strong opinions about transgender bathroom use, making the interpretation of polls on the matter difficult); Andrew McGill, *Americans Are Embracing Transgender Rights*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/08/americans-are-embracing-transgender-rights/497444/> (suggesting that American views of transgender individuals are changing rapidly because there has been an increase in people who know transgender individuals).

Public opinion research about this issue is admittedly difficult given the relatively recent high level of visibility of transgendered individuals—Gallup, which has polled about attitudes towards gay and lesbian individuals since at least 1977, apparently only began polling about attitudes towards transgender individuals in 2016. *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Dec. 22, 2017).

equality-based cases track the opinion of current “elites.”<sup>45</sup> As evidence of elite opinion, support for transgender rights is higher among more educated adults,<sup>46</sup> and the amici supporting Gavin Grimm included corporate powerhouses such as Amazon.com, Apple, IBM, Microsoft, and others,<sup>47</sup> as well as leading associations of medical professionals such as the American Academy of Pediatrics, American College of Physicians, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, and the American Academy of Nursing.<sup>48</sup>

Chief Justice Roberts dissented<sup>49</sup> and was joined by Justices Thomas<sup>50</sup> and Alito.<sup>51</sup> As expected, the dissent also focused on the administrative law question. The dissent declined to apply *Auer*, contending that, as in *Gonzales v. Oregon*, the ambiguity (the word “sex”) was identical in the statute and the regulation. Furthermore, the dissent criticized the majority’s use of *Auer* at length, which two commentators summarized as follows: the doctrine “undermines the separation of powers, defeats the purposes of notice-and-comment as set forth in the Administrative Procedure Act, thwarts the protections of judicial review of agency rulemaking, and encourages regulatory brinkmanship without full consideration of congressional will or practical consequences.”<sup>52</sup> Before the case was decided, some

<sup>45</sup> William Marks & Suzanna Sherry, *Whose Majority is it Anyway? Elite Signaling and Future Public Preferences*, 4 J.L.: PERIODICAL LAB. OF LEGAL SCHOLARSHIP 13, 22-24 (2014).

<sup>46</sup> FLORES ET AL., *supra* note 44, at 8; Rau, *supra* note 44.

<sup>47</sup> Brief for Amici Curiae Apple et al. in Support of Respondent at add. 1, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273 (U.S. S. Ct. Mar. 1, 2017); *see also* Brief for Amici Curiae Apple, IBM Corporation, Microsoft, and 56 Other Companies, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 869 F.3d 286 (4th Cir. 2017) (No. 15-2056).

<sup>48</sup> Brief of Amici Curiae American Academy of Pediatrics et al. in Support of Respondent, at 1a, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273 (U.S. S. Ct. Mar. 2, 2017); *see also* Brief of Amici Curiae Paul R. McHugh et al., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 869 F.3d 286 (4th Cir. 2017) (No. 15-2056).

<sup>49</sup> *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) (inviting a case that properly raises the issue in which the *Auer* doctrine could be considered); Hickman, *supra* note 29 (noting Chief Justice Roberts’ willingness to reconsider *Auer* given adequate briefing on the matter).

<sup>50</sup> *See Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213–14 (Thomas, J., concurring) (noting his support for overruling *Auer*); John C. Eastman, *The President’s Pen and the Bureaucrat’s Fiefdom*, 40 HARV. J.L. & PUB. POL’Y 639, 641–43 (2017) (chronicling Justice Thomas’s criticism of *Auer*).

<sup>51</sup> Justice Alito joined Chief Justice Roberts’ concurrence in *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring), expressed support for Justices Scalia’s and Thomas’s views of *Auer* in *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring); *id.* at 1213–14 (Thomas, J., concurring), and chipped away at *Auer* in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–59 (2012). Hickman, *supra* note 29.

<sup>52</sup> Ilya Shapiro & David McDonald, Gloucester County School Board v. G.G.: *Judicial Overdeference Is Still a Massive Problem*, 18 FED. SOC’Y REV. 8, 9 (2017). To be clear, this is an actual quotation and although Shapiro and McDonald were writing about the Gloucester County case and the shortcomings, in their view, of the *Auer* doctrine, they were not summarizing a dissent in a case that was never argued.

commentators speculated that had Justice Scalia not passed away unexpectedly in February 2016,<sup>53</sup> the case would have been a certain victory for the school district; however, the 5-3 outcome demonstrates that even if Justice Scalia had participated and aligned with his fellow conservatives as he was certain to do,<sup>54</sup> Grimm still would have prevailed 5-4 unless Justice Kennedy, too, had held for the school district.

Although *Gloucester County* established transgender students' bathroom access rights, it did so as the result of an administrative law interpretation and not a constitutional principle. It is expected that a different administration could reverse course, and also that the Court will continue to vacillate regarding the broader issue of agency deference.<sup>55</sup> Indeed, the *Auer* doctrine is part of a much larger conversation addressing fundamental questions about the role of the federal government and the relationship among its branches.<sup>56</sup>

### C. *The Transgender Community's Brown v. Board of Education?*

Not surprisingly, *Gloucester County* was hailed by transgender students and their allies as a "path breaking decision" and "the *Brown v. Board of Education* of transgender rights."<sup>57</sup> *Brown* is the yardstick against which social movements measure their legal victories, and fittingly so: A half century after *Brown* was decided, *Brown* Attorney Jack Greenberg characterized the decision as an event that broke the ice for racial equality, paving the way for significant legal changes in all three branches of the federal government as well as social action.<sup>58</sup> The *Brown* comparison is complex<sup>59</sup> and

<sup>53</sup> Lyall, *supra* note 26.

<sup>54</sup> See *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring) (calling for the Court to overrule *Auer*); Eastman, *supra* note 50, at 642–43.

<sup>55</sup> Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1300, 1306, 1313–14 (2016).

<sup>56</sup> See Kristin Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 528–29 (2014) (discussing how congressional delegation guides *Chevron's* scope and whether Congress considers judicial deference when it drafts legislation). See generally Barron & Kagan, *supra* note 30 (discussing the relationship between Congress and the judiciary after *Chevron*); Kristin Hickman & Nicholas R. Bednar, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017) (finding that judicial *Chevron* doctrine is not declining, but that Congress has relied too heavily on administrative agencies to resolve major policy issues).

<sup>57</sup> These fictitious comments are reflective of the way we often talk about major cases. See, e.g., Klarman, *supra* note 43; Adam Liptak, *Supreme Court Won't Hear Challenge to Assault Weapons Ban in Chicago Suburb*, N.Y. TIMES (Dec. 7, 2015), <https://www.nytimes.com/2015/12/08/us/supreme-court-will-not-hear-challenge-to-assault-weapons-ban-of-highland-park-ill.html>.

<sup>58</sup> Jack Greenberg, *Brown v. Board of Education: An Axe in the Frozen Sea of Racism*, in THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS 61, 74–75 (Kristi Bowman ed., 2015).

<sup>59</sup> See Ilya Somin, Opinion, *Sex Discrimination and the Transgender Bathroom Case*, WASH. POST, (Oct. 31, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/31/sex-discrimination-and-the-transgender-bathroom-case/?utm\\_term=.c9a5fad0e7c9](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/31/sex-discrimination-and-the-transgender-bathroom-case/?utm_term=.c9a5fad0e7c9) (arguing that *Gloucester County* "is not like *Brown*" because "[t]ransgender rights advocates are not seeking to

worth exploring; thus it is the theme that connects the following initial reflections on the Court's recent decision which begin by analyzing *Gloucester County's* expected practical and symbolic societal effects, continue by considering direct effects on other areas of federal law, and conclude by identifying and discussing some of the many legal questions *Gloucester County* leaves unanswered.

### 1. Societal Ripple Effects

Years from now, it may be that the details of the Court's reasoning in *Gloucester County* pale in comparison to the practical and symbolic significance of the outcome. Like *Brown*, initial reaction will be varied, and the near- and long-term indirect effects of the decision have the potential to be significant.

Let us begin by considering initial reactions to these decisions. Historians John Hope Franklin and Alfred A. Moss, Jr., and legal scholar Michael Klarman all write with great nuance about the direct and indirect impact of *Brown*. Among other things, these authors and others describe the initial reactions to *Brown* as a continuum: at the most general level, at one end was the violent and virulent backlash common across the American South;<sup>60</sup> in the middle was the formal acceptance in the Border States with limited immediate impact (though these states also included pockets of deep resistance);<sup>61</sup> and at the other end was the celebration in African-American communities, the significance of which is difficult to overstate.<sup>62</sup> Klarman also argues that *Brown's* direct effects—the desegregation of schools—are only one aspect of *Brown's* importance, and perhaps not even the most significant one. Thus, Klarman contends, *Brown* is also noteworthy because it “forced people to take a position on school segregation,” “unquestionably

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abolish all sex discrimination in bathroom facilities” but only to “have transgender students assigned to bathrooms on the basis of their sense of identity rather than biology”).

<sup>60</sup> JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 453–54 (8th ed. 2000); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 348, 351–60, 385–421 (2004). Across the South, states and school districts resisted *Brown's* mandate. Three years after *Brown* was decided, almost no schools in the South were desegregated. KLARMAN, *supra* at 348, 351. Those that desegregated in the following decade did so because of court orders, and until 1964, the lawsuits were brought only by individual plaintiffs and usually supported by the NAACP, and even then, judges often were inclined to let the litigation move slowly. *Id.* at 351–60. More publicly, massive resistance took root; those who supported desegregation often were the victims of violence. *Id.* at 351–53, 385, 389–92, 410–15, 421. The 1956 Southern Manifesto—rejecting *Brown* wholesale—bore the signatures of 19 Southern Senators and 77 Congressmen. *See id.* at 390, 397, 401, 410, 414, 416 (describing the objectives and the effects of the Southern Manifesto). In a nutshell, after *Brown*, Southern racial politics radicalized. *Id.* at 385, 387, 389–99, 401–08, 421.

<sup>61</sup> KLARMAN, *supra* note 60 at 345–48.

<sup>62</sup> *Id.*, at 368–77, 381–82, 384.

motivated [African Americans] to challenge” segregation, and also “radicalized southern politics” in a way that enabled Massive Resistance and thus “ultimately rallied national opinion behind the enforcement of *Brown* and the enactment of civil rights legislation.”<sup>63</sup> It is useful to import this framework to *Gloucester County*.

Initial reactions to *Gloucester County* seem likely to follow a similar pattern. Indeed, transgender individuals’ rights seem to be at the center of a new culture war.<sup>64</sup> Thus, those who oppose such rights in conservative states and in conservative enclaves of moderate or liberal states will contest the legitimacy of the Court, accusing the Court of “judicial activism” and “social engineering.”<sup>65</sup> Those who are in the equivalent of border states or communities may already have begun to figure out informal ways to accommodate transgender students in their schools, and now will take more formal steps. Indeed, because the long-term direction—transgender individuals will be permitted and accepted in sex-segregated spaces consistent with their gender identity—seems clear for reasons described below, the border-state approach is preferable because it minimizes the harms to transgender students in the interim. Finally, those who are transgender themselves or transgender allies will, indeed, celebrate and feel validated

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<sup>63</sup> *Id.*, at 365, 368, 385.

<sup>64</sup> See Eric Bradner, *Democrats Say They’re Ready for a Culture War as Trump Bans Transgender People from Military Service*, CNN (July 27, 2017, 8:11 AM), <http://www.cnn.com/2017/07/27/politics/trump-transgender-military-ban-politics/index.html> (calling President Donald Trump “a culture warrior” and noting that Democrats, in response to President Trump’s transgender military ban, are prepared to stand up for economic and social issues at the midterm elections); Frederick M. Hess, *New Transgender Rules Are About Obama’s Culture War*, NAT’L REV. (May 16, 2016), <http://www.nationalreview.com/node/435416> (criticizing the Obama Administration’s guidance letter on transgender students’ rights, noting that, with the letter, “[t]he administration went out of its way to seek a culture clash”); Sanders, *supra* note 41 (acknowledging the “culture war” that conservatives have waged against trans people); Alex Shepard, *Trump Wants a Culture War. Are Democrats Ready to Fight Back?*, NEW REPUBLIC (July 28, 2017), <https://newrepublic.com/article/144092/trump-wants-culture-war-democrats-ready-fight-back/> (observing that Democrats’ “Better Deal” agenda for the 2018 midterms is “not a radical document” because it does not address “cultural minefields” like immigration or abortion but rather more “economic bread-and-butter issues” as a reaction to President Trump’s success in the 2016 Presidential Election); Bill Scher, *Democrats Can’t Escape the Culture War*, POLITICO MAG. (July 27, 2017), <https://www.politico.com/magazine/story/2017/07/27/democrats-cant-escape-the-culture-war-215430/> (discussing how the Trump Administration’s transgender military ban has drawn Democrats into a culture war);

<sup>65</sup> See WALTER A. JACKSON, GUNNAR MYRDAL AND AMERICA’S CONSCIENCE: SOCIAL ENGINEERING AND RADICAL LIBERALISM, 1938-1987, at 296–98 (1990) (discussing the strategic approach employed by both President Kennedy and President Johnson to achieve the social results they sought by enacting legislation and thus moving civil rights issues “from the streets to the courts”); ELIZABETH H. SLATTERY, HOW TO SPOT JUDICIAL ACTIVISM: THREE RECENT EXAMPLES 2-3 (June 13, 2013), <http://report.heritage.org/lm96> (“[A] simple working definition is that judicial activism occurs when judges fail to apply the Constitution or laws impartially according to their original public meaning . . . or do not follow binding precedent of a higher court and instead decide the case based on personal preference.”).

by the decision. These indirect effects are far from unimportant.

The indirect effects of *Gloucester County*, both supporting and resisting the decision, will play out for many years. It seems that as with *Brown*, *Gloucester County* will “force[] people to take a position”<sup>66</sup> on the issue of transgender rights, and thus the intensity and significance of any controversy will escalate as school districts and states grapple with their own policies and practices. This is likely to heighten sensitivities around the issue and fuel backlash. Additionally, the backlash could catalyze political action and influence the next presidential election, although it is years away. This is more likely in this instance because *Brown* was rooted in the Fourteenth Amendment, but *Gloucester County* was about deference to a federal administrative agency; thus, a presidential administration with a different approach could reverse course on protections for transgender students.

Whether or not backlash is greater than current resistance, and whether or not the federal protections remain in force after the next presidential election, the importance of the decision to transgender students and their allies today cannot be overstated. Like *Brown*, the direct effects of *Gloucester County* will be measurable—schools will keep records about students’ sex classification changing to reflect their gender identity, and presumably data will be collected about compliance and inclusion in school communities.<sup>67</sup>

The direct and indirect effects are important because transgender students’ experiences while in school have been more negative than the experiences of any other sexual orientation or gender identity group.<sup>68</sup> First, as a 2015 nationwide survey of over 10,000 LGBTQ students documented, “three quarters of transgender students (75.1%) felt unsafe at school because of their gender expression.”<sup>69</sup> Second, about 40% of survey respondents reported hearing negative comments about transgender people “often or frequently” and “[u]nlike biased remarks heard from other students, LGBTQ students heard school staff make negative remarks about gender expression more frequently than homophobic remarks.”<sup>70</sup> Third, LGBTQ

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<sup>66</sup> KLARMAN, *supra* note 61, at 363.

<sup>67</sup> See FRANKLIN & MOSS, *supra* note 60 at 472–73 (describing studies and research on “African Americans’ place in American social and economic life”).

<sup>68</sup> JOSEPH C. KOSCIW ET AL., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION’S SCHOOLS 84 (2016). Economist and education scholar Joseph Cimpian has cautioned about the difficulty of conducting quantitative research regarding sexual and gender minority youth and has identified various ways in which error and bias may be present in this type of research. See generally Joseph R. Cimpian, *Classification Errors and Bias Regarding Research on Sexual Minority Youths*, 46 EDUC. RESEARCHER 517 (2017).

<sup>69</sup> KOSCIW ET AL., *supra* note 68, at 7, 84.

<sup>70</sup> *Id.* at 18–19.



students report missing school because they experienced physical and verbal harassment, and thus it is not surprising that the greater the perceived hostility of a student's environment, the lower the students' GPA.<sup>71</sup> Fourth, transgender students attempt suicide at an unusually high rate. Specifically, the lifetime rate of attempted suicide in the transgender community (41%) is roughly ten times the rate in the total population (4.6%), and even higher than in the gay, lesbian, and bisexual community (10–20%).<sup>72</sup> Of transgender adults who reported attempting suicide, 73% reported that their first attempt was while they were age 17 or younger,<sup>73</sup> and attempts were higher among those who had negative experiences due to their transgender status at school (52%, compared to 37% of those who did not report such negative experiences at school).<sup>74</sup>

Fortunately, recent research about the effect of the legalization of same-sex marriage suggests that changes in law can be related to more positive health and well-being outcomes for individuals. Specifically, a 2017 article in the *Journal of American Medicine—Pediatrics* concluded: “[I]mplementation of same-sex marriage policies [by state legislatures] was associated with a significant decrease in the proportion of high school students attempting suicide . . . equivalent to a 7% decline [and the reduction was] concentrated among students identifying as [gay, lesbian, or bisexual].”<sup>75</sup> The researchers continued, “We estimated that, each year, same-sex marriage policies would be associated with more than 134[,]000 fewer adolescents attempting suicide.”<sup>76</sup> If the legalization of same-sex marriage represents acceptance of gay, lesbian, and bisexual people and is associated with reduced suicide rates within that population, it is not unreasonable to assume that the legal protection of transgender individuals at some level would similarly represent acceptance and also be associated with reduced suicide attempts among students, especially (considering the research discussed above) if the protection occurs at school. It also is reasonable to assume that greater protections for transgender students at school may contribute to reduced hostility in schools and, overall, comparatively better educational outcomes for transgender students.

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<sup>71</sup> *Id.* at 44–46. Specifically, students who reported that they had not experienced discriminatory policies or practices at school averaged a GPA of 3.4; those who reported that they had experienced a low level of gender-expression based victimization averaged a 3.3; and those who reported a high level of gender-expression based victimization averaged a 2.9. *Id.* at 44 tbl. 1.7.

<sup>72</sup> ANN P. HAAS & PHILIP L. RODGERS, AM. FOUND. FOR SUICIDE PREVENTION, SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2014).

<sup>73</sup> SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 4, 115 (2016).

<sup>74</sup> *Id.* at 132.

<sup>75</sup> Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA PEDIATRICS 350, 355 (2017).

<sup>76</sup> *Id.*

## 2. Legal Ripple Effects

Like *Brown*, *Gloucester County* is likely to lead to other federal legal changes, although for various reasons it is likely to have a more limited legal impact than *Brown*. This is not to suggest that *Gloucester County* is insignificant, but rather that *Brown* had such an outsized impact.

A quick summary of federal legal changes that occurred in the decade after *Brown* and grew out of the Civil Rights Movement is as follows: In 1957 Congress created the Civil Rights Division in the Department of Justice as well as the U.S. Commission on Civil Rights;<sup>77</sup> in 1960 it introduced criminal penalties for obstructing federal court orders including those enforcing racial equality;<sup>78</sup> in 1964 it prohibited discrimination in public schools and public accommodations, and also authorized the Attorney General to bring suit on behalf of plaintiffs in school desegregation cases;<sup>79</sup> in 1965 it passed the Voting Rights Act;<sup>80</sup> and in 1968 it passed the Fair Housing Act.<sup>81</sup> In the Executive Branch, the Department of Education conditioned the receipt of federal funding, which was newly available in 1965 due to the Elementary and Secondary Education Act, on desegregation; also around that time the Department of Justice began to initiate dozens of desegregation lawsuits across the country.<sup>82</sup> *Brown* alone did not cause all of these changes, of course, but it undoubtedly marks a turning point, even though many significant challenges remain today. Only history will tell if the same is true of *Gloucester County*.

At this point in time, the Executive Branch appears likely to echo *Gloucester County's* protections of transgender men and women via increasing agency action and executive orders. Although this is movement further down a path, it is not a change in direction because President Clinton has supported and authorized various such policy changes without fanfare since she was inaugurated in January 2017. It is uncertain whether these additional, expected changes will be the focus of a major public campaign or whether the President will continue to take a quieter approach as she did while Secretary of State, when she authorized passports to be issued bearing a transgender person's gender identity with only a note from

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<sup>77</sup> Civil Rights Act of 1957, Pub. L. No. 85-315, § 101, 71 Stat. 634 (1957).

<sup>78</sup> Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960) (codified as amended at 18 U.S.C. § 73).

<sup>79</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 301(a), 78 Stat. 241, 246 (1964).

<sup>80</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

<sup>81</sup> Fair Housing Act, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968).

<sup>82</sup> Gary Orfield, *Education and Civil Rights: Lessons of Six Decades and Challenges of a Changed Society*, in *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN PUBLIC SCHOOLS: MENENDEZ, BROWN, AND BEYOND* 405, 407–09 (Kristi Bowman ed., 2015).

his or her doctor.<sup>83</sup> No bills have yet been introduced in Congress, though presumably when the summer recess ends in September, a range of proposals (both echoing *Gloucester County's* protections and protesting them) will start to make their way through committees. The Republican-controlled Congress<sup>84</sup> seems unlikely to build on *Gloucester County's* holding, although if this issue continues to gain momentum, it could play into the 2018 mid-term elections in a significant way or, as noted above, it could influence the 2020 presidential election. This is the way in which *Gloucester County's* protections are the most vulnerable—*Brown* was a unanimous decision grounded in equality principles, while *Gloucester County* was a split decision focused on deferring to agency authority. Under a different President, much if not all of this approach could be undone.

Even if the Executive Branch and the Legislative Branch follow *Gloucester County's* lead, though, it is unlikely that *Gloucester County* will have the same sort of domino effect in Supreme Court jurisprudence that *Brown* did.<sup>85</sup> Again, although the outcome of *Brown* and *Gloucester County* is the same at one level—a minority group prevailed on an equality claim in the context of public schools—the reasoning of the cases is fundamentally different. Although the Court may issue a decision in a transgender case in the future that is grounded in equality claims like *Brown*, *Gloucester County* was not that decision. Independent of what may happen in the federal Executive or Legislative Branch, or in the Supreme Court, *Gloucester County* raises many questions that will be presented in lower courts in the coming years.

### 3. More Questions Than Answers

Finally, like *Brown*,<sup>86</sup> it seems inevitable that *Gloucester County* is the beginning of a long string of litigation, especially since *Gloucester County* based its holding on administrative deference rather than equality,<sup>87</sup> and also because attacks on transgender individuals appear to be the new focus

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<sup>83</sup> Michael Kruse, 'My Country Accepts Me as a Woman,' POLITICO (July 1, 2016), <https://www.politico.com/magazine/story/2016/07/hillary-clinton-2016-transgender-rights-passport-policy-state-department-lgbt-equality-214007>.

<sup>84</sup> Mark Z. Barabak & Lisa Mascaro, *Republicans Hold the House and Senate, But Will That End Washington Gridlock Even with President Trump?*, L.A. TIMES (Nov. 9, 2016, 12:10 AM), <http://www.latimes.com/politics/la-na-pol-election-congress-control-20161108-story.html>.

<sup>85</sup> See Jack M. Balkin, Plessy, *Brown*, and Grutter: A Play in Three Acts, 26 CARDOZO L. REV. 1689, 1711–12 (2005) (describing how the analysis in *Brown* shaped the development of tiered levels of scrutiny and their application to subsequent equal protection cases).

<sup>86</sup> The Supreme Court was consumed by the issue of school desegregation through much of the twentieth century. See generally THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: MENENDEZ, BROWN, AND BEYOND (Kristi Bowman, ed., 2015).

<sup>87</sup> See Balkin, *supra* note 85, at 1704–12 (noting *Brown's* emphasis on principles of equality).

of the culture war.<sup>88</sup> Furthermore, practically speaking, *Gloucester County* establishes transgender students' rights regarding public school bathroom access. It does not address classification of students, locker room access, sports, the relationship between disability-based claims and gender-based claims, or many other questions, although it effectively defers to the significant guidance that addresses some of these claims.

First, the school district defendant in *Gloucester County* expressed concern about uncertainty regarding how it is to know or assume whether students are transgender; although presented as a concern about avoiding moral or legal liability for unintentionally discriminating, this appears related to a more general concern that students will feign transgender status to gain access to restrooms or other facilities reserved for the other sex. This is possible, however the risk can be reduced significantly because states and school districts can regulate what documentation is required to accommodate transgender students' transitions—and most already did even before *Gloucester County*.<sup>89</sup> The regulations ranged from requiring only a student's statement, to requiring a note from a parent or medical provider, to mandating court-ordered name change or birth certificate.<sup>90</sup> The states with the most restrictive regulations may need to amend their approach to comply with *Gloucester County*, and disputes over how much they can require are likely to result in litigation. The 2016 guidance is not clear on what a school may require, and the agreement to which the guidance refers in footnote 11 allows a school to require "documentation that [a] change [to legal name or gender] has been made pursuant to a court order, amendment of state- or federally-issued identification, or other appropriate documentation."<sup>91</sup>

Second, regarding locker rooms, students' privacy concerns are without a doubt greater in locker rooms than in bathrooms. The 2016 guidance requires locker-room access consistent with students' gender identity and

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<sup>88</sup> Steve Sanders, *Why the Supreme Court Should Dismiss the Gavin Grimm Case*, ACSBLOG (Feb. 27, 2017), <https://www.acslaw.org/acsblog/why-the-supreme-court-should-dismiss-the-gavin-grimm-case>. A significant event that actually did occur in July 2017—President Trump's announcement that transgender individuals would no longer be allowed to serve in the military—bears out Sanders' February 2017 projection.

<sup>89</sup> Allison S. Bohm et al., *Challenges Facing LGBT Youth*, 17 GEO. J. GENDER & L. 125, 140 (2016).

<sup>90</sup> Although this is not a perfect system—for example, students without supportive parents are likely much less able to gain access to medical providers or courts, not to mention a parental note—even that dilemma is not entirely unique. See *id.* at 166–70. For example, the judicial bypass procedures that provide minors seeking abortions with a substitute for parental consent or notification may be an effective option here. See *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Oct. 1, 2017), <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> (providing an overview of each state's parental involvement requirements).

<sup>91</sup> Voluntary Resolution Agreement, Central Piedmont Community College, OCR Complaint 11-14-2265 (Aug. 13, 2015).

prohibits mandatory “use of individual-user facilities when other students are not required to do so.”<sup>92</sup> As Professors George Cunningham and Erin Buzuvis highlight, concerns about privacy in communal showers and changing areas are wide-spread, impacting both transgender and cisgender students.<sup>93</sup> Thus, new school buildings plan for greater privacy in locker rooms, and existing school buildings are being retrofitted with the ceiling-mounted curtains common in doctors’ offices.<sup>94</sup> Practical solutions that accommodate the privacy interests of all students often are possible.<sup>95</sup> Furthermore, of the few lawsuits brought by cisgender students who do not want transgender students in their locker rooms one recently was allowed to proceed but without the preliminary injunction the cisgender plaintiffs requested and others have been withdrawn or not yet decided.<sup>96</sup> Given the heightened sensitivity of the privacy concerns, it is expected that this will continue to be a focus of substantial litigation and a vehicle to challenge the departments’ Title IX interpretation in court.

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<sup>92</sup> Lhamon & Gupta, *supra* note 2.

<sup>93</sup> George B. Cunningham & Erin E. Buzuvis, *Better Locker Rooms: It’s Not Just a Transgender Thing*, THE CONVERSATION (Mar. 26, 2017), <https://theconversation.com/better-locker-rooms-its-not-just-a-transgender-thing-74023>.

<sup>94</sup> See, e.g., *id.* (“To alleviate discomfort that all students . . . might experience in [traditional locker room] settings . . . new locker rooms across the country are being designed with privacy in mind, with individual showers and changing areas available for any student.”); see also Melissa Hale-Spencer, *A ‘Gender-Fluid Student, Riley Says: ‘It’s Been a Spiritual Journey Trying to Fit in Your Own Body,’* ALTAMONT ENTER., June 2, 2016, at 1, 18 (describing one school’s provision of privacy screens to all students, not just transgender students, upon request).

<sup>95</sup> See *id.* (showing that privacy screens and single-stall, gender neutral bathrooms are practical and inexpensive responses to students’ concerns about privacy); see generally *Cubicle Curtains*, COVOC CORP., <http://www.covoc.com/cubicle-curtains/> (last visited July 31, 2017); Pauline Park, *A Middle Ground Can Be Found on Some Transgender Issues*, N.Y. TIMES (Nov. 5, 2015, 11:03 AM), <https://www.nytimes.com/roomfordebate/2015/11/05/transgender-students-in-high-school-locker-rooms/a-middle-ground-can-be-found-on-some-transgender-issues> (praising privacy screens as appropriate accommodations); Mara Keisling, *For Transgender Students, Disparate Treatment is Discrimination*, N.Y. TIMES (Nov. 5, 2015, 3:21 AM), <https://www.nytimes.com/roomfordebate/2015/11/05/transgender-students-in-high-school-locker-rooms/for-transgender-students-disparate-treatment-is-discrimination> (arguing that transgender students should be allowed to use the locker rooms used by the general student body since they already feature private changing areas).

<sup>96</sup> Little has happened in the Chicago-area case in the past year. See generally *Complaint, Students & Parents For Privacy v. United States Dep’t of Educ.*, No. 16-cv-04945 (N.D. Ill. May 4, 2016); Eric Peterson, *Transgender Student’s Graduation Won’t End District 211 Lawsuit*, DAILY HERALD (May 22, 2017, 9:54 AM), <http://www.dailyherald.com/news/20170522/transgender-studentx2019s-graduation-wonx2019t-end-district-211-lawsuit>. A Pennsylvania lawsuit was only filed a few months ago. See generally *Complaint, Doe v. Boyertown Area Sch. Dist.*, No. 17-1249 (E.D. Pa. Mar. 21, 2017); 2017 WL 3675418 (E.D. Pa. Aug. 25, 2017) (denying a preliminary injunction). And, a lawsuit filed in Minnesota was dropped by parents this past spring. See generally *Complaint, Privacy Matters v. United States Dep’t of Educ.*, No. 16-cv-03015 (D. Minn. Sept. 7, 2016); Karen Zamora, *Parents’ Group Drops Lawsuit Over Minn. Transgender Student’s Locker Room*, STAR TRIBUNE (Apr. 13, 2017, 9:28 PM), <http://www.startribune.com/parents-group-drops-lawsuit-over-minn-transgender-student-s-locker-room-use/419436794/>.

Third, school sports present another interesting question, and nearly 8 million high school students participate in high school athletics each year.<sup>97</sup> Again, this is a question that the guidance addresses, more or less requiring schools to permit transgender students to participate in a single-sex sport consistent with their gender identity.<sup>98</sup> Additionally, state athletic associations already have been addressing this question. According to TRANSATHELETE.com, as of mid-2017, sixteen states' athletic associations permit transgender students to participate on the teams of the gender with which they identify, and another twenty states require either medical treatment or the evaluation of situations on a case-by-case basis for the same result.<sup>99</sup> Additionally, seven states require a birth certificate change and/or surgery and other medical treatment, and the remaining seven states have no policy.<sup>100</sup> The group of twenty states seems to follow the lead of the International Olympic Committee and NCAA, which both permit transgender athletes to compete with the gender with which they identify so long as transgender women's testosterone levels are consistent with those of cisgender women.<sup>101</sup> Similar to the locker-room issue, other issues complicate this approach, such as the regular lack of insurance coverage for hormonal or other transgender-related medical treatment, and necessity of parental support for transgender students to be able to receive medical treatment of any sort, which may be part of what has led to sixteen states permitting participation more freely, along with the lower-stakes nature of high school athletics. Litigation regarding athletic participation has been much slower to take off, and like the locker room issue, this may play out through a challenge to the Title IX interpretation and also through the documentation issue identified above.

Fourth, a further question is how disability law's protections will mesh with the protections created by the Court, and how much the stigma of "disability" will discourage transgender students from pursuing this approach.<sup>102</sup> A counterpoint to disability stigma is that much of federal disability law is focused on creating a school-level mediation process to resolve claims, as opposed to litigation, which could be a more productive structure

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<sup>97</sup> NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2015–16 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55 (2016), [http://www.nfhs.org/ParticipationStatistics/PDF/2015-16\\_Sports\\_Participation\\_Survey.pdf](http://www.nfhs.org/ParticipationStatistics/PDF/2015-16_Sports_Participation_Survey.pdf).

<sup>98</sup> Lhamon & Gupta, *supra* note 2.

<sup>99</sup> *High School Policies for Transgender Athletes*, TRANSATHELETE.COM, <https://www.transathlete.com/k-12> (providing a fifty-state survey on this topic with links to state athletic associations' policies) (last visited Dec. 23, 2017).

<sup>100</sup> *Id.*

<sup>101</sup> Steven Petrow, *Do Transgender Athletes Have an Unfair Advantage at the Olympics?*, WASH. POST (Aug. 8, 2016), [https://www.washingtonpost.com/lifestyle/style/do-transgender-athl...676-5b50-11e6-9aee-8075993d73a2\\_story.html?utm\\_term=.47e5ba0966e4](https://www.washingtonpost.com/lifestyle/style/do-transgender-athl...676-5b50-11e6-9aee-8075993d73a2_story.html?utm_term=.47e5ba0966e4).

<sup>102</sup> Hannah Stocker, Note, *She's the Man*, 2017 MICH. ST. L. REV. (forthcoming 2017); see also Bohm, *supra* note 89, at 139.

for resolving these conflicts.<sup>103</sup> Indeed, a 2014 transgender student case in Maine discussed how a school-level group of school staff and the student's parents convened every year to make a plan for the student's success under Section 504 of the Rehabilitation Act.<sup>104</sup> The number of transgender cases brought under disability law is low so far, but appears to be increasing and may be gaining momentum.<sup>105</sup>

Whatever *Gloucester County's* legacy turns out to be, though, whether it follows the path anticipated in this Part or a different one, it is hard to imagine that the decision will not have immense symbolic and practical significance for the transgender community, at least in the short term. Additionally, *Gloucester County* may well be the decision that breaks the ice, and it seems almost certain that it will not be a decision that is the end of the story. Thus, in some significant ways, *Gloucester County* may well be the *Brown v. Board* of transgender rights.

## II. RETURNING TO REALITY

We know, of course, that the reality in which we live is quite different from the alternative sketched out immediately above. The President is Donald Trump, not Hillary Clinton; the Court never heard argument in *Gloucester County* much less decided the case; and in summer 2017, the country was discussing President Trump's announcement that transgender men and women would be banned from serving in the U.S. military,<sup>106</sup> not processing Gavin Grimm's victory in the Supreme Court. Other than some lamenting what could have been, though, how does the counterfactual history above change our perspective of the present reality? This Part attempts to answer that question. First, I explore the plausibility of other outcomes in *Gloucester County*, given the actual outcome of the 2016 Presidential election; second, I analyze ongoing transgender student bathroom and locker room litigation and project the direction of that litigation; third, I emphasize the opportunity for states, school districts, schools, and state athletic associations to protect transgender students even in the absence of a federal directive, given the profoundly negative outcomes associated with a lack of protections and the potentially significant consequences of

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<sup>103</sup> *Id.*

<sup>104</sup> Doe v. Reg'l Sch. Unit 26, 86 A.3d 600, 601–03 (Me. 2014); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, tit. 5, § 504 (codified as amended at 29 U.S.C.A. § 794 (2012)).

<sup>105</sup> Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017) (holding for the first time that transgender people are able to seek relief under the ADA via a gender dysphoria diagnosis); *Know Your Rights: Transgender People and the Law*, ACLU (2017), <https://www.aclu.org/know-your-rights/transgender-people-and-law>.

<sup>106</sup> Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.

greater protections and interventions.

#### A. Other Outcomes

As law professor Cass Sunstein observed, counterfactual history lets us test our explanation about what happened and why.<sup>107</sup> Admittedly, it is difficult to seriously entertain the idea that anything could have happened other than what did, and that may seem especially true in this situation. I have argued above that if Hillary Clinton prevailed in the 2016 presidential election, the *Gloucester County* case would have turned out differently. But, since Donald Trump prevailed, was the actual course of events the only viable one? It appears so.

To play out that argument, let us first consider the Trump Administration's range of policies that are mostly but not universally unsupportive of transgender individuals.<sup>108</sup> With this context, it is hard to imagine that the Trump Administration would have left the high-profile school transgender policy in place for much longer than it did, especially with the *Gloucester County* case pending and set for argument in March 2017. Specifically, with regard to *Gloucester County*, the Trump Administration presumably would not have wanted to chance adverse precedent on transgender issues by letting the case play out. Rescinding the Department of Education's and Justice's policy was the best way to achieve that result because that meant the administrative law question was off the table.<sup>109</sup> Although the Court still could have chosen to engage only the Title IX statutory interpretation question (and the parties had briefed the issue), it was peripheral to the Fourth Circuit's decision.<sup>110</sup> Thus, in retrospect, it would have been highly unlikely for the Court to keep the case on its docket after the Trump Administration reversed the federal government's position.

If for some reason the Court had heard the case on March 28 as originally scheduled, though, Justice Gorsuch would have missed oral argument because he was not confirmed until April 7.<sup>111</sup> However, he almost certainly could have participated in the decision because it seems nearly impossible the Court would have issued its decision in this case in less than two weeks, more likely waiting (as assumed above in the counterfactual history) until

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<sup>107</sup> Sunstein, *supra* note 6.

<sup>108</sup> Emanuella Grinberg, *The First 100 Days in LGBT Rights*, CNN (Apr. 28, 2017), <http://www.cnn.com/2017/04/28/politics/first-100-days-lgbt-rights-trnd/index.html>; Fred Lucas, *Trump Administration Keeps Obama LGBT Policies at Pentagon, Other Agencies*, DAILY SIGNAL (June 16, 2017), <http://dailysignal.com/2017/06/16/trump-administration-keeps-obama-lgbt-policies-at-pentagon-other-agencies/>; Davis & Cooper, *supra* note 106.

<sup>109</sup> Battle & Wheeler, *supra* note 3.

<sup>110</sup> *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 714–15, 723–24 (4th Cir. 2016).

<sup>111</sup> Mauro, *supra* note 28.



the end of June.<sup>112</sup> On the merits, Justice Gorsuch would have been likely to align with the Court's three conservatives.<sup>113</sup> For the reasons discussed above, Justice Kennedy would have been likely to align with the Court's more liberal wing,<sup>114</sup> resulting in a 5-4 decision (or 5-3 without Justice Gorsuch participating). However, Justice Kennedy's outcome was hardly preordained,<sup>115</sup> and it is possible that he would have aligned with the conservatives. Ultimately, that the Court vacated the Fourth Circuit's decision and remanded the case suggests that at least a couple of Justices in the erstwhile majority were more than a little reluctant about this course of action.

Thus, when President Trump was elected, it appears that the die was cast for *Gloucester County*.

### B. *Transgender Student Bathroom and Locker Room Litigation: What Comes Next*

A handful of transgender student cases are making their way through federal courts across the country,<sup>116</sup> and one of these (in addition to *Gloucester County*) already has resulted in a petition for a writ of certiorari.<sup>117</sup> A summary of the three pending and two recently settled transgender student cases begins this sub-Part, followed by a brief discussion of what lawyers involved in these cases and others can learn from the actual events and from the hypothetical events presented above.

To begin, the pending cases. First, the Supreme Court remanded Gavin Grimm's case to the Fourth Circuit in March 2017 after vacating the decision, and in August 2017 the Fourth Circuit remanded the case to the district court to develop the record regarding mootness.<sup>118</sup> If the case is not

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<sup>112</sup> Cf. Sullivan, *supra* note 24 (explaining that the Court's terms "stretch from October of one year to June of the next").

<sup>113</sup> See Oliver Roeder, *Just How Conservative Was Neil Gorsuch's First Term?*, FIVETHIRTYEIGHT (July 25, 2017, 6:00 AM), <https://fivethirtyeight.com/features/just-how-conservative-was-neil-gorsuch-s-first-term/> (analyzing Gorsuch's voting during his first term as compared to the other justices). Gorsuch is known as "a critic of judicial deference to executive agencies." Shapiro & McDonald, *supra* note 52, at 8; see also Eastman, *supra* note 50, at 643 n.25 (describing a Tenth Circuit opinion authored by now-Justice Gorsuch where he calls into question the court's deference to executive agencies).

<sup>114</sup> See *supra* notes 39–48 and accompanying text.

<sup>115</sup> See Sanders, *supra* note 41.

<sup>116</sup> For an excellent overview, see Thomas Burns, *Without Federal Title IX Guidance Can a Federal Case Be Made for Accommodating Transgender Students' Use of Sex-Segregated Facilities at School*, INQUIRY & ANALYSIS, June 2017. Two higher education cases were decided under the prior Title IX guidance. Sam Williamson, Note, G.G. Ex Rel. Grimm v. Gloucester County School Board: *Broadening Title IX's Protections for Transgender Students*, 76 MD. L. REV. 1102, 1109–10 (2017).

<sup>117</sup> Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017), *petition for cert. filed*, No. 17-301 (U.S. Aug. 25, 2017).

<sup>118</sup> Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239, 1239 (2017); Grimm v. Gloucester Cty. Sch. Bd., 869 F.3d 286, 290–91 (4th Cir. 2017).

moot, the Fourth Circuit presumably will consider the Title IX and Equal Protection Clause claims. If the case continues to be assigned to the same panel or heard en banc, plaintiffs will know at least one judge leans in their favor—in April 2017, a judge assigned to *Gloucester County* echoed Justice Kennedy’s equal dignity approach:<sup>119</sup>

G.G.’s case is about much more than bathrooms. It’s about a boy asking his school to treat him just like any other boy. It’s about protecting the rights of transgender people in public spaces and not forcing them exist on the margins. It’s about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.<sup>120</sup>

Although the judge who penned those words stepped down from the bench at the end of August 2017, the judge who joined his opinion remains.<sup>121</sup>

Second, in December 2016 while the Obama Administration’s guidance remained in effect, the Sixth Circuit affirmed an Ohio federal district court’s decision to grant a preliminary injunction sought by transgender students in a restroom access case.<sup>122</sup> In August 2017, the district court struck some of the school district’s affirmative defenses with prejudice, struck others without prejudice, and allowed still other defenses to stand.<sup>123</sup> This case continues to be active in the district court.

Third, in October 2016 a federal magistrate judge in Illinois relied heavily on the Title IX guidance when recommending that the district court deny the preliminary injunction sought by cisgender students who opposed the school district’s policy of allowing locker room access to transgender students consistent with their gender identity.<sup>124</sup> The district court has yet to issue its ruling, although the parties continued through August 2017 to brief the report and to argue about what the record should contain.<sup>125</sup>

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<sup>119</sup> See TRIBE, *supra* note 41, at 17 (claiming that the “chief jurisprudential achievement” of Kennedy’s *Obergefell* opinion “is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*”).

<sup>120</sup> G.G. *ex rel.* Grimm v. Gloucester County School Board, 853 F.3d 729 (4th Cir. 2017) (Davis, J., concurring, joined by Floyd, J.).

<sup>121</sup> Ian Duncan, *New Baltimore City Solicitor Says Police Reform Is His Top Priority*, BALTIMORE SUN (Sept. 6, 2017), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-andre-davis-police-20170906-story.html>.

<sup>122</sup> *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016), *aff’g* Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016).

<sup>123</sup> *Doe ex rel. Doe v. Bd. Of Educ. of the Highland Local Sch. Dist.*, No. 2:16-CV-524, 2017 WL 3588727, at \*5 (S.D. Ohio Aug. 21, 2017).

<sup>124</sup> *Students and Parents for Privacy v. U.S. Dept. of Educ.*, No. 16-cv-4945, 2016 WL 6134121, \*5, \*23 (N.D. Ill. Oct. 18, 2016).

<sup>125</sup> *Students and Parents for Privacy v. U.S. Dept. of Educ.*, No. 16-cv-04945 (docket).

Additionally, two cases have recently settled. In February 2017, on the heels of the Trump Administration rescinding the Obama Administration's guidance, a federal district court in Pennsylvania granted a preliminary injunction sought by transgender students in a restroom access case, relying on Equal Protection arguments.<sup>126</sup> In August 2017, the parties settled the case, which was voluntarily dismissed.<sup>127</sup>

And, in May 2017, the Seventh Circuit affirmed the preliminary injunction a Wisconsin federal district court granted to a transgender student in a restroom access case; the underlying decision relied primarily on Title IX and secondarily on the Equal Protection Clause.<sup>128</sup> In fall 2017, the school district filed a petition for a writ of certiorari, as mentioned above.<sup>129</sup> The Court extended the deadline for the response to the petition four times, most recently extending it to January 26, 2017.<sup>130</sup> Then, on January 9, 2018, the school board approved an \$800,000 settlement in the case and also decided to withdraw its petition for certiorari.<sup>131</sup>

Overall, the trend in these five cases is to allow transgender students access to sex-segregated spaces consistent with their gender identity. Given the lack of federal policy, the increasing visibility of these issues, and the fact that plaintiffs can either be transgender students seeking access or cisgender students opposing transgender students' access, it seems highly likely that the number of cases will continue to grow.

For various reasons, the transgender students' advocates in the cases described above and those that will inevitably follow in their footsteps would be well-advised to adjust course. Because of the federal government's change in position under the Trump Administration and the actual disposition of *Gloucester County*, transgender students and their allies are no longer able to rely on the federal government for legal authority via the policy letter or the significant guidance or for support in other ways, such as assisting in a case by filing an amicus brief. More specifically, all parties will continue to make arguments about what Title IX requires, though in this regard transgender students and their allies would be wise to rely on Title VII employment law case law as they do so, because of the federal executive branch's reticence.<sup>132</sup>

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<sup>126</sup> *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 283 (W.D. Pa. 2017).

<sup>127</sup> *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537-MRH, 2017 WL 3888610 (W.D. Pa. Aug. 8, 2017) (stipulating to voluntary dismissal).

<sup>128</sup> *Whitaker*, 858 F.3d at 1055, *aff'g* No. 16-CV-943-PP, 2016 WL 5239829 \*1, \*4, \*9 (E.D. Wis. Sept. 22, 2016).

<sup>129</sup> See *supra* note 117 and accompanying text.

<sup>130</sup> *Id.*

<sup>131</sup> Jacey Fortin, *Transgender Student's Discrimination Suit is Settled for \$800,000*, N.Y. TIMES (Jan. 10, 2018).

<sup>132</sup> See Williamson, *supra* note 116, at 1112–14 (explaining how Title VII sex discrimination may apply to cases involving discrimination against transgender employees).

Because of this and also due to the current composition of the Court, transgender students' advocates stand to benefit from a greater focus on Equal Protection-based arguments than they have employed to date. As articulated above, Justice Kennedy arguably is amenable to deciding a case like *Gloucester County* in favor of a transgender student via a dignity-based argument.<sup>133</sup> However, the publication of this piece at the end of January 2018 marks the end of the first year of President Trump's first term, and the Court's membership could change greatly during his term. Although no Justices currently are rumored to be retiring, three years is a long time, and early in summer 2017 the speculation that Justice Kennedy would step down any day reached a "fever pitch."<sup>134</sup> In April 2017, Congress confirmed the solidly conservative Justice Neil Gorsuch, President Trump's choice to succeed the late Justice Scalia.<sup>135</sup> If Justice Kennedy were to retire in the next few years, it seems highly unlikely that his successor would be as receptive to Equal Protection arguments as he has been, and since Justice Kennedy has been a swing vote on this issue and others, it would be too late for transgender students to hope to prevail in the Supreme Court.

A focus on Equal Protection arguments need not be driven by Justice Kennedy's presence on the Court, though. Indeed, the current transgender rights cases have much to build on in Justice Kennedy's "equal dignity" jurisprudence as they work their way through lower federal courts.<sup>136</sup> Additionally, the federal bench was shaped significantly during President Obama's eight years in office—thirty percent of federal appeals judges and forty percent of federal district court judges were nominated and confirmed during the Obama Administration.<sup>137</sup> However, in just one year in office, President Trump has made more headway on judicial nominations than presidents have for decades.<sup>138</sup> That said, not all Obama (or Democratic) appointees would necessarily side with transgender students, nor

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<sup>133</sup> See *supra* notes 39–41 and accompanying text.

<sup>134</sup> Ariane de Vogue, *Anthony Kennedy Retirement Watch at a Fever Pitch*, CNN (June 26, 2017), <http://www.cnn.com/2017/06/24/politics/anthony-kennedy-retirement-rumors/index.html>; see also Nina Totenberg, *Justice Neil Gorsuch Votes 100 Percent of the Time With Most Conservative Colleague*, NP (July 1, 2017, 12:25 PM), <http://www.npr.org/2017/07/01/535085491/justice-neil-gorsuch-votes-100-percent-of-the-time-with-most-conservative-collea>.

<sup>135</sup> For a summary of analysis of Gorsuch's voting during his first term as compared to the other justices, see Roeder, *supra* note 113. Gorsuch is known as "a critic of judicial deference to executive agencies." Shapiro & McDonald, *supra* note 52, at 8; see also Eastman *supra* note 50, at 643 n.25 (describing a Tenth Circuit opinion authored by now-Justice Gorsuch).

<sup>136</sup> Tribe, *supra* note 41, *passim*.

<sup>137</sup> This does not include judges who have taken senior status. The United States Courts' website contains a list of the total number of federal judgeships and also the total number of federal judgeship appointments by individual Presidents. *Authorized Judgeships*, U.S. CTS. (2016), <http://www.uscourts.gov/sites/default/files/allauth.pdf>; *Judgeship Appointments by President*, U.S. CTS. (2016), <http://www.uscourts.gov/sites/default/files/apptsbypres.pdf>.

<sup>138</sup> Charlie Savage, *Trump is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES (Nov. 11, 2017),

would all Bush, Trump (or Republican) appointees necessarily side against them. Interestingly, one of the two Fourth Circuit judges quoted earlier in this section in Gavin Grimm's case was appointed to the federal district court by President George W. Bush and the other by President Bill Clinton, though both were elevated to the Fourth Circuit by President Obama.<sup>139</sup> Nevertheless, the critical mass of Obama-appointees on the bench is important when considering that many throughout the federal judiciary may be open to Justice Kennedy's arguments or to other, similar approaches.

Additionally, it may be that, in the end, litigating transgender rights cases under the Equal Protection Clause rather than Title IX provides a cleaner way to engage the questions of discrimination via the scrutiny levels<sup>140</sup> while our common understandings about sex and gender change over time.

In the interim, it would not be a surprise if the five pending and recently settled transgender bathroom and locker room cases soon become fifteen or more. Those seeking access for transgender students—whether transgender students and their parents bringing suit or a school district defending a suit brought by cisgender students—would be wise to make Title IX-based arguments that import reasoning from Title VII employment law cases, and to double down on Equal Protection.

### C. State and Local Action

The alternative reality presented above is one in which transgender students' health, safety, and educational outcomes improve as a result of a fictional Supreme Court decision in *Gloucester County* giving Gavin Grimm the right to use the restroom consistent with his gender identity, and thus extending that protection to all transgender students. Judicial decisions are not the only way to accomplish social change, though, and arguably they are not even the best way to do so.<sup>141</sup> Importantly, although the Trump Administration's 2017 guidance rolls back the clock on transgender protections to the point before federal protections existed, it does not *prohibit*

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<https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>.

<sup>139</sup> Luke Broadwater, *Andre Davis Was a High-Ranking Judge. He Left to Lead Baltimore's Law Department. Why?* BALT. SUN (Oct. 4, 2016, 2:25 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-andre-davis-profile-20171004-story.html>; *Judge Henry F. Floyd* U.S. CT. OF APPEALS FOR THE FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-henry-f-floyd> (last visited Nov. 11, 2017).

<sup>140</sup> See Kristi L. Bowman, *The Failure of Education Federalism*, MICH. J.L. REFORM (forthcoming 2017) (manuscript at 1, 5, 48–49), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2876889](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876889) (proposing a litigation strategy centered on pairing an educational quality right under substantive due process with “rational basis with bite review” under the Equal Protection Clause).

<sup>141</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?*, *passim* (Benjamin I. Page ed. 1991).

states and school districts from extending protections to transgender students.<sup>142</sup> Thus, transgender students' advocates should continue pursuing policy change at the school- and state-level.

Although the controversial nature of transgender rights today would prevent protections in some communities and states and make them difficult to achieve in many others, there also are reasons to think that many states and communities may be receptive to this. If so, this would hardly be the first contemporary civil rights issue to gain traction at the state and local level: For example, between 2000 and 2015, both civil unions/same-sex marriage and school bullying prohibitions expanded substantially at the state level. Thirty-seven states permitted same-sex marriage before the Supreme Court's 2013 decision made the issue a federal one,<sup>143</sup> and although Georgia was the first to adopt an anti-school bullying statute in 1999, by 2015 Montana became the fiftieth.<sup>144</sup>

It may be that the legal protection of transgender students is effectively fought on the state battlefield as well. Schools, school districts, and state athletic associations are already engaging with questions about how to accommodate transgender students.<sup>145</sup> To be sure, not all school districts' and states' policies protect transgender students, or protect them to the extent transgender advocates may want. Indeed, transgender students are protected by statewide anti-discrimination laws in only 13 states and the District of Columbia.<sup>146</sup> However, there is substantially more engagement with these issues at the school level and school district level, and in state athletic associations, than an outside observer might imagine. Additionally, policy advocacy can be customized to individual states or communities and can range from pursuing the broad anti-discrimination provisions mentioned above, to achieving minor facility modifications that enhance comfort for all students such as privacy curtains in locker rooms, and greater privacy in bathrooms, to creating respectful accommodations for one particular student.<sup>147</sup> It is also important that public opinion suggests that our

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<sup>142</sup> Battle & Wheeler, *supra* note 3.

<sup>143</sup> The Pew Research Center offers an excellent interactive map that chronicles states' civil union/same-sex marriage policies over time. *Same Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/>.

<sup>144</sup> *Laws and Policies*, STOPBULLYING.GOV, <https://www.stopbullying.gov/laws/index.html> (last updated Sept. 8, 2017).

<sup>145</sup> Bohm et al., *supra* note 89, at 140; *High School Policies*, TRANSATHLETE.COM, *supra* note 99 (outlining state policies for accommodating high school transgender students).

<sup>146</sup> MAP & GLSEN, SEPARATION AND STIGMA: TRANSGENDER YOUTH & SCHOOL FACILITIES 1 (2017), <https://www.glsen.org/sites/default/files/Separation%20and%20Stigma%20-%20Full%20Report.pdf>. However, a 2016 article noted seventeen states plus D.C. protect students from gender identity harassment in schools. Bohm et al., *supra* note 89, at 137.

<sup>147</sup> See *supra* Part II.B text accompanying notes.

society is moving in a more inclusive direction regarding transgender individuals, who already enjoy a critical mass of support.<sup>148</sup>

Under this view, the present lack of federal protections for transgender students is a short-term problem. Even if that is so, however, there are real costs to delaying protections, and the costs will most easily be mitigated if states, school districts, schools, and state athletic associations take it upon themselves to protect transgender students.

#### CONCLUSION

This piece presented a robust counterfactual narrative with the goal of helping us reflect on our present reality. In the parallel universe, Gavin Grimm prevailed in the Supreme Court on an administrative law argument with Justice Kennedy casting his vote for the transgender student in what was in some ways (though not in others) “the transgender movement’s *Brown v. Board of Education*.” Even under this fictional set of circumstances, many bitter legal battles remained ahead, although transgender individuals and their allies celebrated the symbolic and practical significance of the decision.

The purpose of a counterfactual history is not to seek solace in thoughts of “what might have been” or to rejoice about what did not happen, though, but rather to gain a fresh perspective on what *is*. To that end, I have leveraged the counterfactual history to argue that the presidential election in fall 2016 determined whether federal policy would remain unchanged and thus whether *Gloucester County* would be heard in the Supreme Court; even those who disagree with my counterfactual result of the case would likely agree with this. Additionally, I also have used it to gain insight into the type and extent of current controversies and to better explain why the current cases about transgender bathrooms and locker rooms are likely to become more plentiful. Furthermore, given the actual outcome in *Gloucester County* combined with Justice Kennedy’s “equal dignity” jurisprudence, I contend that transgender students and their advocates in these cases would be wise to focus on the Equal Protection Clause (and, I note briefly, to draw on Title VII precedent when making Title IX arguments). Finally, the Trump Administration’s guidance does not prohibit states and school districts from guaranteeing transgender students access to sex-segregated spaces consistent with their gender identity, and under the counterfactual history we see the potentially significant, albeit indirect, importance of legal recognition and protections. People of good will should seek to implement policies that protect transgender students because these protections, statements of belonging and acceptance, can make a real

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<sup>148</sup> FLORES ET AL., *supra* note 44, at 1; Newport, *supra* note 44.

difference. We must learn from what might have been as we decide what will be.