Litigation addressing the constitutional rights of the transgender community has exploded in the last decade. This litigation revolution has fundamentally reshaped the constitutional landscape with respect to the equality and liberty rights of transgender litigants, recognizing the transgender community as constitutionally protected subjects entitled to meaningful rights. And yet—because this litigation revolution has occurred in the lower and state courts—it has remained comparatively invisible from the perspective of the legal literature.

This Article provides the first systematic account of this constitutional law revolution in transgender rights. Based on an analysis of five years (2017–2021) of transgender constitutional rights litigation, it offers a comprehensive descriptive account of contemporary constitutional transgender rights litigation in the equal protection and due process contexts. As that analysis reveals, recent transgender rights litigation has resulted in important and consistent victories for transgender constitutionalism in the lower and state courts. Indeed, recent constitutional decisions are close to (though not entirely) unanimous in their treatment of the transgender community as warranting meaningful constitutional protections.

This revolution in transgender constitutional rights is important in its own right—indeed it is likely to be critical at a time when a wave of anti-transgender legislation is currently sweeping the country. But it is also important for the ways it...
calls into question the conventional wisdom of constitutional law as a field. As this Article elaborates, contemporary transgender constitutionalism challenges many of the assumptions of constitutional law scholars, including assumptions regarding the death of suspect class analysis under equal protection doctrine, the impossibility of new fundamental rights under the Due Process Clause, and the weakness and futility of rational basis review. It thus highlights the importance of attending to the constitutional law of the lower federal and state courts—not only that of the United States Supreme Court.

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INTRODUCTION

Recent years have seen an explosion of cases addressing the constitutional rights of the transgender community. Across the country, in dozens of cases a year, litigators (and in some instances, pro se litigants) have brought claims challenging the inequality and subordination of the transgender community under the Equal Protection and Due Process Clauses. These cases have generated numerous opinions elaborating on the constitutional rights of the transgender community, and have resulted in widespread and striking victories for transgender rights.

And yet, to date, no systematic account exists of the developing transgender constitutional law landscape. Unlike sexual orientation discrimination, the Supreme Court has yet to meaningfully take up the treatment of anti-transgender discrimination in constitutional law. Because this constitutional law revolution for the transgender community has taken place in the lower and state courts, across dozens of cases, its broader contours and implications have remained comparatively invisible from the perspective of the legal literature.

1 See generally infra Part I.
2 See infra Part I.
4 No article has undertaken a comprehensive review of the large volume of transgender constitutional law decisions that have been decided by the lower courts over the last five years. For other important recent work addressing some part of these decisions, or more specific aspects of transgender constitutional law, see for example Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, A Bare Desire to Harm: Transgender People and the Equal Protection Clause, 57 B.C. L. REV. 507 (2016); Courtney Cahill, Sex Equality’s Irreconcilable Differences, 132 YALE L.J. (forthcoming 2023); Sarah Medina Camiscoli, Reimagining The Constitution with Gender
This Article provides the first systematic exploration of transgender constitutional law cases, decided under the Equal Protection and/or Due Process Clauses (or their state counterparts), between 2017 and 2021. What this systematic review finds is that transgender plaintiffs have been stunningly successful in raising equal protection and due process claims, achieving success on the merits in the vast majority of cases. Across almost all contexts (student restroom and locker room access, medical services discrimination, identity documentation litigation, employment discrimination, etc.), in cases decided by judges appointed by presidents of both parties, and in circuits and districts across the country, transgender litigants are achieving impressive merits victories on their constitutional claims.

These successes have been accompanied by important doctrinal holdings in the lower courts with respect to both the equal protection and due process rights of the transgender community. With respect to equal protection, the last five years have produced a significant trend of cases in the lower courts holding that transgender people meet the criteria for being deemed a suspect or quasi-suspect class, and thus discrimination against them must be subject to heightened scrutiny. Many other courts have also reaffirmed or held for the first time that anti-transgender discrimination is sex discrimination, and


5 See infra Appendix A (describing the scope of the study and its limitations). At the time this study was initially completed, these were the five most recent years of litigation results available. Additional information regarding subsequent caselaw developments in this area, which have largely, but not entirely, been consistent with the study findings, are provided where relevant.

6 See infra Part I. One major category of cases—pro se cases, overwhelmingly filed by prisoners—were excluded from the analysis and thus are not included in the discussion herein. See infra Appendix A. See note 42 and accompanying text for a fuller discussion of this issue.

7 See infra Part I.

8 See infra subsection I.B.1.
is independently subject to heightened scrutiny on those grounds. And courts continue to hold that many forms of anti-transgender discrimination lack even a rational basis, failing even the minimum level of equal protection review.

Similarly, due process claims have often been surprisingly successful when raised in the context of transgender rights litigation. During the study period, courts recognized fundamental rights of gender autonomy and informational privacy in a number of contexts involving transgender rights (though all study cases predated the Supreme Court’s decision in Dobbs v. Jackson Women’s Health Organization). Courts also found anti-transgender government actions to be “conscience shocking,” “void for vagueness,” and violative of procedural due process requirements. Thus, while not all due process claims of transgender litigants have succeeded, and Dobbs may lead to a retrenchment of fundamental rights victories, the Due Process Clause has, in recent years, provided novel avenues to success for many transgender litigants.

These findings are of critical importance at a time when the transgender community is increasingly becoming the subject of sustained and multifaceted attacks. Anti-transgender legislation is pending in two-thirds of state legislatures nationwide. In some states, like Arizona, Iowa and Tennessee, up to fourteen bills are pending seeking to restrict transgender rights. Moreover, these bills do not simply pose a theoretical possibility of rights retrenchment, as successfully enacted anti-transgender laws and executive policies have already begun to profoundly affect transgender communities across the United States.

The instant study thus offers vital insights for the current and future project of transgender equality, at a time when such insights are urgently needed. But importantly, it also offers insights for constitutional law as a field. Among other things, the findings of the instant study challenge several commonly held assumptions in the legal literature about Fourteenth

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9 See infra subsection I.B.2.
10 See infra subsection I.B.3.
12 See infra Section I.C.
15 See sources cited supra note 13.
Amendment doctrine—in ways that have important implications for how students are taught, and how lawyers practice, constitutional law. For example, following Kenji Yoshino’s 2011 article, *The New Equal Protection*, it has become the conventional wisdom that the window for the recognition of new suspect or quasi-suspect classifications “has closed.” And yet transgender litigants have been highly successful in recent years in persuading lower federal courts that transgender individuals should indeed be deemed a suspect or quasi-suspect class.

Similarly, expectations that the application of rational basis review to equal protection claims must inevitably signal defeat for constitutional litigants are upended by the actual results in recent cases involving transgender constitutional rights. In the vast majority of cases in which the courts applied a rational basis review analysis to the equal protection claims of transgender litigants, they applied a meaningful assessment, and concluded that the policy at issue could not survive rational basis review. Thus, the commonly articulated view of scholars that rational basis review is uniformly “enormously deferential,” “almost empty,” and “meaningless” is belied by how that standard is currently being applied on the ground in the context of transgender constitutionalism.

Fundamental rights litigation brought by transgender litigants under the Due Process Clause also suggests a greater continued vitality for such rights-based arguments than might be assumed today—though it remains to be seen whether *Dobbs v. Jackson Women’s Health Organization* will reverse this trend. Indeed, at the same time that the Supreme Court had already begun to retrench fundamental rights jurisprudence in the reproductive rights context, lower courts continued to more often than not find in favor of transgender litigants where they raised fundamental rights or liberty-based claims. While these due process claims have not been as stunningly successful as equal protection-based claims, they suggest that—at least pre-*Dobbs*—

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17 See infra Section I.B.
18 See infra subsection I.B.3.
20 Id. at 410.
22 See infra Section II.B.
24 See infra subsection I.C.1.
fundamental rights remained a viable jurisprudence in the lower courts, and
that it may be a worthwhile strategy to continue to pursue in the state courts.

A nuanced examination of transgender constitutional litigation also helps
to buttress some of the observations by prior scholars as to what factors
matter in litigation success—while also potentially qualifying others. As other
scholars have observed, the participation of impact or other public interest
organizations in litigation appears to be enormously helpful, and indeed not
a single ultimate loss was observed among cases in which such organizations
participated in representing the plaintiff(s).25 Similarly, the observations of
prior scholars that prisoner litigation, and litigation related to criminal law
generally, may be especially difficult for plaintiffs to win was born out in the
cases brought by transgender plaintiffs (though even in the prisoner context,
victories for counseled transgender plaintiffs equaled losses26). Finally, while
the study in some respects affirmed perceptions of judges as ideological actors
insofar as plaintiffs succeed on average more often in cases presided over by
Democratic appointees, it also challenged those perceptions insofar as
transgender plaintiffs were often also awarded victories by judges who were
appointed by Republican presidents, including even appointees of former
President Trump.27

Ultimately, a careful consideration of modern transgender constitutional
law litigation highlights the importance in constitutional law of attending to
the lower federal and state courts. While it is certainly possible that the
Supreme Court may ultimately diverge from the lower courts on any of the
many issues currently under review, transgender constitutional law now is the
law of the lower and state courts. For members of the transgender community
who are currently seeking relief from discrimination and oppression, this
lower court constitutionalism is what matters. Moreover, prior experience has
shown that the lower courts are often the bellwether of the type of shift in
social change and constitutional culture that is needed for any group to
achieve sustained and meaningful constitutional protections.28 And if recent
certiorari denials are any indication, the Supreme Court may be willing to
allow this shift in constitutional culture to continue to percolate without its

25 See infra Section II.E.
26 See infra notes 61–62 and accompanying text.
27 See supra Section II.D.
28 A striking example of this is the important role that state and lower federal court decisions
played in paving the way for the Supreme Court’s ultimate decision in Obergefell v. Hodges, 576 U.S.
victories, under rational basis review, in lower and state courts pre-Obergefell); Neil S. Siegel,
the interplay between the Supreme Court and lower federal courts on marriage equality).
immediate intervention, something that arguably bodes well for the long-term resolution of transgender constitutional equality and liberty issues.29

A few caveats are in order before proceeding to the substance of the analysis. As described more fully in Appendix A, there were a number of limitations imposed on the study to make it manageable in length and scope. For example, there are a significant number of transgender constitutional cases that predate 2017—in some cases by many decades—and yet the instant study, in the interest of manageability, looks only at five years.30 Moreover, equal protection and due process claims were selected as those claims most likely to represent lower courts’ perception of the constitutional stature of the transgender community, but First Amendment, Eighth Amendment, and the constitutional criminal procedure rights of the transgender community are also important indicators of the treatment of transgender individuals as constitutional subjects.31 Finally, the omission from close study of the affirmative constitutional claims of opponents of transgender rights is obviously important, and including such claims could certainly affect the “big picture” take of transgender rights’ success in the courts provided here.32 All of these are important areas for further study, and might qualify or complicate some of the findings herein.

It is also important to note that, even within its own parameters, the study results observed here are necessarily shaped by and limited to the cases that were brought by litigants. Thus, for example, as described at greater length in Part III, although the study included a wide array of search terms to try to

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29 I thank Ezra Young for this insight. See, e.g., Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (denying certiorari review, with Justices Thomas and Alito noting their disagreement), denying cert. to 139 S. Ct. 946 (4th Cir. 2020) (finding that school restroom policy that discriminated on the basis of sex and transgender status was unconstitutional under the Equal Protection Clause); Trump v. Karnoski, 139 S. Ct. 946 (2019) (denying petition for certiorari before judgment), denying cert. to 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018) (finding for plaintiffs in challenge to Trump administration’s ban on transgender servicemembers serving in the military); see also Siegel, supra note 28, at 1193 (arguing that the Supreme Court “further nudged the federal courts in the direction of marriage equality by denying certiorari” in cases involving pro-marriage rulings). But cf. Trump v. Karnoski, 139 S. Ct. 950 (2019) (granting stay of preliminary injunction during lower court proceedings); Trump v. Stockman, 139 S. Ct. 950 (2019) (same).

30 See, e.g., Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); see generally Young, supra note 4.

31 Indeed, the sole occasion on which the Supreme Court has addressed the constitutional rights of a transgender plaintiff involved an Eighth Amendment claim. See Farmer v. Brennan, 511 U.S. 825 (1994). For an excellent recent treatment of the Eighth Amendment issue, see Levi & Barry, supra note 4.

32 Cf. Meriwether v. Hartop, 992 F.3d 492, 511-12 (6th Cir. 2021) (finding that professor’s First Amendment rights were violated by university policy requiring him to use students’ gender-identity appropriate pronouns). But cf. Brian Soucek & Ryan Chen, Misunderstanding Meriwether, FORDHAM L. REV. (forthcoming) (manuscript at 5) (on file with author) (“Meriwether did not hold [what nearly everyone believes], and in fact, it could not have done so given the case’s procedural posture before the Sixth Circuit.”).
capture the diversity of individuals who might plausibly fall within the “transgender” umbrella, almost all of the cases that were unearthed by the search involved binary-identifying transgender individuals (as opposed to, for example, nonbinary, gender fluid or genderqueer-identifying individuals). Thus, the study findings herein are most pertinent to the binary-identifying part of the transgender community and do not necessarily reflect comparable judicial solicitude for non-binary or otherwise radically gender non-conforming transgender people.

Similarly, although the study sample included both state law and federal law cases, the number of state law cases was, as discussed in Part III, very small. As such, while the study discusses results of the federal and state law cases in the aggregate (and I did not discern divergent patterns in the few state law cases), the number of state law cases is so few that it is hard to make generalizations about trends in the state courts, or under state constitutional law. Indeed, the most that can be said about the state cases based on the limited litigation history in the study is that the initial cases appear to suggest that they are following a comparable trajectory to federal law cases (with most cases succeeding, except in narrow subject areas such as criminal law).

As discussed at greater length in Appendix A, the search terms relied on were as follows: (transgend! transsex! nonbinary “non-binary” “gender fluid” transvest! “gender identity” “gender dysphoria” intersex! queer “genderqueer” cross-dress! “cross dress!”). Despite these broad search terms, only a single study case dealt with a nonbinary or gender fluid plaintiff, and no cases dealt with people who identified, for example, as cross-dressers or intersex. See Doe v. Pa. Dep’t of Corr., C.A. No. 20-23 Erie, 2021 WL 1153773, at *1 (W.D. Pa. Mar. 24, 2021). See Katie Eyer, Data and Methodological Appendices for Transgender Constitutional Law, SOC. SCI. RSCH. NETWORK, at Appendix B, https://ssrn.com/abstract=4173207 [http://perma.cc/V84E-VHHS] (Nov. 21, 2022) [hereinafter Appendix B] (detailing the study cases). Appendix B is also available on the University of Pennsylvania Law Review’s website. As discussed at greater length infra note 35, there were, however, several cases brought during the study period on behalf of people falling within these constituencies, but they did not have any merits decisions addressing their constitutional claims, and thus fell outside of the study parameters.

As described at greater length infra Part III, this limitation of the composition of the study cases—especially when coupled with certain strategic limitations of the way most study cases were litigated—may significantly limit the usefulness of recent developments for those members of the transgender community who are non-binary, gender fluid, or otherwise more radically disruptive of existing gender paradigms.

See Appendix B; see also infra Section III.E.

Finally, it is worth noting that this Article is primarily descriptive. Thus, this Article’s central goal is to describe the results and reasoning of contemporary transgender constitutional rights litigation—not to normatively assess the LGBTQ movement’s current legal arguments or strategies, or the ways that judicial decisions have engaged with those arguments and strategies. As such, while I do engage briefly with some of the normative and strategic questions that the study results may raise for the LGBTQ movement in Part III, considerations of length prohibit engaging fully herein with all of the possible normative questions that the descriptive account may raise. As the work of other scholars show, such questions are often difficult and nuanced, and may even in some instances put social movements in the difficult position of balancing strategic success against inclusion.

The remainder of this Article proceeds as follows. Part I provides a descriptive account of transgender equal protection and due process cases decided in the state and federal courts from 2017 through 2021. Part II takes up the ways in which this descriptive account challenges conventional wisdom with respect to constitutional law, while in other ways bolstering the findings of prior scholars about what factors seem to influence litigant success. Part III presents possible questions for the transgender rights movement that are suggested by the existing case law. Finally, Part IV describes how all this may matter to the future of transgender constitutional law, and provides a postscript based on post-study transgender constitutional law decisions in the state and lower federal courts.

37 Other scholarly work engages more fully with normative questions of case strategy and selection, as well as whether constitutional law or equality-based arguments ought to be embraced in the first instance. See, e.g., DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2015) (critiquing the limits of a rights-based framework for transgender liberation); Camiscoli, supra note 4 (arguing for a transgender rights approach focused on youth movement advocacy); George, supra note 4 (describing the contemporary LGBTQ law movement’s limited embrace of QIA issues and discussing how the movement could more fully embrace those issues); Russell Robinson, Marriage Equality and Postraacialism, 65 UCLA L. REV. 1010, 1062-63 (2014) (questioning the desirability of the LGBTQ rights movement’s goal of achieving heightened equal protection scrutiny in the context of the marriage movement); Skinner-Thompson, supra note 4 (advocating for greater reliance on freedom of expression arguments for transgender youth).

38 See, e.g., George, supra note 4, at 249 (observing and critiquing assimilationist arguments by the LGBTQ rights movement but also noting that “[s]ocial movements are limited in their abilities to assert non-assimilationist claims, which is why movements of all kinds have adopted assimilationist strategies”); Welsh, supra note 4, at 1464-68 (describing an “ambivalent utilitarian current” within the transgender rights movement, which seeks broader liberationist goals but also sees the need for current legal advocacy within a more assimilationist frame); see also sources cited supra note 37 (offering differing perspectives on this set of issues).

39 Because of the normal publication timeframe (which can be a year or more from the time of writing), the initial analysis that forms the core of the discussion herein (2017–2021) was completed
I. TRANSGENDER CONSTITUTIONAL LAW CASES, 2017–2021

A comprehensive evaluation of the transgender constitutional law decisions from 2017 to 2021 yields numerous important descriptive findings. Most notably, such cases have been overwhelmingly successful, no matter which metric of success they are evaluated under. Across almost every category of case (e.g., health care discrimination, identity documentation, student restroom or locker room access), and across almost every way of measuring case “success,” transgender litigants are prevailing at exceptionally high rates.

As elaborated in the Sections that follow, this has resulted in a body of doctrine that now presents a formidable tool for transgender rights litigators—and a formidable obstacle to opponents of transgender rights. Six circuits have held that the transgender community ought to receive heightened scrutiny under the Equal Protection Clause, either because the community as a class warrants heightened scrutiny on its own, or because discrimination against the transgender community is sex discrimination.40 And numerous other equal protection and due process holdings from the last five years provide a roadmap for striking down the many discriminatory laws that are pending, or have been recently enacted, around the country.41

40 Four circuits reached such a conclusion within the study period, one of which had already ruled on the issue. See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034, 1050-52 (7th Cir. 2017) (employing a sex discrimination rationale); Karnoski v. Trump, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (holding that transgender people as a class should receive heightened scrutiny); Grimm v. Gloucester Cnty. Sch. Bd., 872 F.3d 386, 610-13 (4th Cir. 2020) (holding that transgender people should be deemed a quasi-suspect class and that discrimination against them is sex discrimination); Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1307-08 (11th Cir. 2021) (employing a sex discrimination rationale), rev’d on reh’g en banc, 57 F.4th 791, 803 & n.5 (11th Cir. 2022) (en banc). As noted, however, one of these panel opinions from the study period was reversed en banc after the study’s end point, with the en banc court concluding that restroom policy did not discriminate based on transgender status and expressing “grave doubts” as to whether transgender people constitute a quasi-suspect class. See Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 803 & n.5 (11th Cir. 2022) (en banc) (concluding further that policy was facially sex discriminatory, but nonetheless survived intermediate scrutiny). While no circuit had concluded prior to the study period that transgender people as a class ought to be deemed a suspect or quasi-suspect class, two circuits had already held before the study period that anti-transgender discrimination ought to be deemed sex discrimination in the constitutional context. See Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004); Glenn v. Brumby, 663 F.3d 1312, 1315-25 (11th Cir. 2011). But cf. Adams, 57 F.4th at 803 & n.5, 812-13 (reading Glenn narrowly, and concluding that gender-inappropriate restroom assignments are not discriminatory on the basis of transgender status). Finally, one circuit found that a law that discriminated against transgender people was sex discrimination as a matter of equal protection law shortly after the study period, though it is not entirely clear whether this holding will reach all future anti-transgender discrimination or be more factually limited. See Brandt ex rel. Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022).

41 See infra Sections I.B–C.
Section I.A, infra, provides a general overview of case characteristics and success rates in the cases studied. Section I.B turns to descriptively elaborating the doctrinal holdings on key equal protection issues in the cases. Section I.C does the same for important due process issues. And finally, Section I.D takes up the major justifications for the relatively limited merits losses in the study sample and what they may suggest in terms of those areas where transgender constitutional litigants are most likely to confront difficulties.

A. Overall Case Characteristics and Success Rates

From 2017 to 2021, ninety opinions addressing the constitutional rights of transgender litigants were decided under the Equal Protection and/or Due Process Clauses or their state counterparts. These opinions spanned sixty-six different cases, across a wide variety of subject areas, ranging from prisoner litigation to student restroom access to identity documentation. In cases resolved during the study period, transgender litigants were generally highly successful. As shown by Figure B, seventy-eight percent (29 of 37) with known results resulted in victories for the plaintiff. Among those victories, eighty-three percent (24 of 29) resulted in policy change or other nonmonetary relief (a measure that was included in the study as a “harder” metric of success). Overall, this means that a full fifty-seven percent of the resolved cases of any kind resulted in policy change or other nonmonetary relief, suggesting strikingly high levels of success.

42 Cases where the plaintiff remained pro se for the entire study period—primarily pro se prisoner litigation—were excluded from the analysis, and thus the opinion and case count. For additional information about the study methodology, see Appendix A. All data referred to herein is available in Appendix B.

43 See Appendix B. As noted in Appendix B, three of the study cases that were coded as victories ultimately obtained those victories on the basis of claims (such as those under the Eighth Amendment or a state statute) that fell outside of the study purview. See Campbell v. Kallas, No. 16-cv-261, 2020 WL 7230235, at *9 (W.D. Wis. Dec. 8, 2020) (finding in favor of the plaintiff on Eighth Amendment grounds after trial); Good v. Iowa Dep’t of Hum. Servs., 924 N.W.2d 853, 863 (Iowa 2019) (finding in favor of plaintiff on the basis of the Iowa Civil Rights Act, and therefore declining to reach plaintiff’s constitutional arguments); Doe v. Northrop Grumman Sys. Corp., 418 F. Supp. 3d 921, 930 (N.D. Ala. 2019) (summarily rejecting constitutional challenge to the ADA’s exclusion of “gender identity disorders,” but case ultimately settled on other grounds). In addition, one case that was coded as a plaintiff success was deemed successful on the basis of a settlement entered into prior to the study period. See Quine v. Beard, No. 14-cv-02726, 2017 WL 1540758, at *7 (N.D. Cal. Apr. 28, 2017) (enforcing settlement previously agreed upon by parties), rev’d on non-merits grounds, 741 F. App’x 338, 362 (9th Cir. 2018).

44 See infra Figure B. For an overview of the status of all cases in the study as of the time of the study’s conclusion, including those that were not yet resolved or were unknown, see Figure A.

45 See infra Figure B; see also Appendix B (identifying those cases in which nonmonetary relief was secured).

46 See infra Figure B.
remain ongoing, twenty-nine percent (8 of 28) have already resulted in a ruling encompassing policy change or other nonmonetary relief, through a preliminary or permanent injunction.47

Figure A: Case Disposition, Transgender Constitutional Litigation 2017 – 202148

[Diagram showing case disposition]

Figure B: Case Disposition, Resolved Cases Only49

[Diagram showing case disposition for resolved cases]

Broken out by subject area, the success rates of transgender litigants during the study period become even more striking. As shown by Figure C, cases were grouped into eleven categories by subject area: Criminal (comprising of 4 cases), Employment Discrimination (4), Health Care and

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47 See Figure B; Figure A.
48 This data is available in Appendix B.
49 This data is available in Appendix B.
Health Insurance (11), Identity Documents (6), Military Discrimination (4), Other Government Discrimination (3), Policing (3), Prisoner Litigation (18), Social Services (3), Student Locker Room or Restroom Access (8), and Trans Athletes (2). Overall, the most common types of cases represented in the litigation were Prisoner Litigation (twenty-six percent of all cases), Health Care and Health Insurance (seventeen percent of all cases), Student Locker Room or Restroom Access (twelve percent of all cases), and Identity Documents (nine percent of all cases).

As is apparent when cases are sorted by subject area, there were a few subject areas that almost completely accounted for the unsuccessful litigation in the study, namely Prisoner Litigation and Criminal law. For other subject areas, litigation success rates were almost shockingly high, with ninety-six percent (23 of 24) of cases with known results resolved during the study period resulting in some form of plaintiff success, and seventy-eight percent (18 of 23) of these resulting in nonmonetary relief on equal protection or due process grounds. Indeed, for most subject areas outside of Prisoner Litigation and Criminal law, the success rate for completed cases was 100%, with only Social Services having a single loss, resulting in a success rate of

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50 See infra Figure C; see also Appendix B (outlining the number of cases in each category).
51 See infra Figure C.
52 This data is available in Appendix B.
53 See infra Figure D; see also Figure E (comparing the success rates of Prisoner Litigation and Criminal cases to all other study categories).
54 See infra Figure D; see also Appendix B (providing a more detailed breakdown of the kinds of recovery awarded by case category).
fifty percent (1 of 2). Figure D, below, presents litigation success and loss counts by subject area.

In contrast, litigation in the areas of Prisoner Litigation and Criminal matters was markedly less successful. Five out of ten cases, or fifty percent, of resolved Prisoner Litigation cases resulted in success for the plaintiff, with forty percent of these successful cases resulting in nonmonetary relief. Only one Criminal case (1 in 3 cases, or thirty-three percent) was successful, although this case did result in nonmonetary relief. Figure E, below, shows the stark difference in success rates between Prisoner Litigation and Criminal cases and all other cases. Interestingly, though the sample size is small, the interim nonmonetary relief rate in cases that were still pending as of the time of the study’s conclusion was actually somewhat higher for the Prisoner Litigation category than overall, with three of eight cases, or thirty-eight percent of pending cases awarded nonmonetary relief, perhaps suggesting increasing success for this category of cases in the most recent era.

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55 Figure D, infra.
56 This data is available in Appendix B.
57 Figure D; see Appendix B (detailing what percent of Prisoner Litigation cases resulted in nonmonetary relief).
58 Figure D; see Appendix B (detailing what percent of Criminal cases resulted in nonmonetary relief).
59 Figure D; see Appendix B (detailing which still-pending cases have resulted in interim nonmonetary relief).
A number of factors likely explain the lower success level for these two categories. First, Prisoner Litigation cases in general have notoriously low success levels for a variety of reasons, including lower quality at filing, as well as procedural obstacles and judicial biases against prisoner claims. Second, as prior constitutional law scholars have observed, courts may be especially reluctant to intervene in criminal justice matters on equality law grounds. Third, cases in these categories were disproportionally litigated without the support of impact litigation or other nonprofit groups (seventy-two percent of Criminal and Prisoner Litigation cases were litigated without nonprofit or impact litigation support, as compared to twenty-three percent of all others). As described below, given the stunning overall success rates for nonprofit organizations litigating transgender rights cases (likely partially explained by case selection, and partially by expertise), this may be relevant to explaining the lower success rates of these two categories. Finally, two of the prisoner cases involved a litigant who was pro se at the time of loss and

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60 This data is available in Appendix B.


62 See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 108-39 (2d ed. 2012) (describing the pervasive ways that the Supreme Court has “closed the courthouse doors” to individuals seeking to show racial bias in the criminal justice system).

63 Appendix B.

64 See infra notes 66–69 and accompanying text.
abandoned the litigation, despite having received favorable rulings on the merits earlier in the case history.\textsuperscript{65}

The other most notable case characteristic that corresponded to disproportional levels of success as compared to the overall study sample was the participation of an impact or nonprofit organization. As shown by Figure F, below, cases in which an impact organization or other nonprofit organization participated achieved a stunning 100\% success rate in cases concluded during the study period (out of a total of 23 cases).\textsuperscript{66} A full eighty-three percent (19 of 23) of these resolved cases, moreover, resulted in some form of nonmonetary relief, including often substantial systemic changes to government policies.\textsuperscript{67} Among the pending cases in this category, forty-four percent (8 of 18) had, as of the time of the end of the study, already secured some form of nonmonetary relief through a preliminary or permanent injunction, although some of these results were reversed during further proceedings.\textsuperscript{68} Given the very high success rates of cases with impact or nonprofit involvement in the sample, the substantial level of representation of such cases (sixty-two percent, or 41 of 66 cases) in the study likely accounts in part for the high success rates witnessed.\textsuperscript{69}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{success_rates.png}
\caption{Success Rates for Cases with Nonprofit Participation v. Private Counsel Only\textsuperscript{70}}
\end{figure}


\textsuperscript{66} See cases cited in Appendix B; see also Figure F.

\textsuperscript{67} See cases cited in Appendix B.

\textsuperscript{68} See cases cited in Appendix B.

\textsuperscript{69} See cases cited in Appendix B.

\textsuperscript{70} See cases cited in Appendix B.
Finally, it is worth noting that the political party of the judge resolving the matter also seemed to bear some relationship to litigant success, though judges appointed by all presidents represented in the sample, including appointees of President Trump, voted in favor of transgender litigants in some cases. Though the numbers are small, this relationship appeared strongest at the Court of Appeals level, with seventy-five percent (6 of 8) Democrat-appointed judges voting in favor of a pro-transgender result on one or more claims, while only twenty-nine percent (2 of 7) of Republican-appointed judges voted in favor of a pro-transgender result on one or more claims. At the federal district court level, this relationship appeared to be more attenuated with sixty-three percent (10 of 16) of Republican-appointed judges ruling in favor of transgender litigants on one or more claims, as compared to eighty-eight percent (38 of 43) of Democratic-appointed judges. Figures G and H show this relationship for courts of appeals and district courts, respectively. Notably, the number of Democrat-appointed judges adjudicating cases in the studied cases was significantly higher than Republican judges, something that may reflect strategic case selection considerations, and could partially explain the overall high case success rates.

See Appendix B. Because magistrate judges are not appointed through a political process, they are not included in this analysis, though where their recommendations were adopted by a district judge, the party of that district judge is coded. See Appendix B (categorizing judge by appointing president). In addition, because of the multiplicity of ways that state court judges join the bench, no attempt was made to code this criterion for the limited number of state court cases in the data set.

Id. However, it is important to note that the Karnoski panel, which was coded as voting against the pro-transgender result because it remanded the preliminary injunction for reconsideration based on changed circumstances, also found that heightened scrutiny is appropriate for discrimination against transgender people as a class. See Karnoski v. Trump, 926 F.3d 1180, 1199-1201 (9th Cir. 2019). The panel had two Republican-appointed judges. Because the numbers are so small, if these two judges were counted as judges voting in favor of a pro-transgender result, fifty-seven percent of Republican-appointed Court of Appeals judges in the study would have voted in favor of such a result.

See supra notes 71–72 and accompanying text (comparing the raw numbers of Democratic- and Republican-appointed judges hearing transgender cases).

See Appendix B.
In short, overall, transgender litigants experienced strikingly high levels of success in raising constitutional claims during the time frame studied (2017–2021). Indeed, excluding the Prisoner Litigation and Criminal categories, ultimate success rates were at ninety-six percent for transgender constitutional rights litigants, with a very substantial proportion of those litigants (seventy-eight percent) achieving even forms of nonmonetary

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75 This data is available in Appendix B.
76 This data is available in Appendix B.
Thus, viewed at a high level of generality, transgender constitutional rights claims are experiencing extremely high levels of success, with most subject areas resulting in consistent and substantial success for transgender litigants.

B. Equal Protection

The above statistics, while striking, provide only high-level information about the success of transgender constitutional rights litigants. But what has this meant in terms of the courts’ approaches to doctrine in the context of transgender constitutionalism? As elaborated below, the reasoning of the lower courts in finding for transgender litigants is equally as striking as the overall results. During the time frame studied (2017–2021), there was a wave of decisions in the lower courts developing a jurisprudence of transgender equality: finding that transgender individuals should be considered a suspect or quasi-suspect class (and thus discrimination against them should be subject to heightened scrutiny), that anti-transgender discrimination should be considered sex discrimination (and thus under established law should receive intermediate scrutiny), and that discrimination against the transgender community is irrational. Collectively, these case law developments represent a fundamental shift in the lower courts’ approach to the equality rights of the transgender community.

1. Heightened Scrutiny: Transgender People as a Suspect or Quasi-Suspect Class

Under the Equal Protection Clause, whether a group is deemed a “suspect” or “quasi-suspect” class generally determines the level of scrutiny that discrimination against them is afforded (strict scrutiny is applied for discrimination targeting “suspect” classes, intermediate scrutiny for “quasi-suspect” classes, and rational basis review for all other groups). Because the assessment of whether a group qualifies as “suspect” or “quasi-suspect” involves an assessment of whether discrimination against them is likely, as a general matter, to be justified, there is arguably no more important signal of the constitutional culture surrounding a group’s equality rights than the willingness (or unwillingness) of courts to afford them protected class

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77 See Appendix B.
78 It should be noted, however, that most individual subject areas resulted in relatively few numbers of resolved cases during the study period.
Moreover, the higher levels of scrutiny (strict or intermediate scrutiny) that go with protected class status generally result in discrimination against the group being invalidated, while rational basis review can generate far more variable results. Thus, whether the transgender community is being recognized by the courts as a “suspect” or “quasi-suspect” class provides an important metric of their current constitutional success.

This metric, evaluated in the context of the case studies, suggests that transgender litigants are experiencing extraordinarily high levels of substantive success in contemporary constitutional litigation—and that constitutional culture may have shifted decisively in their favor. While not every decision during the study period addressed suspect or quasi-suspect class status, in every one of the twenty-four cases during the study period that addressed the issue of whether the transgender community should receive heightened scrutiny, the court ruled in favor of transgender litigants.  

80 See Lauren Sudeall Lucas, Identity as Proxy, 115 COLUM. L. REV. 1605, 1607-08 (2015) (describing how equal protection doctrine uses identity as a “doctrinal shorthand for marginalization”). Of course, as some scholars have pointed out, heightened scrutiny has also come with costs for groups that have pursued it, as it has led to judicial restrictions on the ability of government entities to use group status for reparative or ameliorative aims. See Robinson, supra note 37, at 1062-63.

81 See Reed, supra note 79, at 157; cf. Eyer, The Canon of Rational Basis Review, supra note 28, at 1335-41 (describing the inconsistent ways that the lower and state courts apply rational basis review, some of which entail quite meaningful review).

82 See cases cited infra note 83.

These decisions, moreover, included the first two circuit-level decisions to hold that the transgender community is, as a class, entitled to intermediate or strict scrutiny, as well as two holdings that the transgender community is entitled to heightened scrutiny under the Iowa state constitution.\textsuperscript{84} As described in subsection I.B.2, infra, several circuits had held before the study period that anti-transgender discrimination warranted intermediate scrutiny as sex discrimination, but none had held that the transgender community warranted protected class status in its own right.

It is important to note that the overwhelming success of this argument represents a transformation, rather than simply a continuation, of the existing lower court case law with respect to the treatment of transgender people under the Equal Protection Clause. Prior to 2014, no court had held that transgender people, as a class, were entitled to heightened scrutiny in their own right (as opposed to because discrimination against them was sex discrimination). Moreover, this was not because the courts had not been presented with the question—rather, prior to 2014 courts were uniformly consistent in rejecting this argument.\textsuperscript{85} And in contrast to the study period’s twenty-four cases holding that transgender individuals should receive heightened scrutiny as a class (in just five years), only three cases between 2014 and 2016 so held, all at the trial level.\textsuperscript{86} Thus, the study period saw a dramatic growth in the success of arguments that transgender people should be deemed a suspect or quasi-suspect class.

\textsuperscript{84} See Karnoski, 926 F.3d at 1200-01; Grimm, 972 F.3d at 608-13; Ruling, Good, supra note 83, at 30, aff’d on other grounds, 924 N.W.3d 583 (Iowa 2019); Ruling, Vasquez, supra note 36, at 32.


\textsuperscript{86} See Norsworthy v. Beard, 74 F. Supp. 3d 1100, 1115 (N.D. Cal. 2014) (holding, for the first time, that transgender people as a class deserved heightened scrutiny), amended on other grounds, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Adkins v. City of New York, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); Bd. of Educ. of the Highland Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); see also Zavaras, 63 F.3d at 971 (suggesting that Holloway should be “reevaluat[ed]” in light of “recent research concluding that sexual identity may be biological” but declining to do so in that case because the plaintiffs’ allegations were conclusory). These cases can be compared with cases cited in note 83, supra.
The overwhelming success of this argument in the cases studied here has important implications. While the number of circuit court decisions holding that transgender litigants are entitled to suspect or quasi-suspect class treatment remains relatively low (two in total), the overwhelming consistency of recent decisions addressing this question is likely to shape future litigation on this issue. Indeed, it is common for the lower federal courts in considering a question like the propriety of suspect or quasi-suspect class status to look to existing authority (even if non-binding) in reaching their conclusions, something that in this case may predispose courts toward continuing to find transgender individuals to be a suspect or quasi-suspect class. Even at the Supreme Court level, the Court may find it more difficult to rule against transgender people being considered a suspect or quasi-suspect class (or conversely may find it easier to rule in favor of such a proposition) given the consistency of recent rulings—though it of course remains to be seen whether the Court will take up this question at all.

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87 As discussed more fully in Part IV, infra, post-study cases, including especially Adams, may cast some shadow on this. However, even in Adams, the majority did not reject heightened scrutiny for transgender people as a class (though it expressed “grave doubts” as to its appropriateness). Indeed, the Adams majority addressed the issue only in a footnote and failed entirely to engage with the factors that ought to govern such a decision. 57 F.4th at 803 n.5. As discussed further, infra notes 90–105 and accompanying text, it is difficult, on any substantive analysis of the “protected class” factors, to reach the conclusion that transgender people are not entitled to protected class status, and indeed no court that has taken those factors seriously has rejected protected class status since Holloway in 1977.

88 The post-Holloway, pre-2010s legal landscape with respect to the transgender suspect class issue is itself an excellent example of this precedential path-dependency. Holloway was the first case to address whether transgender people ought to be considered a suspect or quasi-suspect class and was the only one to substantively analyze the issue. In all of the subsequent cases to find that transgender people are not a suspect or quasi-suspect class, the courts simply relied summarily on Holloway, even though very few of them were formally bound by Holloway’s ruling. See cases cited supra note 85; cf. Andrew F. Daugherty & Jennifer F. Reinganum, Stamped to Judgment: Persuasive Influence and Herding Behavior by Courts, 1 AM. L. & ECON. REV. 158, 158–59 (1999) (describing how, especially when precedent is uniform, courts may “progressively rely more on previous decisions” and less on independent reasoning).

89 Cf. Siegel, supra note 28, at 1186 (noting that the Supreme Court at times can and has relied on the movement of the lower federal courts to justify its own politically controversial rulings, and that such decisions open up space for the Court to do so). As I discuss more fully in Part IV, there are reasons to doubt that the Supreme Court will take up this question, which it has dodged for five decades in the sexual orientation context, any time imminently. If it does not, this area will remain, as in the sexual orientation context, governed by the jurisprudence of the lower federal and state courts. Cf. United States v. Windsor, 570 U.S. 744 (2013) (not addressing suspect or quasi-suspect class status even though it had been extensively briefed and was the basis for the decision below in the Second Circuit); Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (holding that gays and lesbians are a quasi-suspect class), aff’d on other grounds, 570 U.S. 744 (2013). See generally Stacey L. Sobel, When Windsor Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications, 24 CORNELL J.L. & PUB. POL’Y 493, 518–26 (2015) (canvassing state and lower court case law addressing the issue of whether gays and lesbians should be deemed a suspect or quasi-suspect class).
Moreover, as the consistency of the existing litigation demonstrates, taking the criteria the Supreme Court has articulated for suspect and quasi-suspect class status seriously, it is genuinely difficult to find that transgender litigants are not entitled to protected class treatment. These four criteria are (1) a history of discrimination, (2) whether the group shares an “immutable or distinguishing characteristic[]”, (3) the political powerlessness of the class, and (4) a lack of relationship between the characteristic and the ability to contribute. Existing cases provide a strong foundation for future litigants to argue that these criteria ought to be taken seriously, and that doing so, it becomes relatively straightforward to conclude that discrimination against the transgender community should receive heightened scrutiny. Indeed, historically every transgender equal protection case to have substantively evaluated the criteria for suspect and quasi-suspect class status—with the exception of the Ninth Circuit’s now overruled 1977 opinion in Holloway v. Arthur Anderson—have concluded that the transgender people meet those criteria, and thus should qualify as a suspect or quasi-suspect class.

For example, on the issue of whether transgender people have been subjected to a “history of discrimination,” courts have easily concluded in the affirmative. As such courts have observed, there is an extensive and irrefutable history of discrimination against the transgender community, extending into the modern era. Even today, “[t]he transgender community[] suffers from high rates of employment discrimination, economic instability and homelessness[,] . . . [is] more likely to be the victim of violent crimes . . .

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90 It may be seen as telling in this regard, that the one post-study circuit case expressing “grave doubt” as to whether transgender people ought to be deemed a quasi-suspect class engaged in no analysis at all of these criteria. See Adams, 57 F.4th at 803, 803 n.5.

91 See, e.g., Windsor, 699 F.3d at 182-85 (stating the criteria and analyzing them in the context of sexual orientation), aff’d on other grounds, 570 U.S. 744 (2013). Although these four criteria are commonly applied in the lower courts to evaluate whether suspect and quasi-suspect class status are appropriate, the Supreme Court has never actually done so itself in establishing new suspect or quasi-suspect classes. See, e.g., Eyer, The Canon of Rational Basis Review, supra note 28, at 1324-35. Rather, they have typically relied on these considerations descriptively after the fact to explain the reasons why particular groups have been afforded heightened scrutiny. Id.

92 For a more extensive academic discussion of each of the four factors, and why transgender people as a class clearly satisfy them, see Barry et al., supra note 4, at 550-67.

93 See Appendix B. Not all courts have rested their conclusion that transgender individuals are a protected class warranting heightened scrutiny on these four factors. See, e.g., Karnoski v. Trump, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (relying on complicated circuit precedent from the sexual orientation context to conclude that discrimination against transgender people warrants heightened scrutiny); Morris v. Pompeo, No. 19-cv-00569, 2020 WL 6875208, at *7 (D. Nev. Nov. 23, 2020) (following Karnoski as binding circuit precedent).

94 See infra notes 95-96; see also Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1051 (7th Cir. 2017) (noting that “[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity” and describing statistics on this front as “alarming,” but declining to reach the issue of whether transgender people constitute a suspect or quasi-suspect class).
[and] current measures and policies continue to target transgender persons for differential treatment.”95 Thus, as one court recently put it, “other than certain races, one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.”96

Courts have also easily concluded that transgender individuals meet the criteria of exhibiting “obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]”97 As major medical associations like the American Medical Association, the American Psychiatric Association, and the American Academy of Pediatrics have affirmed, “[e]very person has a gender identity, which cannot be altered voluntarily[.]”98 Thus courts have readily concluded that “gender identity is formulated for most people at a very early age, and . . . [being transgender] is as natural and immutable as being cisgender. But unlike being cisgender, being transgender marks the group for different treatment.”99

Courts have also regularly found that “transgender people constitute a minority lacking in political power.”100 As such courts have observed, “transgender individuals make up a small (according to all parties, less than [one percent]) proportion of the American population.”101 Moreover, “there

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96 Flack v. Wis. Dep’t of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018).
98 As described below, many courts have focused in this context on the “immutability” aspect of this criteria, finding it to be satisfied in the context of the transgender community. But as a number of courts and scholars have recognized, immutability is not in fact required by the Supreme Court in order to find a group is a suspect or quasi-suspect class, and thus it may be better to characterize this element as focusing on the question of “whether the characteristic of the class calls down discrimination when it is manifest.” Windsor v. United States, 699 F.3d 169, 183 (2d Cir. 2012), aff’d on other grounds, 570 U.S. 744 (2013); see also Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 STAN. L. REV. 503, 506 (1994) (“[I]mmutability is not a requirement for suspect class status and is unlikely to become one . . . .”).
99 This is of course, an inquiry that members of the transgender community amply satisfy, and that is less likely to lead to complication and confusion with respect to, for example, non-binary or gender fluid members of the community—though such individuals may also have a gender identity that is immutable in the sense that being gender fluid or non-binary itself may be a fixed orientation over time. See, e.g., George, supra note 4, at 271.
are very few transgender elected officials” and courts have, into the current
day, “had to block enforcement of policies approved by the federal
government or laws passed by state legislatures because they violated the
rights of transgender individuals.”\textsuperscript{102} Indeed, as the recent wave of anti-
transgender legislation demonstrates, the political process at this time
decisively disfavors the transgender community in many states.\textsuperscript{103}

Finally, and most importantly, the courts that addressed the issue of
whether the transgender community ought to be afforded suspect or quasi-
suspect class status all easily concluded that “transgender status bears no
relation to ability to contribute to society.”\textsuperscript{104} And while some such courts
relied on the consensus of medical and mental health experts to so conclude,
others simply observed as a matter of common sense that “transgender people
are no less capable of contributing value to society than other people.”\textsuperscript{105} This
burgeoning common-sense recognition that transgender status carries with it
no inherent indication of incapability of contributing to society marks
perhaps the most important aspect of recent cases finding transgender people
to be a suspect or quasi-suspect class, as it represents a profound paradigm
shift in the perspective that courts bring to the question of who transgender
people are, and what they are capable of.

Of course, a holding that transgender people as a group should be deemed
a suspect or quasi-suspect class of course does not guarantee the success of a
transgender litigant’s constitutional claims: the government still has the
opportunity to prove that they satisfy the requisite level of scrutiny (either
intermediate or strict scrutiny). Nevertheless, it represents a highly
important marker of the constitutional stature of the transgender community
in the eyes of the courts, and makes it far less likely that the government will
prevail. And indeed, there was no study case in which a court held that the
transgender community ought to be deemed a suspect or quasi-suspect class
where a court ultimately found that the government satisfied the requisite
standard of review.\textsuperscript{106}

\textsuperscript{102} M.A.B., 286 F. Supp. 3d at 721; see also PAISLEY CURRAH, SEX IS AS SEX DOES:
GOVERNING TRANSGENDER IDENTITY 3 (2022) (noting that it was not until 2017 that the first
openly transgender person was elected to a state legislature).

\textsuperscript{103} See sources cited supra note 13.

\textsuperscript{104} M.A.B., 286 F. Supp. 3d at 720.

\textsuperscript{105} Ray, 507 F. Supp. 3d at 937; see also Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 612
(4th Cir. 2020) (relying on medical and mental health amici to hold the same).

\textsuperscript{106} See sources cited supra note 83. One post-study decision in a study case, B.P.J. v. West Virginia
conclude that intermediate scrutiny was satisfied despite observing that anti-transgender
discrimination is subject to intermediate scrutiny, and is discussed at greater length in Part IV.
However, the Court’s analysis of intermediate scrutiny focused virtually exclusively on the sex
classification, rather than the argument that law was discriminatory against transgender students.
2. Heightened Scrutiny: Gender Identity Discrimination as Sex Discrimination

As described above, during the study period there was an enormous growth in the number of cases holding that the transgender community ought to be deemed a suspect or quasi-suspect class in its own right—an argument that had previously been largely moribund in the courts. But even before that development, transgender litigants had already begun to experience success in obtaining heightened scrutiny under another argument: that discrimination against the transgender community is sex discrimination. Because sex discrimination already receives intermediate scrutiny under established constitutional law, this approach represented an independent way for the transgender community to secure heightened scrutiny of discriminatory government actions under the Equal Protection Clause.

Perhaps unsurprisingly, this argument that anti-transgender discrimination is sex discrimination—already fairly robust in the lower courts prior to the study period—also saw considerable success and growth during the study period itself. Even before the Supreme Court’s 2020 decision in *Bostock v. Clayton County*, courts in study cases regularly and consistently concluded that anti-transgender discrimination was sex discrimination warranting intermediate scrutiny. Decisions in the study period post-dating

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*See id. at *6-8. The B.P.J. decision is currently on appeal in the Fourth Circuit, and the appeals court has reinstated injunctive relief pending appeal. See Docket at No. 50, B.P.J. v. W. Va. State Bd. of Educ., No. 32-1078 (4th Cir. Feb. 22, 2023).*

*See supra subsection I.B.2.*

*See Smith v. City of Salem, 378 F.3d 566, 575-77 (6th Cir. 2004); Glenn v. Brumby, 663 F.3d 1312, 1335-20 (11th Cir. 2011).*

*Under modern standards, sex discrimination must have an "exceedingly persuasive justification" in order to be affirmed under the Equal Protection Clause. See United States v. Virginia, 518 U.S. 515, 531-33 (1996). The traditional articulation of the intermediate scrutiny test was that the government must have an important government interest, which is substantially related to the classification. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976).*

*See infra notes 112–113 and accompanying text.*

*The Supreme Court held in *Bostock v. Clayton County* that anti-transgender discrimination is "because of sex" and thus encompassed within the discrimination prohibited by Title VII. See Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738-43 (2020).*

Bostock also regularly found that anti-transgender discrimination was a form of sex discrimination (thus necessitating the application of intermediate scrutiny). 113

While decisions in the study were thus generally quite consistent in concluding that anti-transgender discrimination was sex discrimination (and thus intermediate scrutiny was warranted), the reasoning by which courts reached this conclusion varied considerably across differing contexts. Unlike arguments for protected class status for the transgender community (described in subsection I.B.1), which have generally tended to take a very similar form across different cases and factual contexts, sex discrimination arguments for transgender equality have proven far more variable and context-sensitive. Below, two of the most common types of sex discrimination arguments for transgender constitutional equality that were observed in the studied cases are discussed.

a. Explicit Sex Classifications 114

Many recent transgender constitutional litigation cases have arisen in the context of explicit sex classifications—often, though not always, in areas

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114 The statutes and policies at issue in this part would commonly be referred to in the case law as “facial” classifications in the case law. Because there is also a discussion herein of “facial” challenges, which might lead to reader confusion, I have mostly used the term “explicit” rather than “facial” when referring to statutes that on their face classify. Nevertheless, these two terms (“facial classifications” and “explicit classifications”) should be understood herein as referring to interchangeable ways of referring to policies or statutes that are explicit in discriminating based on sex and/or transgender status.
where sex separation is, even today, widely socially accepted. Thus, for example, a transgender woman might challenge her placement in a men's prison (an explicitly sex-segregated facility) or a transgender girl might challenge her exclusion from girl's athletics (an explicitly sex-segregated activity). Explicit sex classifications are typically subjected to intermediate scrutiny as a matter of established constitutional doctrine. And indeed, almost all of the courts faced with explicit sex classifications during the study period found the challenged actions of the government to be subject to intermediate scrutiny.

Interestingly, courts have generally reached the conclusion that intermediate scrutiny was warranted in contexts of explicit sex classifications, even though transgender litigants have often (though not always) declined to challenge at a global level explicitly sex-classifying systems themselves. Thus, as discussed further in Section III.D, at least where systems of sex-based distinction are widely socially accepted, it appears to be far more common for transgender litigants to challenge the assimilation of the

115 See, e.g., Quine, 2017 WL 1540758, at *5-7, overruled on other grounds by, 741 F. App’x 338 (9th Cir. 2018) (access to gendered clothing and accessories in prison); Whitaker, 858 F.3d at 1020-54 (school restrooms); M.A.B., 286 F. Supp. 3d at 718-719 (school locker rooms); Doe v. Mass. Dep’t of Corr., 2018 WL 2994403, at *9-11 (sex-based prison assignment); Boyden, 341 F. Supp. 3d at 999-1002 (sex-based restrictions on when certain medical procedures will be funded); Hampton, 2018 WL 5830730, at *10-12 (sex-based prison assignment); Sullivan-Knoff, 348 F. Supp. 3d at 792-94 (sex-differentiated public nudity law); J.A.W., 396 F. Supp. 3d at 843 (school restrooms); Flack, 328 F. Supp. 3d at 952-53 (sex-based restrictions on when certain medical procedures will be funded); A.H., 408 F. Supp. 3d at 575-76 (sex-separated restrooms); Kadel, 446 F. Supp. 3d at 17-19 (sex-based exclusions on insurance coverage of certain medical procedures); Tay, 457 F. Supp. 3d at 680-82 (sex-based prison assignment); Grimm, 972 F.3d at 607-10 (sex-separated restrooms); Corbit, 513 F. Supp. 3d at 1323 (sex-differentiated requirements for obtaining gender-marker on drivers’ license); Brandt, 551 F. Supp. 3d at 891 (sex-based ban on certain medical treatments for minors), aff’d, 2022 WL 3652745 (8th Cir. 2022); Adams, 3 F.4th at 1307-08, rev’d en banc, 57 F.4th 791 (11th Cir. 2022) (sex-separated restrooms); B.P.J., 550 F. Supp. 3d at 347, 354-56 (separate sports teams); Iglesia, 2021 WL 6112790, at *24-25 (sex-separated prisons).


118 See cases cited supra note 115. But cf. Hennessey-Waller v. Snyder, 529 F. Supp. 3d 1031, 1044-45 (D. Ariz. 2021) (concluding that plaintiffs had not adequately demonstrated that Medicaid benefits exclusion was because of sex, and declining to apply heightened scrutiny).

119 See cases cited supra note 115. Note that there were some cases, such as, for example, those involving bans on insurance reimbursement for certain types of medical procedures, where facial sex classifications were challenged. See, e.g., Flack, 328 F. Supp. 3d at 952-53. Reviewing the briefing for each of the remaining cases was not within the scope of this study, and so it is possible that categorical arguments were at times raised but simply not addressed by the courts. However, given the uniformity with which courts have ignored the possibility of a direct challenge to sex classification itself, it seems far more likely that these arguments are generally not being raised by litigants.
transgender community into such systems on an as applied basis than to challenge the underlying system itself. Nevertheless, even where this was the case, courts generally concluded that the application of an explicit sex classification demanded the conclusion that sex discrimination was at play, and that intermediate scrutiny was thus warranted.

While many courts have not elaborated on their reasoning for so finding, this conclusion—that sex discrimination exists in the application of explicit sex-based policies to an individual even where the policy is not globally challenged—seems amply justified. Even a plaintiff who is not challenging at a global level a system of sex segregation—but rather simply complaining about its application to them—has, at an individual level, plainly been subjected to disparate treatment based on their sex. Thus, for example, a transgender woman who is placed in a men’s prison has clearly been subjected to sex-based government action, thus triggering intermediate scrutiny—even if she declines to challenge the overall system of sex-separation in prisons. The government’s action remains sex-based as applied to the individual plaintiff, thus necessitating intermediate scrutiny.

Nevertheless, the posture of these “as applied” cases has required the courts to grapple with a further important question: how to assess the government’s interests in the context of a situation where the plaintiff is not challenging the underlying sex-based regulation—but rather only their treatment within it. Some defendants—recognizing perhaps that they are more likely to be seen as having important interests in defending the overall structures of sex segregation, like sex-separated restrooms—have argued that they must only justify the systems of sex separation as a whole (e.g., why there should be sex-separated restrooms generally). But courts have, with limited exceptions, rejected this argument, instead treating the relevant inquiry as whether the government’s reasons for treating the plaintiff (and/or transgender individuals as a group) as they did, i.e., the government’s use of sex in this instance, satisfied intermediate scrutiny.

120 See infra Section III.D.
121 See sources cited supra note 115.
122 Cf. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (stating that the right to be free from group-based disparate treatment is a “personal” one); Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019) (stating that “even a single instance of [protected class] discrimination” must be evaluated under the relevant equal protection strictures).
123 Cf. Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 800 n.3, 803 (11th Cir. 2022) (en banc) (ruling that school district’s sex segregated restrooms satisfied intermediate scrutiny generally, and declining to meaningfully engage with plaintiff’s as applied arguments).
This as applied approach to intermediate scrutiny appears to likely be correct under the Supreme Court’s case law. Most modern sex-segregated systems are justified (if at all) on the basis that there are “real differences” between men and women. As the Supreme Court has made clear in the “real differences” cases, where a particular individual is “similarly situated” to the favored sex-based category, the classification is impermissible as to that individual—even where the classification might generally be justified by “real differences” between men and women. This type of “as applied” inquiry is of course necessary to ensure that “real differences” does not devolve in practice into the simple application of gender stereotypes.

Moreover, it is important to note that although historically, most Equal Protection cases have involved facial challenges, this is not true of all areas of constitutional law—and in many other areas, as applied scrutiny has been, and remains, common. For example, in the context of religious liberties it has been common for plaintiffs to challenge government action only as applied to them. And in that context, where the Court has concluded that free exercise is implicated at all, the norm is to ask whether the government had a sufficient interest in applying the law to a particular religious person or

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126 See, e.g., Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692 n.12 (2017); Lehr v. Robertson, 463 U.S. 248, 267 (1983). Cf. United States v. Virginia, 518 U.S. 515, 533-538 (1996) (while acknowledging that “physical differences between men and women are . . . enduring[,]” holding that this was not a reason for excluding women who were capable of meeting the qualifications for admission to the Virginia Military Institute).

127 See, e.g., Whitaker, 858 F.3d at 1050-52; M.A.B., 286 F. Supp. 3d at 719; Grimm, 972 F.3d at 609-10.

128 Note that I use the term “facial” here to distinguish global challenges, i.e., those that are targeted at the policy as a whole, from “as applied” challenges, those targeted only at the application of the policy to an individual, or a particular subgroup.

129 Under Employment Division v. Smith, 494 U.S. 872, 878-79 (1990), there are still a substantial number of cases in which a law is a “neutral law of general applicability” and thus that free exercise is not implicated in the first instance. But where free exercise is implicated, or where the Religious Freedom Restoration Act applies, the as applied approach to scrutiny is often utilized.
entity.130 Indeed, conventional wisdom has often situated as applied challenges as the preferred or even mandatory form of constitutional adjudication across constitutional law.131

Of course, as other scholars have observed, this favoring of as applied challenges is not necessarily reflected in equal protection doctrine, where challenges have tended to be facial.132 And indeed, it is arguably inherent in the very nature of the test on heightened scrutiny that a failure to meet the test generally ought to lead to the invalidation of the classification as to all: if a racial classification, for example, is not supported by a compelling state interest, or is not narrowly tailored as to that interest, that itself is conceived of as the constitutional harm requiring invalidation.133 Importantly, however, it is not at all clear that the converse is true—that is, a law that may be able to survive strict or intermediate scrutiny as a global matter, may nonetheless not be valid as to all.134 Indeed, this appears to be the clear import of the Court’s holdings that even laws generally supported by government justifications arising from “real differences” between the sexes cannot be sustained as applied to those to whom those justifications are not apt.135 In other contexts too, the Supreme Court has recognized “as applied” equal

130 See, e.g., Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881-82 (2021) (“The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [petitioner].”). Constitutional religious liberties jurisprudence is of course currently in a state of significant flux, but seems poised if anything, to further embrace this “to the person” approach to religious liberties adjudications. See id. at 1874-82 (applying an “as applied” approach while signaling receptivity to potentially overruling Employment Division v. Smith, 494 U.S. 872 (1990)); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430-32 (2006) (analyzing pre-Smith free exercise precedents in the context of a Religious Freedom Restoration Act case, and concluding that they compelled a “to the person” approach to the analysis of whether strict scrutiny was satisfied).

131 See, e.g., Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 HARV. L. REV. 1321, 1321-22 (2000) (“Traditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge, . . . [b]ut [i]n important writings over the past few years, nearly every aspect of this traditional thinking has come under assault.”).

132 See, e.g., David H. Gans, Strategic Facial Challenges, 85 B.U. L. REV. 1333, 1381-82 (2005) (“Th[e] doctrinal tests [associated with the Equal Protection Clause] lead inexorably to facial review in almost all equal protection challenges; as a result, the distinction between facial and as-applied adjudication rarely surfaces.”).

133 Id.

134 See, e.g., sources cited supra note 126; see also Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (finding ordinance invalid under equal protection law “as applied” to the denial of a special use permit to the plaintiff); W. States Paving Co., Inc. v. Wash. State Dep’t of Transp., 407 F.3d 983, 1002-03 (9th Cir. 2005) (finding the Transportation Equity Act, which encouraged utilization of minority contractors, to be facially valid, but invalid as applied to the state of Washington); H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233, 258 (4th Cir. 2010) (finding affirmative action program valid as applied to African-American and Native American subcontractors, but not as applied to women, Asian-American and Hispanic-American subcontractors).

135 See sources cited supra note 126.
protection challenges and found them dispositive, making clear that even in the equal protection context, both “as applied” and “facial” challenges are possible.\textsuperscript{136}

Finally, it is important to note that many (though not all) of the contexts in which as applied sex discrimination challenges have been raised have also involved obvious anti-transgender discrimination.\textsuperscript{137} And as to this anti-transgender discrimination, the equal protection challenges raised by litigants ought to be understood as facial, not as applied. This is because even where transgender plaintiffs are declining to categorically challenge preexisting systems of sex separation, they are categorically challenging the (mostly recently enacted) trans-discriminatory laws and policies that today dictate how members of the transgender community ought to be assimilated into those systems.\textsuperscript{138} As described infra Section III.B, as a larger number of courts recognize anti-transgender discrimination as itself a basis for applying heightened scrutiny, this fact should allow courts and litigants to sidestep the questions that have arisen in the sex discrimination context about the legitimacy of an as applied approach to equal protection doctrine.

Ultimately, almost all courts during the study period that addressed the application of explicit sex-based classifications to transgender litigants concluded that intermediate scrutiny was applicable, regardless of whether the litigant challenged the classification itself, or only its application to the plaintiff or the transgender community.\textsuperscript{139} Moreover, such courts also almost always concluded that the intermediate scrutiny standard—a substantial relationship to an important government interest—was (at least preliminarily) not met.\textsuperscript{140} While the specific arguments regarding the governments’ interests varied depending on the context, the government—in

\textsuperscript{136} See, e.g., Cleburne, 473 U.S. at 448.

\textsuperscript{137} This is true, for example, of all three of the post-study decisions in which courts declined to entertain an as applied sex discrimination challenge and found the relevant sex segregation to satisfy intermediate scrutiny as a whole. See Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 798 (11th Cir. 2022) (en banc) (relating factual history making clear that transgender students were facially singled out for distinctive treatment in restroom policy); D.H. v. Williamson Cnty., No. 3:22-cv-00570, 2022 WL 16639994, at *1-2 (M.D. Tenn. Nov. 2, 2022) (describing the “Tennessee Accommodations for all Children Act”, which was enacted as a response to the issue of transgender youth’s restroom usage); B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316, 2023 WL 111875, at *1-2 (S.D. W. Va. Feb. 7, 2023) (describing the “Save Women’s Sports Bill”, which was enacted because of perceived concerns about transgender girls participating on gender-identity-appropriate athletic teams). Regardless of the merits of the plaintiffs’ as applied sex claims, those decisions erred by failing to separately consider the plaintiff’s facial challenge to the anti-transgender discrimination at issue in each instance.

\textsuperscript{138} For a fuller discussion of this theoretical point, see infra Section III.B.


\textsuperscript{140} See sources cited supra note 115.
virtually all of contexts challenged—could not demonstrate the type of “exceedingly persuasive justification” that constitutional sex discrimination law demands.

Notably, however, this is an area in which cases post-dating the study period (from the years 2022 and 2023, while publication was pending) diverged in some respects from the study results. In particular, while courts were virtually unanimous in finding that intermediate scrutiny was not satisfied where facial sex discrimination was present during the study period, three transgender equal protection cases, including one circuit case, affirmed sex classifications on intermediate scrutiny after the study period, typically by declining to engage meaningfully with the as applied aspect of plaintiffs’ arguments, and instead focusing on the overall acceptability of sex-separation. As Part IV explores, it is unclear whether these decisions mark a new trend, or isolated incidents of divergent outcomes.

b. Discrimination Based on Transgender Status as Sex Discrimination

Although it was common for explicit sex classifications to be at issue in study cases, and for courts to rely on those classifications as their basis for finding sex discrimination, not all courts relied on this reasoning. Among the most common other forms of reasoning that courts relied on to determine that sex discrimination was implicated (either in the alternative or in addition to explicit discrimination arguments) was reasoning that anti-transgender discrimination is itself a form of sex discrimination, and thus demands intermediate scrutiny.

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143 See sources cited infra notes 153, 157 & 159.
The reasoning behind this argument long predates the study period, and indeed originated in statutory cases in the 1970s. Initially seeing only limited and sporadic success, by the 2010s this argument became the mainstream position of the lower federal courts (as well as many state courts). The Supreme Court eventually endorsed this argument in the 2020 case of Bostock v. Clayton County, holding that anti-transgender discrimination is necessarily “because of . . . sex” and thus prohibited by Title VII.

Though many courts have held that anti-transgender discrimination is sex discrimination, the reasoning behind these holdings has varied in different contexts and cases. The version embraced by the Supreme Court in Bostock focused on the statutory language of Title VII (“because of . . . sex”), and on the impossibility of discriminating on the basis of transgender status without also discriminating on the basis of sex. As the Court had recognized even before Bostock, disparate treatment because of protected class status is a core form of discrimination (indeed, in the constitutional law context, the only type of actionable discrimination). And disparate treatment by definition occurs when an individual would have been treated differently but-for their protected class status.

144 For early cases that were successful in raising this argument, see Richards v. U.S. Tennis Ass’n, 93 Misc. 2d 713, 722 (N.Y. Sup. Ct. 1977); Maffei v. Kolaeton Indus., Inc., 164 Misc. 2d 547, 556 (N.Y. Sup. Ct. 1995).
146 Bostock, 140 S. Ct. at 1738-43.
147 Id.
148 See, e.g., Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (characterizing Title VII’s prohibition on “disparate treatment” as its “principal nondiscrimination provision” and describing disparate treatment as “the most easily understood type of discrimination[]” (quoting Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))).
As the Supreme Court recognized in Bostock, each and every instance of gender identity discrimination entails sex-based disparate treatment in precisely this sense. Thus if Sarah, a transgender woman, is fired for showing up for work in a dress, we know that her employer would not have objected to her attire but-for her sex assigned at birth. So too, if a government policy (like recent bans on transgender medical care for youth) targets transgender people as a class because of their transgender status, it is inevitably the case that the conduct the government objects to (like seeking certain types of gender-specific care) would not have been deemed objectionable but-for the plaintiff’s sex assigned at birth.

While the but-for argument is one important argument for why gender identity discrimination should be deemed sex discrimination, it is not the only one, or even the most common one in the constitutional cases from the study period. Rather, gender stereotyping arguments, with roots both in 1970s-era constitutional sex precedents and the 1989 case of Price Waterhouse v. Hopkins played perhaps the most substantial role in the decisions of study courts that anti-transgender discrimination ought to be deemed sex discrimination (and thus entitled to intermediate scrutiny).

Like the but-for argument, the gender stereotyping argument is a fairly straightforward one. As Price Waterhouse v. Hopkins recognizes, and as Bostock reaffirmed, affording an individual disadvantageous treatment because they fail to conform to gender stereotypes is a core form of sex discrimination. Moreover, as the courts have recognized,

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. “[T]he very acts that

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Theory (discussing the development of the but-for theory in the case law, as well as its potential for future cases).

150 Bostock, 140 S. Ct. at 1741.
155 Price Waterhouse, 490 U.S. at 250–51; Bostock, 140 S. Ct. at 1741–43, 1748–49.
define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.156

Courts during the study period often embraced this gender-stereotyping-based reasoning, concluding that government entities’ adverse treatment of transgender individuals was motivated by gender stereotypes—and thus constituted sex discrimination warranting intermediate scrutiny.157 Whether a transgender woman was deemed by the defendant to be an insufficiently masculine man—an insufficiently feminine woman—or simply someone who could not comfortably be categorized within existing gender stereotypes, courts often concluded that gender stereotyping—and thus sex discrimination—was at the heart of government’s adverse treatment of transgender individuals.158

Finally, a few courts in the study reached the conclusion that anti-transgender discrimination was a form of sex discrimination based on definitional understandings of sex and/or evolving medical understandings of sex.159 As the Court in F.V. v. Barron put it,

[O]ur medical understanding of biological sex and gender has advanced significantly [in the last several decades]. For instance, it is universally acknowledged in leading medical guidance that not all individuals identify as the sex they are assigned at birth. Despite ongoing study to more fully understand the impact of differences in chromosomes, brain structure and chemistry, there is medical consensus that gender identity plays a role in an individual’s determination of their own sex. Therefore, to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning.160

156 Glenn, 663 F.3d at 1316 (quoting Ilona M. Turner, Sex Stereotyping Per Se: Transgender Employees and Title VII, 95 CAL. L. REV. 561, 563 (2007)).


158 See sources cited supra note 157.

159 See, e.g., F.V., 286 F. Supp. 3d at 1142-44 (relying partly on medical understandings and partly on gender stereotyping).

160 Id. at 1143-44.
Much as described above, some arguments that anti-transgender discrimination is sex discrimination can appear more complex when set against a backdrop of sex classifications that are not being challenged globally in the context of the case.\textsuperscript{161} Such complexity arose in the context of several of the study cases making the “anti-transgender discrimination as sex discrimination” argument (whether under the but-for argument, the gender stereotyping argument, or medical/definitional arguments).\textsuperscript{162} But again, courts in the study period regularly concluded that the lack of such a global challenge did not obviate the conclusion that sex discrimination existed as applied to the specific transgender plaintiff—or the need to apply intermediate scrutiny to their treatment by the government.\textsuperscript{163} Again, this seems likely correct given that, at the level of the individual plaintiff, they surely were treated differently because of their sex—and/or because of gender stereotypes about what a “real” man or woman is—regardless of whether they chose to challenge the overall system or policy.\textsuperscript{164}

Ultimately, many courts during the study period concluded that anti-transgender government action is, in general, sex discrimination (under either a “but for,” a gender stereotyping, or some other rationale)—and that intermediate scrutiny was thus warranted.\textsuperscript{165} Having reached this conclusion, almost all study decisions went on to (at least preliminarily) find such scrutiny not to be satisfied.\textsuperscript{166} Thus, when pressed to justify anti-transgender discrimination under the constitutional standards applied to modern sex discrimination (“exceedingly persuasive justification,” no hypothesized reasons, etc.), government defendants were generally unable to do so.

\textsuperscript{161} See supra notes 119–135 and accompanying text.


\textsuperscript{163} See sources cited supra note 162.

\textsuperscript{164} For example, a transgender boy who is forced to use the girl’s restroom clearly has been treated differently based on their sex assigned at birth than an individual assigned male at birth has been—and likely has also been treated differently based on stereotypes and assumptions about what a “real” boy is. See, e.g., Whitaker, 858 F.3d at 1051 (“[T]here is no requirement that every girl, or every boy, be subjected to the same stereotyping. It is enough that [plaintiff] has experienced this form of sex discrimination.”).

\textsuperscript{165} See sources cited supra notes 153, 157 & 159.

\textsuperscript{166} See sources cited supra note 165; but cf. Campbell v. Kallas, No. 16-cv-261, 2018 WL 2089351, at *9–10 (W.D. Wis. Dec. 8, 2018) (assuming without deciding that heightened scrutiny would apply to sex-differentiated policy regarding access to vaginoplasty, but concluding that differences in the procedure for accessing the procedure were justified under the “real differences” strand of sex discrimination equal protection jurisprudence).
3. Rational Basis Review

Most cases in the study period found some form of heightened scrutiny to be applicable, either because discrimination against transgender people as a class should be deemed suspect or quasi-suspect, or because it is sex discrimination.\(^{167}\) However, a sizeable minority of cases evaluated the discrimination at issue under rational basis review, either alone, or in the alternative.\(^{168}\) As described further in Section II.B, rational basis review, the default standard when no heightened scrutiny applies, is often conceptualized in mainstream scholarly accounts as an “empty”\(^{169}\) “meaningless”\(^{170}\) form of review, under which plaintiffs always lose.\(^{171}\) And yet, in all but one of the study cases applying rational basis review, the courts concluded that the anti-transgender policy under review lacked even a rational basis.\(^{172}\)

As such courts observed, when defendants were pressed to articulate reasons for anti-transgender government discrimination, they were typically unable to meaningfully do so. Thus, for example, courts during the study period concluded that the government lacked a genuine rational basis for decisions to criminally profile transgender individuals as sex workers\(^{173}\)—to adopt policies targeted at the transgender community which created more burdensome procedures for amending identity documents\(^{174}\)—to exclude from insurance coverage or even wholly prohibit medically necessary

\(^{167}\) See supra subsections I.B.1–2.


\(^{169}\) Chemerinsky, supra note 19, at 410.

\(^{170}\) Levy, supra note 21, at 426.

\(^{171}\) See infra Section II.B.

\(^{172}\) See sources cited supra note 168.

\(^{173}\) D.H., 309 F. Supp. 3d at 74 n.7.

treatments for transgender individuals—and to subject transgender inmates to harsh, dangerous and unsanitary conditions of confinement. As these cases illustrate, government justifications for anti-transgender policies are often difficult to defend when even a modicum of meaningful scrutiny is applied to them.

* * *

As described above, the overwhelming success of the equal protection claims of transgender litigants during the study period represents a key marker of the currently unfolding shift in constitutional culture with respect to transgender equality. Courts in the study period were unanimous in holding that transgender people as a class are deserving of protection as a suspect or quasi-suspect class (when they reached the issue). Many more courts also held that discrimination against the transgender community must be afforded intermediate scrutiny as a form of sex discrimination, and found the discrimination at issue could not satisfy this standard of review. And even in those cases where rational basis review was applied, almost all courts concluded that the discriminatory policies at issue were not even rational.

Collectively, these holdings suggest a tipping point with respect to claims that the transgender community is entitled to constitutional equality rights. In the words of Jack Balkin, such arguments are no longer “off the wall,” but are very much “on the wall” in the lower federal and state courts. Indeed, although there were some limited losses among the study equal protection claims (as explored further in Section I.D), the courts in such cases typically avoided making claims that transgender people as a group ought not

175 Ruling, Good, supra note 83, at 33 (exclusion of procedures from health insurance); Brandt v. Rutledge, 551 F. Supp. 3d 882, at 891 (E.D. Ark. 2021) (ban on gender-affirming care for minors), aff’d, 47 F.4th 661 (8th Cir. 2022).
177 See supra subsection I.B.1.
178 See supra subsection I.B.2. As noted supra note 141 and accompanying text, three cases decided in 2022 and 2023, after the study’s conclusion, did validate global systems of sex segregation adversely affecting transgender plaintiffs on intermediate scrutiny, at least preliminarily. As discussed at greater length in Part IV, it is unclear to what extent these cases represent the start of a retrenchment with respect to certain types of transgender rights claims, or simply isolated losses.
179 See supra subsection I.B.3.
to be afforded constitutional protections. Thus, equal protection cases during the study period strongly support the conclusion that the transgender community is widely perceived today as warranting constitutional protections under the Equal Protection Clause.

C. Due Process

Due process claims were selected as the second type of claim for this study, as they are—second to equal protection—the most likely to reflect the courts’ perception of the constitutional stature of the transgender community. And indeed, a significant number of the cases in the study period involved novel due process claims related to transgender status. A close examination of those claims reveals, however, that the potential bases for due process claims are far more varied than in the equal protection context. In addition, the lesser frequency in plaintiffs raising, and courts addressing, these varying types of due process claims makes overarching trends more difficult to discern. Nevertheless, as set out below, there are a number of emerging trends in the jurisprudence of transgender due process law that are worth observing.

1. Substantive Due Process: Fundamental or Liberty Rights

The types of due process claims most closely linked to the constitutional stature of the transgender community are those relating to substantive due process fundamental or liberty rights. Three principal types of such claims were raised in the study cases: claims related to a fundamental right to gender autonomy, claims related to a right to informational privacy, and claims related to “bodily integrity” and the right to refuse unwanted medical treatment. As described below, during the study period, all three of these arguments met with some success, though they were not raised as often, nor were they as consistently successful as the equal protection arguments discussed supra.

More than four decades ago, the Illinois Supreme Court recognized that substantive due process principles protected transgender individuals from prosecution under a local ordinance prohibiting “appear[ing] in a public place in a dress not belonging to his or her sex, with intent to conceal his or her sex . . . .” The Court stated, “[t]he notion that the State can regulate one’s

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182 See infra Section I.D. But cf. Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 803 & n.5 (11th Cir. 2022) (en banc) (expressing “grave doubt” as to whether transgender people ought to be deemed a quasi-suspect class in decision after study period).

183 See infra subsections I.C.1–3.

184 See sources cited infra notes 192, 203.

185 Chicago v. Wilson, 389 N.E.2d 522, 523 (Ill. 1978). A series of “void for vagueness” challenges were also brought to laws prohibiting non-gender-congruent dress and grooming during
personal appearance, unconfined by any constitutional strictures whatsoever is fundamentally inconsistent with ‘values of privacy, self-identity, autonomy and personal integrity that the Constitution was designed to protect.’”

Concluding that the city lacked an adequate justification for applying the law to the defendants (transgender individuals), the court ruled the ordinance invalid as applied. Two years later, a federal district court in Texas would go on to invalidate a similar ordinance under similar substantive due process principles, as applied to transgender defendants.

Although these early cases arose in the context of criminal proscriptions and did not formally find a fundamental right, they can be seen as precursors of what has today come to be characterized as a fundamental “right to gender autonomy” or a “right to gender self-determination.” Drawing on substantive due process precedents recognizing the right to make fundamental personal decisions free from undue government interference, transgender rights litigators and scholars have argued that there ought to be a recognized fundamental right to gender autonomy or a right to gender self-determination. Because “one’s gender is among the most personal and private of matters,” scholars and litigators have argued that it ought to be afforded protections akin to those afforded reproductive autonomy, marriage, and choice of intimate partner.

While such a gender autonomy right seemed plausible under existing substantive due process precedents, it remained largely the object of only this time frame, with mixed results. See, e.g., People v. Gillespi, 204 N.E.2d 211, 212 (N.Y. Ct. App. 1964) (rejecting due process “void for vagueness” challenge); City of Columbus v. Rogers, 324 N.E.2d 563, 565 (Ohio 1975) (invalidating ordinance on void for vagueness grounds); see also Levi & Barry, Transgender Tropes, supra note 4, at 599-601 (describing this history); see generally Redburn, supra note 4 (same).

186 Wilson, 389 N.E.2d at 524.
187 Id. at 525.

190 Jillian T. Weiss, Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas, 5 TOUKO J. RACE, GENDER & ETHNICITY 2, 6 (2010); see also sources cited supra note 189.
theoretical speculation until the study period. But in a handful of cases during the study period, litigants raised—and a number of courts endorsed—the argument that a due process right of gender autonomy or self-determination exists. As such courts reasoned, “[s]ubstantive due process protects fundamental liberty interests in individual dignity, autonomy, and privacy from unwarranted government intrusion. These fundamental interests include the right to make decisions concerning bodily integrity and self-definition central to an individual’s identity . . . . [These include] Plaintiffs’ ability to define and express their gender identity[.]”

As these cases illustrate, the recognition of a right of gender autonomy could have important implications for numerous contemporary contexts involving transgender constitutional rights. Where a substantive due process right exists, the government generally may burden it only if it satisfies an elevated level of scrutiny. And there are numerous ways that government arguably burdens the gender autonomy of the transgender community today—through restrictive procedures for obtaining appropriate identity documentation, through outright discrimination based on gender identity or presentation, through restrictions on access to medical care and insurance, through prohibitions on gender-identity appropriate restroom access—indeed through all of the myriad ways that government has erected.

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191 A few plaintiffs did raise similar arguments in the time frame between McCrory and the start of the study, but those few cases generally resulted in rulings unfavorable to transgender plaintiffs. See Schroer v. Billington, 525 F. Supp. 2d 58, 64-65 (D.D.C. 2007) (rejecting a right to choose to undergo gender-affirming surgery as not “deeply rooted” in history); Doe v. U.S. Postal Serv., Civ. A. No. 84-2296, 1985 WL 9446, at *4 (D.D.C. June 12, 1985) (rejecting a right to privacy regarding gender identity).


193 Karnoski, 2017 WL 6311305, at *8; see also sources cited supra note 192.


195 See, e.g., Arroyo Gonzalez, 205 F. Supp. 3d at 328; D.T., 552 F. Supp. 3d at 891.

196 See, e.g., Karnoski, 2017 WL 6311305, at *1.


obstacles to the fair and equal treatment of the transgender community today.\footnote{ Cf. Witt v. Dep’t of the Air Force, 527 F.3d 806, 813-21 (9th Cir. 2008) (recognizing that discrimination against gays and lesbians generally must be afforded a higher level of scrutiny under Due Process Clause after Lawrence v. Texas because such discrimination burdens the right of choice of intimate partner, which is a protected right post-Lawrence).}

While a right of gender autonomy thus could have sweeping implications, it is important to note the limitations of the study cases. Most notably, the entirety of the study (and thus all study cases) predated Dobbs, a case which seems highly likely to cause a retrenchment in this nascent trend, as discussed at greater length in Section II.C, infra.\footnote{ See infra Section II.C; see also Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2279 (2022) (overruling Roe v. Wade and adopting a narrow approach to recognizing substantive due process rights).} Moreover, even taking the study cases on their own terms, gender autonomy arguments were addressed only in a handful of cases, all of which were decided at the trial court level.\footnote{ See sources cited supra note 192.} Thus, while cases in the study provided important indications of potential judicial receptiveness to the recognition of a right of gender autonomy, it remains to be seen whether such a substantive due process right will be able to find firm footing—perhaps in the state courts under state constitutions—after Dobbs.

The other major type of fundamental rights argument addressed in the study cases was premised on the right to informational privacy.\footnote{ Cf. Witt v. Dep’t of the Air Force, 527 F.3d 806, 813-21 (9th Cir. 2008) (recognizing that discrimination against gays and lesbians generally must be afforded a higher level of scrutiny under Due Process Clause after Lawrence v. Texas because such discrimination burdens the right of choice of intimate partner, which is a protected right post-Lawrence).} Because the circuits where most informational privacy cases were brought already recognized a right to informational privacy, much of the dispute in the study cases was over whether such a right was implicated by the context of the case before the court.\footnote{ There are a number of important cases predating the study period that also held for transgender plaintiffs on informational privacy grounds. See, e.g., Powell v. Schrifer, 175 F.3d 107, 111-13 (2d Cir. 1999) (holding that a transgender prisoner had an informational privacy right in their transgender status, and stating that “[i]t is hard[] to think of circumstances in which the disclosure of an inmate’s transsexualism . . . serves legitimate penological interests,” but finding that the right was not clearly established and granting defendant qualified immunity); Love v. Johnson, 146 F. Supp. 3d 848, 853-57 (E.D. Mich. 2015) (finding that the plaintiffs had alleged a cognizable informational privacy claim in relation to the unduly burdensome process for changing the sex marker on state-issued IDs).} A majority of the study cases where this issue was raised

\footnote{ Compare Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327, 322-33 (D.P.R. 2018) (concluding that a right to informational privacy was implicated and violated by restricting amendments to identity documentation), Grimes v. Cnty. of Cook, 455 F. Supp. 3d 630, 639-40 (N.D. Ill 2020) (concluding that fundamental right to informational privacy was implicated by disclosure of transgender status by employer and that no important government interest had been suggested at that stage), Ray v. McCloud, 507 F. Supp. 3d 925, 936, 938-40 (S.D. Ohio 2020) (holding that a policy prohibiting transgender individuals from changing the sex on their birth certificate was unconstitutional), Ray v. Himes, No. 2:18-cv-272, 2019 WL 11791719, at *11 (S.D. Ohio Sept. 12, 2019) (holding that Ohio’s ban on amendment of sex-designation on birth certificates implicated the fundamental right to informational privacy and thus could not survive strict scrutiny), Doe v. Wash. State Dep’t of Corr., No. 21-cv-5059, 2021 WL 2453099, at *5-7 (E.D. Wash. May 17, 2021).}

199 Cf. Witt v. Dep’t of the Air Force, 527 F.3d 806, 813-21 (9th Cir. 2008) (recognizing that discrimination against gays and lesbians generally must be afforded a higher level of scrutiny under Due Process Clause after Lawrence v. Texas because such discrimination burdens the right of choice of intimate partner, which is a protected right post-Lawrence).

200 See infra Section II.C; see also Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2279 (2022) (overruling Roe v. Wade and adopting a narrow approach to recognizing substantive due process rights).

201 There are a number of important cases predating the study period that also held for transgender plaintiffs on informational privacy grounds. See, e.g., Powell v. Schrifer, 175 F.3d 107, 111-13 (2d Cir. 1999) (holding that a transgender prisoner had an informational privacy right in their transgender status, and stating that “[i]t is hard[] to think of circumstances in which the disclosure of an inmate’s transsexualism . . . serves legitimate penological interests,” but finding that the right was not clearly established and granting defendant qualified immunity); Love v. Johnson, 146 F. Supp. 3d 848, 853-57 (E.D. Mich. 2015) (finding that the plaintiffs had alleged a cognizable informational privacy claim in relation to the unduly burdensome process for changing the sex marker on state-issued IDs).

202 Compare Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327, 322-33 (D.P.R. 2018) (concluding that a right to informational privacy was implicated and violated by restricting amendments to identity documentation), Grimes v. Cnty. of Cook, 455 F. Supp. 3d 630, 639-40 (N.D. Ill 2020) (concluding that fundamental right to informational privacy was implicated by disclosure of transgender status by employer and that no important government interest had been suggested at that stage), Ray v. McCloud, 507 F. Supp. 3d 925, 936, 938-40 (S.D. Ohio 2020) (holding that a policy prohibiting transgender individuals from changing the sex on their birth certificate was unconstitutional), Ray v. Himes, No. 2:18-cv-272, 2019 WL 11791719, at *11 (S.D. Ohio Sept. 12, 2019) (holding that Ohio’s ban on amendment of sex-designation on birth certificates implicated the fundamental right to informational privacy and thus could not survive strict scrutiny), Doe v. Wash. State Dep’t of Corr., No. 21-cv-5059, 2021 WL 2453099, at *5-7 (E.D. Wash. May 17, 2021).
concluded that the informational privacy rights of transgender plaintiffs were indeed implicated, and most further held that these rights were violated by government defendants. Three of eight cases did, however, at least partially find against plaintiffs’ informational privacy claims, though only one of these three squarely rejected the idea that an informational privacy right might be implicated.

Thus, the study cases suggest that a right of informational privacy can afford important protections to the transgender community. Most notably, transgender individuals remain subject to unwanted disclosures of their transgender status by government officials in a number of contexts ranging from employment to incarceration. Most of the cases in which this issue arose concluded that disclosure of an individual’s transgender status in this way implicated their informational privacy rights—and thus the courts held that governments must justify their reasons for disclosing transgender status (or even information from which it might be ascertained that an individual is transgender), under a fairly high level of scrutiny. These courts further concluded that such disclosure was not adequately justified, at least at the relevant stage of the litigation. Thus, while isolated courts did ultimately

(concluding that, where there was a possibility that public records response could reveal individual inmates’ transgender status, Fourteenth Amendment and state constitutional privacy rights were likely implicated and violated), and Arriaga v. Dart, No. 20 C 4498, 2021 WL 308829, at *3-4 (N.D. Ill. Jan. 29, 2021) (denying motion to dismiss an informational privacy claim on qualified immunity grounds, where Police Academy officials disclosed transgender identity), with Brown v. Hamilton Cnty., No. 16-cv-412, 2018 WL 4558465, at *11-12 (E.D. Tenn. Sept. 21, 2018) (rejecting an argument that the right to informational privacy was implicated where the government had a policy of including prior names with booking photo, which in this case disclosed transgender status). Cf. Doe v. Pa. Dep’t of Corrs., No. 20-cv-00023, 2021 WL 1583556, at *13-15 (W.D. Pa. Feb. 19, 2021) (stating that there is a right of informational privacy that would be implicated by the unwarranted disclosure of an inmate’s transgender status, but dismissing claim as to one of two defendants where the only allegation as to that defendant was that the individual disclosed transgender status in service of obtaining medical assistance); Doe v. Gray, No. 20-cv-129, 2021 WL 5113966, at *2-3 (N.D. Ind. Nov. 3, 2021) (denying leave to amend complaint on grounds that qualified immunity would bar suit, because there was no clearly established law in the specific context of this case, i.e., disclosure of an arrestee’s transgender status to his spouse and children). Two study cases also had further merits proceedings in 2022 on this issue, but those proceedings mirrored the earlier stages of litigation. See Grimes v. Cnty. of Cook, No. 19 C 6091, 2022 1641887, at *4-6 (N.D. Ill. May 24, 2022) (finding that the plaintiff had a valid informational privacy claim, and denying qualified immunity at the summary judgment stage); Doe v. Gray, No. 20-cv-129, 2022 WL 6029199, at *3-5 (N.D. Ind. Mar. 1, 2022) (holding that the defendant was entitled to qualified immunity at the summary judgment stage on his informational privacy claim because no “closely analogous” cases existed, as required for qualified immunity).

204 See sources cited supra note 203.
206 See cases cited supra note 203.
207 Id.
208 Id.
reject constitutional claims premised on the government’s disclosure of transgender status, most courts recognized transgender identity as the type of sensitive information that is entitled to constitutional protections.209

The other principle arena in which informational privacy claims were addressed by courts during the study period is in the context of restrictive identity documentation laws that posed an obstacle to the ability of transgender litigants to amend their gender marker on their identity documents.210 While such claims were only addressed in two cases, they succeeded in both.211 Reasoning that being unable to obtain modified gender markers on government documents would subject transgender individuals to a risk of violence and harassment (due to the fact that unamended gender markers reveal the individual to be transgender), as well as require them to reveal “highly personal and intimate” information, courts addressing such arguments concluded that significant restrictions on gender marker amendments must be subject to meaningful scrutiny.212 And both courts in the study period further found such scrutiny not to be satisfied by the interest the government provided for restricting gender marker amendments.213

Finally, there were a small number of study cases that raised issues with respect to a fundamental substantive due process right to bodily integrity (independent of a right to gender autonomy), or a right to refuse unwanted medical treatment.214 This argument was raised twice in the context of restrictions on the amendment of identity documents (claiming that such restrictions compelled plaintiffs to obtain certain medical procedures to

209 Id.
211 See Arroyo Gonzalez, 305 F. Supp. 3d at 332-33; McCloud, 507 F. Supp. 3d at 931-34; Himes, 2019 WL 11791719, at *5.
213 See Arroyo Gonzalez, 305 F. Supp. 3d at 333; McCloud, 507 F. Supp. 3d at 938; Himes, 2019 WL 11791719, at *11-12.
214 See Sullivan-Knoff v. City of Chicago, 348 F. Supp. 3d 787, 796-97 (N.D. Ill. 2018) (rejecting bodily integrity argument where transgender performer was precluded from performing partially nude by ordinance); Morris v. Pompeo, No. 19-cv-00569, 2020 WL 6875208, at *5-6 (D. Nev. Nov. 23, 2020) (concluding that right to avoid unwanted medical treatment was not implicated by policy requiring physician verification of clinical transition in order to include gender identity appropriate marker on passport, and finding that requirement survived rational basis review); D.T. v. Christ, 552 F. Supp. 3d 888, 895-98 (D. Ariz. 2021) (suggesting strongly that the right to avoid unwanted medical treatment was implicated by a requirement that all individuals, including transgender children, undergo a "sex change operation" in order to change the gender marker on their birth certificates). Where cases raised issues of bodily integrity in reference to respect for gender autonomy, see supra notes 191-200 for a discussion of these cases.
obtain accurate identity documents), leading to success in one case and failure in the other. 215 The one other case raising this argument involved the right of a transgender performer to perform in the nude, which the court found not to implicate the right to bodily integrity (though it credited another of the performer’s due process claims). 216

Thus, although substantive due process claims of fundamental rights or liberty interests were raised much less frequently in the study cases, they generally saw a significant level of success where they were raised. While it is far too early to characterize the substantive due process rights of the transgender community as rising to the level of a “tipping point” or “consensus” in the lower courts, especially given the retrenchment likely to be occasioned by Dobbs, cases during the study period show signs of an emerging jurisprudence of transgender fundamental rights, which could potentially have substantial implications if more broadly adopted.

2. Shocks the Conscience, Void for Vagueness and Procedural Due Process

In addition to fundamental rights claims, the other three most common types of due process arguments in the study (with two study cases addressing each of them) were: “shocks the conscience” arguments; 217 “void for vagueness” arguments 218; and procedural due process arguments. 219 In each

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215 See Morris, 2020 WL 6875208, at *5-6 (concluding that right to avoid unwanted medical treatment was not implicated by policy requiring physician verification of clinical transition in order to include gender identity appropriate marker on passport, and finding that requirement survived rational basis review); D.T., 552 F. Supp. 3d at 895-98 (strongly suggesting that the right to avoid unwanted medical treatment was implicated by a requirement that all individuals, including transgender children, undergo a “sex change operation” in order to change the gender marker on their birth certificates).

216 See Sullivan-Knoff, 348 F. Supp. 3d at 796-97 (rejecting bodily integrity argument where transgender performer was precluded from performing partially nude by ordinance).

217 See Stone v. Trump, 286 F. Supp. 3d 747, 770-71 (D. Md. 2017) [hereinafter Stone I] (denying motion to dismiss on substantive due process claim because plaintiffs sufficiently alleged that initial Trump tweet excluding transgender servicemembers “certainly can be considered shocking under the circumstances”); Stone v. Trump, 400 F. Supp. 3d 317, 355-58 (D. Md. 2019) [hereinafter Stone II] (reaching the opposite conclusion with respect to plaintiff’s allegations regarding revised policy implementing transgender military ban); Arriaga v. Dart, No. 20 C 4498, 2021 WL 308829, at *6-7 (N.D. Ill. Jan. 29, 2021) (concluding that plaintiff raised sufficient allegations to show conduct that “shocks the conscience” where defendants allegedly, deliberately, and without regard for plaintiff’s safety revealed her transgender status to other police academy trainees, and then failed to protect her).


instance, the overall number of cases raising these arguments was very low in the study sample, making it difficult to characterize an overall trend.\textsuperscript{220} Moreover, case results under each of these arguments were at least partially mixed, with rulings often relying on very context-specific factors to rule for or against plaintiffs.\textsuperscript{221}

Nevertheless, it is worth noting that at least one court held for a transgender plaintiff on each of the above grounds during the study period. A court held, for example, that former President Trump’s initial ban on transgender people serving in the military was arbitrary and shocked the conscience, thus likely violating due process (though that same court later held that the revised policy did not shock the conscience).\textsuperscript{222} Another held that a nudity law prohibiting the display of female breasts was unconstitutionally vague as applied to a transgender performer (though another court held that a “loitering for prostitution” law was not unconstitutionally void for vagueness, even where used to target transgender individuals).\textsuperscript{223} And a final court found that a transgender prisoner plaintiff had a procedural due process claim arising from \textit{Sandin v. Conner}, where her housing in a men’s prison allegedly imposed “atypical and significant hardship” (though another found no liberty or property interest implicated by housing in a non-gender-identity appropriate prison).\textsuperscript{224} In other words, it is impossible to discern any trends in the context of these less commonly raised due process claims, though judges may be receptive to them in some contexts.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{220} See cases cited supra notes 217–219.
\item \textsuperscript{221} See cases cited supra notes 217–219.
\item \textsuperscript{222} Compare \textit{Stone I}, 280 F. Supp. 3d at 770-71, with \textit{Stone II}, 400 F. Supp. 3d at 355-58.
\item \textsuperscript{223} Compare \textit{Sullivan-Knoff}, 348 F. Supp. 3d at 795-97 (nudity law) with \textit{D.H.}, 309, F. Supp. 3d at 63-73 (“loitering for prostitution” law).
\item \textsuperscript{224} Compare \textit{Doe v. Mass. Dep’t of Corr.}, 2018 WL 592403, at *10-12 (allowing \textit{Sandin} procedural due process claim to proceed), with \textit{Crowder}, 2019 WL 3892300, at *9-11 (ruling the opposite).
\item \textsuperscript{225} None of these less common due process claims rested on the substantive due process line of cases addressed in \textit{Dobbs}, and thus they are unlikely to be affected directly by that opinion.
\end{itemize}
3. Other Claims

Finally, there were a number of study cases that raised unique due process issues or were unclear in the basis for the due process claim alleged. These included, for example, a foster care class action, including a subclass of sexual- and gender-minority foster children, a claim regarding the right of parents of transgender children to obtain medically-appropriate care for their children, and an unspecified employment-related due process challenge. Most of these one-off cases succeeded, but on grounds specific to the context at hand. Thus, while such cases illustrate the importance of thinking creatively about the possible applicability of due process arguments (which may vary depending on factual context), they offer little in the way of systematic guidance for future litigants or for the field.

* * *

In the study cases, due process claims were less frequent and less consistently plaintiff-favorable than equal protection claims. Nevertheless, some important emerging trends can be found in the study cases. Most notably, study cases suggest at least possible receptivity to arguments regarding a fundamental right to gender autonomy—a right that could have substantial implications for the constitutional stature of the transgender community (although, as discussed in Section III.D, infra, such claims may most profitably be pursued in state courts and under state constitutions post-Dobbs). Study cases also suggest a fairly high level of receptivity among lower courts to claims of informational privacy by transgender plaintiffs, both in

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226 See Duronslet v. Cnty. of Los Angeles, 266 F. Supp. 3d 1213, 1220-21 (C.D. Cal. 2017) (finding that plaintiff had sufficiently alleged basis for Monell liability on due process claim where plaintiff was forced to use male facilities as a detainee in county’s Department of Child and Family Services); Tay v. Jeffreys, No. 19-cv-00501, 209 WL 3429162, at *1 (S.D. Ill. July 30, 2019) (allowing due process claim to proceed without discussion), dismissed for mootness, 2020 WL 2100766 (S.D. Ill. May 1, 2020); Monegain v. Va. Dept of Motor Vehicles, 491 F. Supp. 3d 117, 148 (E.D. Va. 2020) (holding that the due process claim was inadequately pled because it did not plead whether substantive or procedural due process or what liberty or other interest might be implicated); Stanley v. New York, 71 Misc. 3d 171, 185 (N.Y. Sup. Ct. 2020) (denying a motion to dismiss a due process claim with respect to city interference with ability to ensure that Muslim transgender decedent’s end of life decisions were honored); Wyatt B. ex rel. McAllister v. Brown, No. 19-cv-00556, 2021 WL 4434011, at *9 (D. Or. Sept. 27, 2021) (concluding that many of the allegations of foster care class action, including a subclass of sexual- and gender-minority foster children, were cognizable under governing standards for due process in the foster care context, but that those that went to optimal treatment were not); Brandt v. Rutledge, 551 F. Supp. 3d 882, 892 (E.D. Ark. 2021) (finding that parents’ right to the care and control of their children was implicated by ban on trans-affirming care for youth, and that state could not demonstrate that the law satisfied strict scrutiny or even rational basis review), aff’d on other grounds, 47 F.4th 661 (8th Cir. 2022).

227 See cases cited supra note 226.

228 See cases cited supra note 226.
the context of affirmative government disclosures of transgender status and incidental government facilitated disclosures by virtue of the government's interference with individuals' ability to amend identity documents. Finally, there are a host of other types of due process claims—void for vagueness, procedural due process, shocks the conscience, foster care rights—which may apply in specific factual circumstances, and which the studied cases suggest may receive a receptive audience in the courts at least some of the time.

D. Losses

As described above, transgender constitutional law plaintiffs were overwhelmingly successful in their constitutional claims in the lower federal and state courts during the study period. Nevertheless, a number of equal protection and due process claims in the study cases were unsuccessful. Many of these losses appear to have resulted from factors that are not indicative of the broader transgender constitutional law landscape, such as poor pleading or briefing of the claim. Moreover, in some cases, the plaintiff—even while losing on one claim or a part of a claim—did prevail on alternative equal protection and/or due process grounds. Nonetheless, there are a few categories of losses that are sufficiently common as to warrant some further discussion. Below, each of the commonly articulated bases for dismissing transgender plaintiffs' equal protection and/or due process claims are discussed.

1. Equal Protection: Failure to Plead or Prove Discrimination

By far the most common substantive reason articulated by the courts for the failure of equal protection claims was a failure to plead or prove discrimination. Although the overwhelming majority of study cases found sex discrimination, anti-transgender discrimination, or both, in a handful of cases courts concluded that such discrimination was not adequately shown. Thus, while there was virtual unanimity among courts that addressed the issue as to the appropriateness of heightened scrutiny where sex or anti-transgender

229 See Appendix B (detailing losses on specific claims in the study cases).
230 See, e.g., Garcia v. Nevada, No. 17-cv-00359, 2018 WL 11278694, at *5 (D. Nev. Mar. 9, 2019) (stating that discrimination on the basis of transgender status is subject to intermediate scrutiny, but dismissing an equal protection claim because plaintiff did not identify who was responsible for the alleged discrimination); Garcia v. Nevada, No. 17-cv-00359, 2019 WL 11731008, at *6 (D. Nev. Mar. 22, 2019) (allowing the equal protection claim to proceed after plaintiff amended the complaint to specify who was responsible for the alleged discrimination).
232 See infra notes 234–238.
discrimination was proven, a few courts concluded that such discrimination had not been demonstrated in the first instance in the circumstances of the case at issue.\footnote{233}

The vast majority of these losses arose in the context of plaintiffs attempting to plead and prove covert discrimination, i.e., where there was no explicit classification, and where the defendant did not explicitly act on sex or gender-identity based grounds.\footnote{234} That some unsuccessful covert discrimination cases exist in the study cases is unsurprising given the experiences of other groups entitled to formal equality, many of whom have struggled to persuade courts of the fact of covert discrimination in individual cases.\footnote{235} Moreover, it appears that—like cases brought by all groups—a few of the study cases were simply lacking in merit in their allegations of discrimination.\footnote{236} Nevertheless, it is worth noting that there are already cases in which transgender litigants are struggling to show discrimination in the absence of explicit evidence, and the proportion of such cases is likely only to grow as the existence of constitutional protections for the transgender community becomes clearer and more well-known (thus pushing discrimination into more covert forms).

Although almost all cases rejecting claims for a failure to prove anti-transgender and/or sex discrimination were cases in which only covert discrimination was alleged, there was one exception. In the case of Hennessy-Waller v. Snyder, the government’s policy on its face imposed both sex-based and transgender-specific classifications.\footnote{237} Nevertheless, the court held that because the statute did not bar coverage for all services for transgender individuals, and because it may have been motivated by what the court regarded as good reasons, it could not be said to be sex or gender-identity

\footnote{233}{See sources cited infra note 234.}
\footnote{235}{See, e.g., Katie Eyer, That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law, 96 MINN. L. REV. 1275, 1287-88 (2012).}
\footnote{236}{See, e.g., Smith, 2017 WL 9485537, at *15; Lee, 2021 WL 927372, at *4.}
\footnote{237}{Hennessy-Waller v. Snyder, 529 F. Supp. 3d 1031, 1043-44 (D. Ariz. 2021).}
discriminatory. In light of Supreme Court precedent making clear that explicit classifications must be evaluated under the level of scrutiny applicable to the classified group, it seems highly likely that this reasoning is simply erroneous regardless of the underlying reasons for the classification. And indeed, in an appeal subsequent to the study period, the Ninth Circuit, while affirming denial of a preliminary injunction on other grounds, also stated that the District Court’s reasoning on the merits was flawed and represented an “erroneous reading of Bostock.”

Finally, it is worth noting with respect to this category of losses (failure to plead or prove discrimination) that defendants—while having little success in the study cases—did attempt to push some study cases into the harder to prove “covert” discrimination category by relying on the decades-old precedent of Geduldig v. Aiello. Geduldig held that pregnancy discrimination is not categorically sex discrimination, though debates continue regarding its correctness and continuing vitality. Regardless, even taking Geduldig on its 238 Id.

239 See, e.g., Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) (reiterating that even in contexts of benign motives such as affirmative action, “judicial review must begin from the position that ‘any official action that treats a person differently on account of his race or ethnic origin is inherently suspect[]’” (quoting Fullilove v. Klutnick, 448 U.S. 448, 533-534 (1980))); City of Richmond v. J.A. Croson, 488 U.S. 469, 493-94 (1989) (declining to subject “remedial” or “benign” uses of race such as affirmative action to a different standard of review, and stating that “[a]bsent searching judicial inquiry into the justification for such race-based measures [under strict scrutiny], there is simply no way of determining what classifications are ‘benign’ or ‘remedial’”).

240 See Doe v. Snyder, 28 F.4th 103, 113-14 (9th Cir. 2022).

241 417 U.S. 484 (1974). For examples of briefing on this argument in study cases, see, for example, En Banc Reply Brief of Appellant the Sch. Bd. of St. Johns Cnty., Fla. at 3-6, Adams v. School Bd. of St. Johns Cnty., Fla., 3 F.4th 1299 (11th Cir. Dec. 17, 2021) (No. 18-13592) (arguing that policy requiring students to use restroom consistent with their “biological sex” was not facially discriminatory as to transgender students under Geduldig); Reply Brief of the State Defendants-Appellants at 9, Corbitt v. Taylor, No. 21-10486 (11th Cir. Aug. 30, 2021), 2021 WL 3912655 (arguing that policy specifically directed at changing sex on a driver license due to gender reassignment was not facially discriminatory on the basis of sex or transgender status under Geduldig); Appellants’ Opening Brief at 13-16, Hecox v. Little, Nos. 20-35813, 20-35815, 2023 WL 1097255 (9th Cir. Nov. 12, 2020), 2020 WL 6833365 (arguing that requirement that sports teams be “based on biological sex” and ban on those assigned male at birth from competing on those teams designated for those designated female at birth, was not facially discriminatory on the basis of transgender status under Geduldig); Appellants’ Opening Brief at 22-23, Doe v. Trump, 755 F. App’x 19 (D.C. Cir. Sept. 21, 2018) (No. 18-5257), 2018 WL 4538327 (arguing that policy which explicitly disqualified “transgender persons”, inter alia, on the basis of a “gender dysphoria” diagnosis or “gender transition” was not facially discriminatory under Geduldig); Appellants’ Opening Brief at 23, Karnoski v. Trump, 926 F.3d 1180 (9th Cir. May 29, 2018) (No. 18-35347), 2018 WL 2981765 (arguing under Geduldig that classification based on gender dysphoria and transition status are not facially discriminatory based on transgender status).

242 Geduldig, 417 U.S. at 496 n.20. Compare Dobbs, 142 S. Ct. 2228, 2246 (2022) (suggesting in dicta that Geduldig remains good law and extends even to the criminal regulation of pregnancy), with Reva Siegel, Serena Mayeri & Melissa Murray, Equal Protection in Dobbs and Beyond, 32 Colum. J. Gender & L. 67, 76 (2023) (arguing that Geduldig has been superseded by subsequent precedents).
own terms, the study decisions generally refused to credit defendants’ Geduldig–based arguments, instead finding discrimination based on sex and/or transgender status despite Geduldig.243 As I explain more fully in other work, this outcome seems amply justified, as defendants’ arguments have relied on a misreading of Geduldig that is demonstrably incorrect upon meaningful examination.244

Again, however, this is an area where at least one post-study case has diverged from the study cases, thus warranting a cautionary note. In the en banc rehearing of Adams v. School Board of St. Johns County (issued in late 2022), the Eleventh Circuit relied on Geduldig to decline to find that the policy at issue there discriminated based on transgender status.245 Paraphrasing Geduldig, the Court reasoned that “[b]ecause the bathroom policy divides students into two groups, both of which include transgender students, there is a lack of identity between the policy and transgender status . . . .”246 As I elaborate more fully in other work, this reasoning misunderstands Geduldig and conflicts with numerous other equal protection precedents.247 Nevertheless, Adams is significant insofar as it marks the first time a circuit court has adopted the Geduldig reasoning for declining to subject anti-transgender discrimination to heightened scrutiny.

2. Other Substantive Bases for Losses

All of the other substantive bases for losses in the study cases were idiosyncratic and do not appear to be representative of broader trends. Thus, for example, one court ruled against a plaintiff on their equal protection claim related to access to gender affirmation surgery on the basis of the “real differences” strand of equal protection—but numerous other courts found

243 Only a few courts have directly addressed the Geduldig argument, even where it was raised by defendants, and the vast majority of those have rejected the argument. See, e.g., Kadel v. Folwell, No. 19CV272, 2022 WL 326731, at *21 (M.D.N.C. Aug. 10, 2022); Fain v. Crouch, No. 20-0740, 2022 WL 3051015, at *8 (S.D. W. Va. Aug. 2, 2022), appeal filed, No. 22-1927 (4th Cir. Sept. 6, 2022); Boyden v. Conlin, 341 F. Supp. 3d 979, 999-1000 (W.D. Wis. 2018). But cf. Lange v. Hous. Cnty., No. 19-cv-392, 2022 WL 181236, at *8 (M.D. Ga. June 2, 2022) (relying on Geduldig to find no facial discrimination based on sex or transgender status, though denying summary judgement on the equal protection claim because a trial was required on intentional discrimination arguments); Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022) (en banc) (relying on Geduldig to find that school restroom policy did not discriminate on the basis of gender identity).

244 See Eyer, Transgender Equality and Geduldig 2.0, supra note 142, at 3 (“[B]oth the Supreme Court and the lower courts have continued to recognize post-Geduldig that explicit reliance on protected class status—as well as close proxies for protected class status—must be deemed facially discriminatory.”).

245 Adams, 57 F.4th at 809.

246 Id. (paraphrasing Geduldig).

247 See Eyer, Transgender Equality and Geduldig 2.0, supra note 142, at 27-29 (addressing this argument and explaining why it is wrong under equal protection doctrine).
such medical discrimination claims to be viable. In the due process context, there was often conflict and disagreement with respect to less-common due process claims (like procedural due process), but none of those claims had sufficient representation to draw any broader conclusions. In short, with the exception of difficulties in proving covert discrimination claims, it is hard to discern any trends in the substantive bases for losses in the study cases.

3. Federal Courts Doctrines

Finally, it is important to note that merits-based losses of any kind were not the most common basis for losses on equal protection and due process claims in the study cases. Rather, losses based on federal courts doctrines—while still rare—accounted for the single most common way that claims in the study sample were at least partially dismissed. Notably, this was true even though some decisions based on federal courts doctrines were excluded from the study altogether, such as decisions based on standing or mootness. Thus, arguments like a failure to demonstrate the prerequisites for Monell liability, the applicability of qualified immunity, or a failure to meet

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250 See supra Section I.C.

251 See, e.g., Meyer v. S.F. Pub. Libr., No. 17-cv-02278, 2017 WL 3455364, at *4-5 (N.D. Cal. Aug. 11, 2017) (finding a failure to adequately plead Monell liability); Boyden, 341 F. Supp. 3d at 1004-05 (ruling for the plaintiffs on the merits, and allowing some claims to go forward, but granting individual defendants qualified immunity); Brown v. Hamilton Cnty., No. 16-cv-412, 2018 WL 4558465, at *10 (E.D. Tenn. Sept. 21, 2018) (holding that the plaintiff had failed to adequately prove theory of municipal liability); Smith v. Maceachern, No. 09-10434, 2019 WL 2522717, at *11-12 (D. Mass. Feb. 21, 2019) (stating that no clearly established Supreme Court law existed at the time of state court’s decision, thus habeas claim barred under Antiterrorism and Effective Death Penalty Act standards); Vuz v. DCSS III, Inc., No. 20-cv-246, 2020 WL 4366023, at *7-8 (S.D. Cal. July 30, 2020) (ruling for plaintiff on the merits and allowing claims against some parties to go forward, but granting individual defendants qualified immunity); Lange v. Houston Cnty., 499 F. Supp. 3d 1258, 1282-83 (M.D. Ga. 2020) (ruling mostly for plaintiffs on merits, but granting qualified immunity to certain individual defendants, as well as legislative immunity to others, plus dismissing state constitutional claim on the ground that there is no private cause of action); Jackson v. Valdez, 852 F. App’x 119, 135-37 (9th Cir. 2021) (affirming the dismissal of municipal liability and official capacity claims, based on allegedly inadequate pleading on that front); Arriaga v. Dart, 568 F. Supp. 3d 953, 959-62 (N.D. Ill. 2021) (partially granting and partially denying motion to dismiss on grounds that municipal liability was not adequately pled as to certain defendants); Doe v. Gray, No. 20-cv-129, 2021 WL 5113666, at *2 (N.D. Ind. Nov. 3, 2021) (granting qualified immunity on the grounds that no closely analogous cases existed finding conduct of the kind at issue unconstitutional); see also Doe v. Gray, No. 20-cv-129, 2022 WL 602919, at *3-5 (N.D. Ind. Mar. 1, 2022) (reaffirming qualified immunity holding at summary judgment).

251 See infra Appendix A.
Antiterrorism and Effective Death Penalty Act requirements of “clearly established” law represented the largest single cause of the (relatively limited number) of claim losses in the studied cases. As discussed further in Section II.F, infra, it is important for constitutional law scholars to attend to the significant impact of federal courts doctrines on constitutional litigants’ success.

* * *

As described above, a descriptive analysis of transgender constitutional law cases from 2017 to 2021 reveals striking and consistent successes for the transgender community in raising constitutional claims. This consistent success suggests that we have reached a turning point with respect to the treatment of the transgender community as constitutional subjects, at least in the lower federal courts. In the Parts that follow, I turn to the more nuanced conclusions that can be drawn from this descriptive account. As these Parts lay out, the implications of the descriptive account set out herein are important for constitutional law as a field, for transgender rights as a movement, and for the future of transgender constitutional law.

II. LESSONS FOR THE FIELD

As prior scholars have observed, constitutional law as a field is unquestionably Supreme Court-centric. Thus, the instant study—focused exclusively on constitutional law in the lower federal and state courts—provides an excellent opportunity to assess the accuracy of many of the field’s Supreme Court-centric assumptions. It also provides an opportunity to further verify the findings of prior scholars that have themselves looked at lower and state court jurisprudence. As set out below, the findings of the instant study challenge many important areas of conventional wisdom in constitutional law, while also buttressing and offering new nuance to some of the findings of prior constitutional and anti-discrimination law scholars.

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252 See sources cited supra note 250.
253 However, as noted in several locations supra and discussed further infra Part IV, post-study cases, including especially Adams v. School Board of St. Johns County, 57 F.4th 791 (11th Cir. 2022) (en banc), suggest at least some need for caution in whether this turning point is fully secure.
A. New Protected Classes Are Possible

In 2011, Kenji Yoshino asserted in *The New Equal Protection* that the center of gravity in constitutional equality litigation had shifted from equal protection to due process.255 As Yoshino observed, “the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977.”256 Thus, Yoshino concluded that “[a]t least with respect to federal equal protection jurisprudence, this canon [i.e., of recognizing new protected classes] has closed.”257

Since *The New Equal Protection*, this perspective has become the conventional wisdom of the field. Many constitutional law scholars, for example, take for granted Yoshino’s perspective that the recognition of new protected classes is a virtual impossibility.258 Many students are taught that the recognition of new classes is virtually certain not to occur, despite the doctrine.259 And even litigators at times strategically omit protected class arguments based on a belief that such arguments are likely to be untenable.260

But the results of the instant study suggest that this conventional wisdom is erroneous. While Yoshino’s position was understandable at the time that he was writing, virtually immediately thereafter, some lower federal courts began to endorse the idea that gays and lesbians ought to be deemed a suspect or quasi-suspect class.261 And as the instant study reveals, a similar trend has emerged for the transgender community, which found success in every single

255 Yoshino, supra note 16, at 748.
256 Id. at 757.
257 Id.
258 See, e.g., Araiza, supra note 16, at 199 & n.289 (citing Yoshino for the proposition that the Court “appears to have abandoned any further evolution of suspect class analysis”); Pollvogt, supra note 16, at 897-98 (explaining that the Court likely fears that, by acknowledging new suspect classifications, it will be forced to recognize “too many groups” (quoting Yoshino, supra note 16, at 757)). This is no critique of scholars that have embraced this account, as I myself have probably reinforced this conventional wisdom in prior work, despite noting its occasional inaccuracy in the lower federal courts. See, e.g., Katie Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 218 (2018) [hereinafter Eyer, *Animus Trouble*].
259 I taught this in my own constitutional law class prior to the recent wave of lower court opinions recognizing sexual orientation and gender identity discrimination as bases for heightened scrutiny.
260 While it predated Yoshino’s article, *Lawrence v. Texas*, 539 U.S. 559 (2003) appears to be an example of this concern influencing litigation strategy. In *Lawrence*, LGBTQ rights advocates raised the issue of heightened scrutiny for gays and lesbians only in a footnote in their Supreme Court briefing, relying almost exclusively on rational basis review arguments in making their equal protection arguments. See Brief of Petitioners at 32 n.24, Lawrence v. Texas, 539 U.S. 559 (2003) (No. 02-102).
261 See Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 179, 268-14 (2013) [hereinafter Eyer, *Lower Court Popular Constitutionalism*]; see also SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471, 480-84 (9th Cir. 2014) (concluding, on different grounds, that heightened scrutiny should apply to sexual orientation discrimination).
study case in which the issue of suspect or quasi-suspect class status was addressed.\textsuperscript{262}

These cases reveal that the lower courts continue to be willing, at least in some circumstances, to take seriously the four-part “test” that the Supreme Court has suggested ought to govern protected class status.\textsuperscript{263} To reiterate, this test considers (1) the history of discrimination, (2) immutability (or distinguishing characteristic), (3) political powerlessness, and (4) the lack of relationship to ability to contribute.\textsuperscript{264} And taking this test seriously, it becomes clear that the existing protected classes should not be considered a “closed” set—there are other social groups which satisfy the criteria for discrimination against them to be deemed “suspect” or “quasi-suspect.”\textsuperscript{265} At a minimum, the instant study makes clear that the conventional wisdom is wrong with respect to the transgender community.\textsuperscript{266} But it also suggests more broadly the possibility of other new protected classes (once they have gained comparable success in their development as a social movement), insofar as it makes clear that courts are willing to take the test for suspect and quasi-suspect classes seriously.

Of course, one rejoinder might be that this recognition of the transgender community as a suspect or quasi-suspect class remains restricted to the lower and state courts, and may never be recognized by the Supreme Court. But, as elaborated further in Part IV, infra, it is not clear why this matters, or at least why it should be considered decisive of the conventional wisdom. Litigation regarding whether the gay and lesbian community should be deemed suspect or quasi-suspect has been ongoing for more than forty years, and yet the Supreme Court has never addressed the issue, allowing lower court rulings finding suspect and quasi-suspect status to stand.\textsuperscript{267} So too for transgender litigants, the real-world constitutional law that they face on this issue is not the law of the Supreme Court, but rather the law of the lower federal and state courts. This reflects a broader truth: that the vast majority of cases—

\begin{footnotesize}
\begin{enumerate}
\item See supra subsection I.B.1.
\item See generally supra subsection I.B.1 (discussing study cases applying the four-part “test” to conclude that transgender people are a protected class entitled to heightened scrutiny).
\item See, e.g., Windsor v. United States, 699 F.3d 169, 182-85 (2d Cir. 2012) (stating the criteria and analyzing them in the context of sexual orientation), aff'd on other grounds, 570 U.S. 744 (2013).
\item Id.
\item See supra subsection I.B.1.
\item See sources cited supra note 261; cf. United States v. Windsor, 570 U.S. 744 (2013) (not addressing suspect or quasi-suspect class status even though it had been extensively briefed and was the basis for the decision below in the Second Circuit), aff'd on other grounds Windsor, 699 F.3d at 181.
\end{enumerate}
\end{footnotesize}
and even important constitutional law issues—are never decided by the Supreme Court.268

Thus, the instant study calls into question the conventional wisdom that new protected classes are not possible. Taken seriously, the “test” for suspect and quasi-suspect class status—looking to history of discrimination, immutability (or distinguishing characteristic), political powerlessness, and lack of relationship to ability to contribute—should counsel in favor of at least some new groups falling within the suspect class canon. And the lower courts, unlike the Supreme Court, appear to be willing to take this test seriously. At least where—as in the case of the transgender rights movement—a group has reached a sufficient level of social movement success, the canon of suspect class status is not closed.

B. Rational Basis Review is Not Empty and Meaningless

Few pieces of conventional wisdom in constitutional law are more broadly embraced than the assumption that rational basis review spells litigant failure.269 Many scholars have characterized rational basis review as “empty”270 and “meaningless,”271—save only perhaps for the narrow corner of “animus” doctrine, under which plaintiffs may occasionally prevail.272 Ultra-deferential exemplars of the Supreme Court’s rational basis jurisprudence are often characterized as the only “real” rational basis review cases, while cases applying less deferential rational basis analysis are treated as only “purporting” to apply rational basis review.273

As I have previously written, the characterization of rational basis review as uniformly empty and meaningless is plainly inaccurate, even looking only to the Supreme Court’s case law.274 But it becomes patently so when one also considers the legal landscape of the lower federal and state courts.275 The cases

270 Chemerinsky, supra note 19, at 410.
271 Levy, supra note 21, at 426.
273 Id.
of the instant study are emblematic of this fact, showing exceedingly high levels of success, even where judges applied rational basis review. Indeed, judges applying rational basis review in the study cases almost uniformly concluded that the challenged government action lacked a rational and legitimate basis.

Moreover, such judges typically did not arrive at this conclusion via what scholars often today treat as the narrow window for rational basis victories, i.e., a doctrinal showing of animus. As I have previously written, while animus may be descriptively present in at least some of the cases where the courts apply meaningful forms of rational basis review (including many of the study cases herein involving transgender litigants), courts do not treat it as a prerequisite for such meaningful review. This is critical, since the scholarly landscape often treats animus as a doctrinal requirement, rather than an incidental descriptive characteristic, an approach which would have far different (and much more problematic) implications for constitutional litigants.

Rather, as the study cases herein make clear, courts finding for plaintiffs on rational basis review most often take a messy back-end approach, looking to the government’s asserted interests and simply finding them to be unsubstantiated. While it is no doubt practically likely that a suspicion of group animus causes judges to probe those reasons more carefully than they otherwise might, animus is not a formal doctrinal feature of many judges’ reasoning. Thus, the study cases strongly suggest that constitutional law as a field gets it wrong, both in its overarching assessment of the ability of constitutional litigants to succeed on rational basis review, and in its characterization of the doctrinal circumstances in which courts can apply meaningful forms of rational basis review.

276 See sources cited supra note 168.
277 Id.
278 Id.
281 See sources cited supra note 168; see also Eyer, Animus Trouble, supra note 258, at 224-26; Eyer, The Canon of Rational Basis Review, supra note 28, at 1356-64; Dana Berliner, The Federal Rational Basis Test—Fact and Fiction, 14 GEO. J.L. & PUB. POL’Y 373, 400 (2016) (“Courts are uncomfortable with governmental purposes that engage in favoritism, either economic or social. And even with legitimate government purposes, if the law can be shown under the statutes or facts not to achieve its purposes, it can fail the rational-basis test . . . .”).
C. New Fundamental Rights May Still Be Possible

The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*—decided just after the study period—understandably sent shockwaves through the constitutional law field when it overruled *Roe v. Wade.* Moreover, the type of reasoning relied on by the Supreme Court in *Dobbs*—repudiating the possibility of analogical reasoning from prior substantive due process precedents and suggesting that fundamental rights must be narrowly defined and “deeply rooted in our Nation’s history and traditions”—has historically heralded a retrenchment in the Court’s approach to fundamental rights claims.* Dobbs* thus has justifiably caused concern among commentators that the Supreme Court may retrench other existing fundamental rights—and certainly that it will be unlikely to extend substantive due process rights to further contexts.*

The study cases, despite being limited to the lower federal and state courts, do not necessarily undermine this pessimistic appraisal of the potential for fundamental rights claims in the immediate future. Indeed, the Supreme Court’s prior applications of a “history and tradition” standard similar to that deployed in *Dobbs*—in cases such as *Bowers v. Hardwick* in 1986 and *Washington v. Glucksberg* in 1997—did in fact lead to increased reluctance in the lower courts to recognize new fundamental rights claims.* It thus seems probable that the potential for new fundamental rights claims in the lower federal courts is likely to be low for the immediate future, and that indeed, such reluctance may in the short term lead to a halt, or even reversal, of the emerging trend of recognition of “gender autonomy” as a fundamental right in the lower federal courts.*

But it is important to remember that the federal courts are not the only forum in which such fundamental rights claims can be brought. At times

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284 *Id.* at 2253.


287 *See,* e.g., *Abigail All.,* 495 F.3d at 711 (applying *Glucksberg* to reject a fundamental rights argument regarding the “right to procure and use experimental drugs” because the right at issue was not “deeply rooted in our Nation’s history and traditions”); *Williams v. Atty Gen. of Ala.,* 378 F.3d 1232, 1242 (11th Cir. 2004) (rejecting an argued right to engage in “lawful, private sexual activity” under the “history and tradition” standard).

288 *Cf.* Section I.C (describing this nascent trend).
when the Supreme Court has been skeptical of new fundamental rights claims, LGBTQ rights lawyers have often successfully shifted their litigation strategies to bring constitutional claims in state court. Moreover, such state court decisions often pave the way for a return—in relatively short order—to a more expansive fundamental rights jurisprudence in the federal courts, under the federal Constitution. And as the study cases illustrate, there are strong analogical arguments why existing protections for privacy, autonomy, and liberty under due process law should be understood to extend to rights of gender autonomy—and likely to other contexts as well. These protections for privacy, autonomy and liberty also exist—sometimes in more expansive form—under many state constitutions. Thus, the horizon for new (and existing) substantive due process rights may not be as bleak as current commentary might suggest.

While the study findings in the substantive due process context do not directly call into question the current conventional wisdom of the field—that there is likely to be a retrenchment of substantive due process rights in the federal courts in the wake of Dobbs—they do temper this perspective. State courts, and state constitutions, remain available tools in bringing fundamental rights claims. And as the study cases suggest, existing state commitments to principles of fundamental autonomy rights for personal decisionmaking can readily be extended—even to new contexts—and may potentially limit the impact of rights retrenchment in the federal courts.

D. Appointing Party is Not a Reliable Proxy for Outcome, Especially at the District Court Level

Another piece of conventional wisdom in constitutional law—and more generally across the legal academy—is that judges are likely to vote in politically self-interested ways, at least in politically polarized subject areas, as measured by the party of their appointing president. This piece of conventional wisdom, at least in its more moderate forms, has been empirically validated, including by research that has looked specifically at the

289 See, e.g., Kentucky v. Wasson, 842 S.W.2d 487, 493, 502 (Ky. 1992) (noting that Kentucky courts had recognized a right of privacy in the Kentucky constitution and common law prior to the Supreme Court and invalidating a state criminal sodomy statute under the Kentucky constitution); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that same-sex marriage restrictions violate the Massachusetts constitution).


291 See supra Section I.C.

292 See, e.g., sources cited infra note 352.

lower federal courts.\footnote{See, e.g., Cass Sunstein, David Schkade & Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 VA. L. REV. 301, 304-05 (2004).} And indeed, the study herein supports the conclusion that there are discernable differences in the voting patterns of Democrat and Republican-appointed judges with respect to the politically controversial area of transgender rights.\footnote{See supra Section I.A. This is not necessarily inconsistent with the empirical work of prior scholars, which suggests that judges are more likely to vote in a manner consistent with the ideology associated with their appointing president, but of course does not and could not suggest that such influences are always dispositive. See sources cited supra notes 293–294.} However, the study also suggests that such patterns are not monolithic, and that more extreme versions of this presumption are both inaccurate and unhelpful.\footnote{See supra Section I.A.}

Indeed, one of the more striking findings of the study was that even among Republican-appointed judges, victories for transgender litigants remain quite common.\footnote{See supra Section I.A.} This may partially reflect the constraints of a vertical system in which some such judges were constrained by rulings within their circuits to apply higher levels of scrutiny.\footnote{Six circuits have now held that anti-transgender discrimination must be afforded heightened scrutiny, either because it is sex discrimination, or because discrimination against transgender people as a class must be afforded heightened scrutiny in its own right. See supra note 40 and accompanying text.} But not all Republican-appointed judges who ruled on behalf of transgender litigants were so constrained—and even among those who were, many authored thoughtful and detailed opinions, which went far beyond what precedent would demand.\footnote{See, e.g., Hecox v. Little, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) (granting a preliminary injunction against Idaho’s law barring trans women from participating in women’s sports in an extended and thoughtful opinion) (judge appointed by President Trump); Stone v. Trump, 280 F. Supp. 3d 747, 769 (D. Md. 2017) (granting a preliminary injunction against the transgender military ban prior to the Fourth Circuit holding that transgender military people as a class are entitled to heightened scrutiny) (judge appointed by President H.W. Bush).} In short, it appears that at least some Republican-appointed judges were genuinely persuaded by the merits of constitutional transgender rights claims in the study cases, something that should counsel strongly against the most extreme versions of legal realism nihilism.

Conversely, not all Democrat-appointed judges ruled for transgender litigants, illustrating that here too, more extreme assumptions about partisan voting are both unhelpful and untrue.\footnote{See supra subsection I.D.1.} Many of the limited number of cases in which transgender litigants lost involved situations in which there were more tenuous factual bases for their claims—and in these cases, judges appointed by presidents of all political parties were equally willing to rule against litigants.\footnote{See supra Section I.A.} And the other most common basis for losses in the study—
federal courts doctrines—was one that was as often deployed by Democrat-appointed judges as it was by Republican-appointed judges.302

Thus, while there were a few cases in the study sample that appeared to display partisan bias—for example, a case of a Trump-appointed judge ignoring explicit sex and gender identity discrimination in a circuit where the court would have been compelled to apply heightened scrutiny had such discrimination been recognized—these cases were few in number.303 Overall, the study cases suggested that while political partisanship may play a role in adjudication, so too do other important factors, such as the law, facts, and the broader social context in which a case is brought. Currently—as the exceedingly high success rates of transgender constitutional litigants suggest—all of these other factors tend to tilt quite strongly in favor of transgender litigants in the constitutional law cases that are reaching the courts.

While the overall picture from the instant study thus suggests the tempering of stronger versions of the assumption that judges will uniformly behave in politically polarized ways in controversial areas of the law, this overall assessment should come with some caveats. As an initial matter, as noted at the outset, there were discernable differences in voting patterns between Democrat-appointed and Republican-appointed judges (with Democrat-appointed judges voting more reliably for transgender litigants).304 Moreover, those differences appear to be larger at the court of appeals level (though the numbers of court of appeals cases in the sample are too small to make any generalizations).305 Finally, the hyper-politicization of transgender rights—although ongoing for some time—has arguably even further increased in the time since the study’s conclusion.306 Thus, it is possible that

302 See sources cited supra note 250 and accompanying text.
303 See Hennessey-Waller v. Snyder, 529 F. Supp. 3d 1031, 1043-44 (D. Ariz. 2021). Although it post-dates the study period, Adams v. School Board of St. Johns County, 57 F.4th 791 (11th Cir. 2022) (en banc), where all of the Republican-appointed judges (mostly appointed by former President Trump) relied on questionable reasoning to find the relevant policy satisfied intermediate scrutiny, is likely another example. See generally @katie_eyer, TWITTER (Dec. 31, 2022, 1:50 PM), https://twitter.com/katie_eyer/status/1609260060672063490 [https://perma.cc/D2MA-VDfM] (discussing a number of the errors in the Adams majority’s opinion).
304 See supra Section I.A.
305 See supra Section I.A. To provide one example, as Zalman Rothschild has observed, the voting patterns at the court of appeals level have generally been highly polarized in the area of gender-identity appropriate restroom or locker room access (though the total number of cases/votes is small). See Zalman Rothschild, Free Exercise Partisanship, 107 CORNELL L. REV. 1067, 1130 n.343 (2022). In contrast, although the numbers are again small, one-hundred percent of district court judges in study cases involving restroom or locker room access ruled in favor of plaintiffs, including all Republican-appointed judges. See Appendix B.
306 See, e.g., Anna Brown, Deep Partisan Divide on Whether Greater Acceptance of Transgender People is Good for Society, PEW RSCH. CTR. (Feb. 11, 2022), https://www.pewresearch.org/fact-
the relatively nonpolarized voting patterns discerned herein may shift as more of these issues reach courts of appeals (and ultimately the Supreme Court), and as transgender rights becomes even more clearly inscribed in society as a politically polarized issue.  

E. Public Interest Organization Participation Matters

As prior scholars have observed, nonprofit legal organizations often achieve comparatively high levels of success for their clients, and the results of the instant study strongly corroborated this finding. Indeed, one of the most striking findings of the study was that among cases where a nonprofit legal organization participated, there were no ultimate losses—all resolved cases obtained at least some form of relief. Moreover, a stunning eighty-three percent of those cases resulted in the form of relief that is typically most desirable to constitutional change litigants, i.e., some form of injunctive or other policy change relief.

Of course, it is difficult to make causal claims about public interest organization participation, in view of the difficulty of disaggregating case selection effects from the effects of such organizations’ skill, expertise and commitment. And indeed, it is virtually certain in this study that some of the high levels of success observed in cases in which public interest organizations participated has to do with the ability and predilection of public interest organizations (especially impact organizations) to be selective in the cases they take on. In fact, one of the questions I pose for the movement in Part...
III is whether these high success rates of movement cases suggest that public interest organizations are currently striking too conservative of a balance in case selection, and ought to be taking on a greater proportion of marginalized clients, or riskier claims.311

Nevertheless, it seems very likely that factors beyond case selection (such as expertise, commitment, skill and knowledge) do play a role in the high success rates for public interest organizations observed in this study, and to some extent in prior work. Prior scholars employing sophisticated empirical models have found an impact (independent of case quality) of “collective legal mobilization,” a category that included, but was not limited to public interest organization participation.312 Moreover, it defies belief that the extraordinarily high level of case success achieved by public interest organizations in the instant study could have been achieved in the absence of highly skilled and committed representation.313 Finally, as elaborated at greater length below, at least one strategic litigation approach—the introduction of social/scientific expertise314 to support claims—appears to be both associated with litigant success, and more likely to occur in cases counseled by nonprofits.315

Thus, the current study further supports the work of prior scholars suggesting that cases brought by public interest organizations are likely to be comparatively successful, as compared to their private counsel counterparts. Indeed, in the area of transgender rights, such cases have seen almost shockingly high levels of success. While this is likely partially explicable by the selectiveness of public interest organizations in the cases they agree to take on, it also suggests that a very high level of expertise and skill among movement attorneys can play a role in the success of litigated constitutional claims.

F. Social/Scientific and Scientific Expertise Can Play an Important Role in Constitutional Change

The idea that social/scientific expertise may be important to constitutional adjudication is not new.316 Social science research in the form of the “doll”

311 See supra Section III.C.
312 See BERREY ET AL., supra note 308, at 68-69.
313 See supra Section I.A.
314 To be concise, I use the term “social/scientific expertise” to designate scientific or social scientific expertise.
315 See infra Section II.F. I thank Omar Gonzalez-Pagan for sharing this insight with me, and also for suggesting I investigate the role of expertise in study cases.
316 I include in my discussion herein litigation experts, but also other reliance by courts on social/scientific expertise, such as discussion of the standards or positions of relevant medical organizations (in amicus briefs or as publicly stated), pre-litigation expertise expressed by doctors
studies famously played a role in the _Brown v. Board of Education_317—and the use of social science expertise in constitutional disputes dates back even further.318 Moreover, as contemporary scholars such as Suzanne Goldberg and Marie-Amelie George have shown, social science research and the positions of “expert” organizations have continued to play an important role in contemporary constitutional change.319 Indeed, such expertise is often critical to the ability of subordinated groups to begin to undermine widely believed stigmatizing beliefs about their merit and social stature—often a key prerequisite to achieving meaningful constitutional protections.320

Nevertheless, the role of experts in constitutional litigation—and in generating new constitutional norms—typically is not prominent in academic constitutional theorizing, which tends to focus on doctrine, not facts.321 But as the study cases demonstrate, in the real world of litigation, constitutional decisionmaking often depends critically on facts, especially what Goldberg has referred to as “thick facts”—those “factual” assertions that also incorporate within them value judgments about a group.322 As Goldberg notes, “[i]f it is widely believed that African Americans are intellectually inferior or that women are not physically capable of full-time workforce participation . . . courts will be likely to sustain classifications drawn based on race or sex.”323 Thus, the factual understandings provided by

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320 See sources cited supra note 319.
321 This is not to suggest that there are no scholars working at the intersection of facts, or the role of social/scientific expertise and constitutional law. In addition to Suzanne Goldberg and Marie-Amelie George’s work on social/scientific expertise, discussed above, Alison Orr Larson is another prominent scholar who has written extensively on the manner and role of constitutional fact finding in the modern era. See Allison Orr Larson, _The Trouble With Amicus Facts_, 100 VA. L. REV. 1757, 1775-82 (2014) (discussing the increased reliance on factual claims from amicus briefs in Supreme Court decisions); Allison Orr Larson, _Confronting Supreme Court Fact Finding_, 98 VA. L. REV. 1255, 1258-61 (2012) (finding that the Supreme Court has increasingly resolved questions of legislative fact through independent internet-based research); Allison Orr Larson, _Constitutional Law in the Age of Alternative Facts_, 93 N.Y.U. L. REV. 175, 218 (2018) (emphasizing the importance of incorporating fact-checking into standards of review in constitutional law questions due to the potential for litigants to manipulate facts for their own agendas).
322 Goldberg, supra note 319, at 1965; see generally sources cited infra notes 324–338 and accompanying text.
323 Goldberg, supra note 319, at 1990-91.
social/scientific expertise can play a key role in setting the stage for groups to prevail on constitutional claims.

The transgender constitutional law cases decided during the study period amply demonstrate this dynamic in action. The overwhelming majority of the study cases involved some reference to social/scientific expertise in the course of the court’s discussion of the issues, whether in the context of the court’s factual discussion or its legal analysis. Indeed, many of the study decisions relied extensively on forms of social/scientific expertise, and some judges explicitly adverted to the importance of social/scientific expertise (or in some cases, the lack of expertise introduced by the defendants) to their decisions. While both the types of expertise, and uses of expertise, varied from case to case, reliance on social/scientific expertise was a feature of most of the victories for plaintiffs in the study.

In contrast, all of the complete losses for transgender plaintiffs in study cases (i.e., those study cases where judgment was entered against the plaintiffs on all claims) arose in contexts where courts did not engage with expertise-based arguments about the transgender community—apparently because

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324 See infra notes 335–338 and accompanying text.
325 See Appendix B.
326 See, e.g., Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 274-75 (W.D. Pa. 2017) (beginning the opinion ordering gender-identity appropriate restroom access for transgender youth by noting that “facts matter” and including findings based on experts and expert organizations); Doe v. Trump, 275 F. Supp. 3d 167, 214 (D.D.C. 2017) (“Contrary to Defendants’ assertion, this does not appear to be a case where the Court is required to pick sides in a ‘battle of experts.’ To the contrary, the record at this stage of the case shows that the reasons offered for categorically excluding transgender individuals were not supported and were in fact contradicted by the only military judgment available at the time.”), denying prelim. inj. on non-merits grounds sub nom., Doe v. Shanahan, 755 F. App’x 19 (D.C. Cir. 2019); Ruling, Good, supra note 83, at 5 (“[T]he agency chose not to offer any updated medical evidence to rebut [plaintiffs’ expert’s] opinions concerning the current consensus regarding the medical necessity of gender affirming surgery for some patients suffering from Gender Dysphoria.”), aff’d on other grounds, 924 N.W.2d 853 (Iowa 2019), superseded by statute, Iowa Code § 216.7(3) (2019), as recognized in Covington v. Reynolds, 949 N.W.2d 663 (Iowa Ct. App. 2020); Flack v. Wis. Dep’t of Health Servs., 395 F. Supp. 3d 1001, 1020-21 (W.D. Wis. 2019) (rejecting the defendant’s arguments that gender-affirming surgery exclusion was protective of public health on the grounds that the defendant did not undertake any study or review of the safety or efficacy of medical or surgical treatments for gender dysphoria “aside from the expert reports specially prepared in defense of plaintiffs’ present lawsuit” and that “the medical consensus” was contrary to the defendants’ allegations); Tay v. Dennison, 457 F. Supp. 3d 657, 674 n.10 (S.D. Ill. 2020) (ruling against defendants because they “presented no expert witness testimony to rebut” plaintiff’s evidence); Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293, 1296 (M.D. Fla. 2018) (observing that the key question in a restroom access case was whether the plaintiff was a boy and that the court “can only answer that question with the evidence given to [it] at trial”), rev’d, 57 F.4th 791 (11th Cir. 2022) (en banc) (disregarding evidence introduced at trial); Ruling, Vasquez, supra note 36, at 16 & n.8 (“There is little, if any, documentation in the record to refute the medical and psychological evidence put forth by Petitioners. There were no facts presented regarding the State’s interest.”); see also sources cited infra note 336.
327 See Appendix B.
such arguments were not presented to the court. Notably, all such losses also involved private attorneys, suggesting that a part of the value added from nonprofit participation may be such organizations’ knowledge of broader social/scientific expertise regarding the transgender community and their commitment to presenting such expertise to the court. While some cases involving expertise-based arguments also saw partial or nonfinal losses, and some study cases without expertise nonetheless won in part, it is striking that the only complete losses for transgender plaintiffs in the study also involved the relatively uncommon fact of a failure to harness social/scientific expertise on the part of the plaintiffs’ attorneys.

Moreover, as the study cases demonstrate, social/scientific expertise is not only important to constitutional decision-making—it can be, and in the case of contemporary transgender rights is, overwhelmingly favorable to only one side of the constitutional dispute. Mainstream medical and social/scientific organizations overwhelmingly support access to equal rights for the transgender community, and to gender-identity affirming social environments and medical care. As such, plaintiffs in study cases often had

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330 See Appendix B.

331 See sources cited supra notes 328–329 and accompanying text.

access to a wide variety of forms of social/scientific expertise to support their arguments—including not only traditional litigation experts, but also amicus participation by leading national medical and social science organizations, public statements and data produced by such organizations, and other indicia of expertise. In contrast, while defendants did in some study cases retain litigation experts who support their arguments at least in part, and in other cases have attempted to rely on internal institutional “experts” or publicly available data or resources, it has been difficult for them to overcome the overwhelming social/scientific consensus which is generally in opposition to their arguments.

Finally, the study cases cast in renewed relief what has been a long-standing dilemma for the transgender rights advocacy community, namely the role of medicalized frameworks in achieving transgender rights. Such medicalized frameworks harness medical expertise to legitimate or explain the transgender experience by reference to its association with the medical diagnosis of gender dysphoria, and the recognized medical necessity of

major medical and scientific organizations that have endorsed the World Professional Association for Transgender Health standards of care for gender-affirming care).


334 As Kate Redburn points out in their study of early challenges to cross-dressing bans, the dilemma over medicalized arguments dates back even to the earliest constitutional victories for the transgender community in the 1960s and 1970s. See Redburn, supra note 4, at 17-18, 33-34. For other scholars problematizing medical frameworks for understanding transgender people and transgender rights, even as they often recognize their potential effectiveness, see, e.g., Dean Spade, Resisting Medicine, Re/modeling Gender, 18 BERKELEY WOMEN’S L. J. 15, 18 (2003); Skinner-Thompson, supra note 4, at 2-3.
gender-affirming environments and healthcare. This type of medicalized understanding of the transgender experience was common in study cases and appeared for many courts to be important to their crediting of plaintiffs’ constitutional claims—whether as factual background, or even in some cases as central to courts’ legal analyses. And yet some transgender rights advocates and scholars have long cautioned against such medicalized frameworks, suggesting that they may unintentionally limit who has access to the rights thereby obtained. For example, if a constitutional decision granting a youth access to gender-identity appropriate facilities stresses that the youth had a gender dysphoria diagnosis, that gender identity is immutable, and that gender-affirming treatments include being able to live life fully in accordance with gender identity, what would the result be for a youth who may experience gender identity as fluctuating, and/or who is without a medical diagnosis? The study cases suggest that this dilemma remains a very real, and perhaps intractable one, insofar as medicalized frameworks continue to play a key role in transgender constitutional rights victories—and yet nevertheless, undoubtedly also limit the scope of the rights obtained thereby.

335 See sources cited supra note 334.
337 See sources cited supra note 334.
338 Cf. Skinner-Thompson, supra note 4, at 2-3 (raising similar concerns in the context of school committees that have been set up to address the rights of gender-nonconforming youth in schools); Morris v. Pompeo, No. 19-CV-00569, 2020 WL 6875208, at *6 (D. Nev. Nov. 23, 2020) (finding in a due process-based challenge to physician gender certification requirement for passport, that “[t]he Policy is rationally related to” accurately identifying the identities of U.S. citizens because “doctors often play an important role in gender transition treatment” though ultimately finding for plaintiff on equal protection grounds).
G. Field Segregation of Constitutional Law and Federal Courts Risks Missing Key Insights

A final area in which the study may hold implications for the broader field of constitutional law is in the risks of field segregation of constitutional law and federal courts doctrine. Traditionally, constitutional law and federal courts doctrines are treated as different subjects: taught as separate classes, discussed in different bodies of literature, and often (though not always) attended to by different scholars. Indeed, the instant study is in some ways representative of this phenomenon insofar as it excluded from the study parameters cases that were decided on non-merits adjacent federal courts grounds such as standing, mootness, or the Eleventh Amendment.

But as a systematic investigation of the cases included in the study suggests, this type of field segregation, while common, risks missing key insights. Even including only merits-adjacent federal courts doctrines (such as Monell liability, qualified immunity and Antiterrorism and Effective Death Penalty Act deference), the single largest cause of claim losses was federal courts doctrines. Moreover, this is surely a very significant underestimate of the impact of federal courts doctrines on transgender constitutional litigation, as it excludes the transgender rights claims that were dismissed on non-merits adjacent grounds.

Nor is this phenomenon restricted to the transgender constitutional law context. As other scholars have observed, important constitutional equality and liberty rights across other contexts have often also been rendered less available—and at times functionally inaccessible—due to the application of seemingly distinctive federal courts doctrines. Thus, the recognition of a substantive constitutional right may mean little if federal courts doctrines fundamentally stymie its enforcement.

The risks of federal courts doctrines stymieing rights enforcement are, moreover, arguably only increasing. As the example of Texas’s S.B. 8 law

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340 See Appendix A.

341 See supra Section I.D.

342 See Appendix A.

illustrates\textsuperscript{344}, states are increasingly seeking to immunize arguably unconstitutional laws from challenge by creatively designing laws with an eye to federal courts doctrines that would prevent a challenge.\textsuperscript{345} And some of the pending legislation seeking to infringe on transgender rights adopts precisely this framework, which could make future transgender constitutional challenges considerably more difficult to win.\textsuperscript{346}

Thus, the present represents an especially urgent moment for constitutional law scholars to reject field segregation, and to carefully attend to how federal courts doctrines are impacting constitutional claims. Both in our own research, and in our attentiveness to the work of our federal courts colleagues, it is a critical time to ensure that the impact of federal courts doctrines on constitutional rights plaintiffs is carefully considered.

III. QUESTIONS FOR THE MOVEMENT

As described above, public interest organizations (which I use here as a proxy for the LGBTQ movement) were extraordinarily successful in winning transgender constitutional law claims during the study period.\textsuperscript{347} This Part thus offers no “lessons” for the movement, which has evidently skillfully navigated the challenges of successfully litigating trans-protective constitutional claims. It does, however, suggest possible questions for the movement as it moves forward from here: questions about future case selection, the framing of claims, the siting of transgender constitutional rights claims in state v. federal court, and finally, the possible need for political partners in order to effectively enforce transgender constitutional equality and liberty rights. Most of these questions are no doubt already under consideration by movement organizations in some form but may nevertheless benefit from the birds-eye view of recent litigation afforded here.

\textsuperscript{344} Texas’s S.B. 8 was enacted pre-\textit{Dobbs} and imposed what were then substantively unconstitutional restrictions on abortion access while relying on the interplay of sovereign immunity doctrine and standing as a way of endeavoring to make challenges to the law impossible. See, e.g., CONG. RSCH. SERV., LSB10651, THE TEXAS HEARTBEAT ACT (S.B. 8), WHOLE WOMAN’S HEALTH V. JACKSON, AND UNITED STATES V., TEXAS: FREQUENTLY ASKED QUESTIONS 2 (Oct. 25, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10651 [https://perma.cc/YH3H-QZSK] (explaining the reasons why S.B. 8’s unique remedial structure made it difficult to challenge as a matter of sovereign immunity and standing doctrine).


\textsuperscript{346} Id. at 8 (describing a 2021 Tennessee law that allowed private parties to recover damages for “emotional harm” caused by schools that allowed transgender students to use gender-identity appropriate restrooms).

\textsuperscript{347} See supra Section I.A. I use this as a proxy, despite the fact that I am aware that private attorneys can do movement work, and that not all public interest organizations are movement organizations. Nevertheless, because public interest participation is the closest proxy that exists in the study data for movement litigation, I use it as a starting point for my discussion herein.
A. Should the Movement Be Losing More?

The first counterintuitive question that the study results raise is whether the transgender rights movement should be losing more. As described above, public interest organizations have been stunningly successful in their recent transgender constitutional rights cases, securing some level of success one-hundred percent of the time in concluded cases, and securing some form of nonmonetary or systemic relief in eighty-three percent of those cases.348 While these results are certainly a cause to celebrate the work of movement attorneys in securing transgender constitutional rights, they also may suggest that the movement could potentially afford to be taking on more risky set of clients, and perhaps to be raising a more risky set of claims.

By way of explanation, impact organizations involved in equality movements typically select both their plaintiffs and their challenges carefully.349 While this phenomenon has reasonably been criticized by scholars, the reality is that almost all movements engage in careful case selection for good reasons.350 The opposite of the old adage “bad facts make bad law,” selecting cases and plaintiffs that judges are likely to be sympathetic to is a part of how equality movements win rights—rights that may be important to the whole of the community.351

While conservative case selection thus has real purposes behind it, there are also risks to this type of approach.352 Most notably, focusing only on the plaintiffs or claims most likely to appeal to judges can leave behind those parts of the community that are most in need of protections.353 For example, those who are less assimilationist in their presentation, who face intersecting forms of bias, or who are poor, or homeless, may find that the “rights revolution” wrought by such case selection measures has little impact on their lived experience.354 Too conservative case selection and framing may also lead to sub-optimal doctrinal development when attorneys fail to raise arguments

348 See supra Section I.A.


350 See sources cited supra note 349.

351 See sources cited supra note 349.


353 See sources cited supra note 352.

354 See sources cited supra note 352.
that are perceived of as risky—but that could offer important and additional steps toward a liberatory jurisprudence if they were raised.355

In the case of transgender constitutional law cases, both of these concerns seem worthy of consideration. Prisoner litigation and criminal law cases had some of the lowest rates of public interest organization representation in the study, and also the lowest rates of success.356 So too, there were very few cases in the study sample that addressed issues like discrimination in public housing, or in foster care systems, sex-segregation in public shelters, or trans bias in urban public schools—all contexts where multiply marginalized individuals might experience meaningful benefits from legal change.357 Thus, although there were some obvious efforts by movement organizations to include issues that might affect more marginalized members of the community (such as, for example, challenges to Medicaid exclusions on gender-affirming care or to inaccessible identity documentation regimes), other issues affecting those who may face crosscutting forms of oppression were less well-represented.358

Moreover, the plaintiffs themselves in many of the study cases appeared to skew toward more “assimilationist” and “relatable” parts of the movement, though this was not universally true.359 Most notably, there was only one case


356 See Appendix B. Other categories with low public interest participation, but which fared better, included policing and employment cases. Id.

357 See Appendix B. Of course, the focus of the study itself—i.e, transgender constitutional law cases—may have excluded from the sample some cases that are likely to be of greater benefit to intersectionally disadvantaged parts of the community, such as, for example, lawsuits challenging exclusion from sex-segregated private shelters. However, this seems to be an incomplete explanation, as there are many areas in which government actors continue to play a role in the oppression of transgender people who experience intersectional forms of bias, including especially racial and class bias.

358 See Appendix B.

359 See sources cited infra notes 360–362 and accompanying text. A striking example of movement efforts to include a diversity of plaintiffs that go beyond those who are most “respectable” and “relatable” is the case of Foster v. Andersen, a challenge to Kansas’s policy of refusing to correct birth certificate gender markers for transgender individuals. Complaint for Declaratory and Injunctive Relief at 2-3, Foster v. Andersen, No. 18-cv-02552 (D. Kansas Oct. 15, 2018), ECF No. 1, https://www.lambdalegal.org/in-court/legal-docs/foster_ks_201802552_complaint [https://perma.cc/F6RJ-5RPF]. In that case, all of the non-anonymous individual plaintiffs came from multiply-marginalized communities, including the Black, disabled, incarcerated, and formerly homeless communities. See id. Because it resulted in an early consent decree before any merits decision by the court, Foster did not meet the study criteria. See Appendix A. However, it was a constitutional case, and obviously was highly successful in the results it obtained. See Consent Judgment at 2-4, Foster v. Anderson, No. 18-cv-02552 (D. Kansas June 21, 2019), ECF No. 33, https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/foster_ks_20190624_consent-judgment.pdf [https://perma.cc/ZZ9D-BX7P].
in the whole of the study—litigated by a prisoner rights’ organization, not an LGBTQ organization—that apparently involved a non-binary or gender fluid plaintiff. As prior scholars have written, and as I discuss at greater lengthinfra Section III.C, this skewing of litigation plaintiffs toward those members of the transgender community that identify in a consistent and binary way is significant, insofar as this part of the community may have goals that are not identical to those who identify in more gender fluid, non-binary, or otherwise less gender assimilationist ways. Without full representation of this non-assimilationist part of the community across all types of claims, their goals may not be adequately represented, and movement victories even may prove exclusionary with respect to many members of the community. At a time when the movement is winning at such high rates, it may be the time to expand to greater representation of those parts of the community that do not self-identify stably along a gender binary, to ensure that constitutional victories are truly meaningful for the full community.

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360 See Doe v. Pa. Dept of Corr., C.A. No. 20-23 Erie, 2021 WL 1115373, at *1 (W.D. Pa. Mar. 24, 2021). It should be noted, however, that there were at least two constitutional cases brought by leading movement organizations during this time frame (and likely more) that did involve non-binary, gender fluid, intersex or otherwise less assimilationist parts of the community. But these cases dropped out of the study sample because they did not have merits decisions on constitutional grounds during the study period. See Zzyym v. Pompeo, 958 F.3d 1014, 1018 (10th Cir. 2020); Saba v. Cuomo, 953 F. Supp. 3d 282, 286 (S.D.N.Y. 2021). An additional constitutional decision involving a non-binary plaintiff was decided just after the study period. See L.O.K. ex rel. Kelsey v. Greater Albany Pub. Sch. Dist. 8J, No. 20-cv-00529, 2022 WL 2341855 at *12-13 (D. Or. June 28, 2022) (denying the majority of defendant’s motion for summary judgment as to plaintiff’s equal protection claim). This case was not brought by a movement nonprofit organization, but rather by a former movement lawyer in private practice. Id.; see also Profile of Jennifer J. Middleton, JOHNSON, JOHNSON, LUCAS & MIDDLETON, https://www.justicelawyers.com/attorney/jennifer-j-middleton [https://perma.cc/5L3F-LNYC].

361 See, e.g., George, supra note 4, at 266-94; Welsh, supra note 4, at 1459-64, 1499-1500. As Welsh observes, these identity categories are not themselves a perfect proxy for the goals of individuals, who may be assimilationist or more broadly liberationist in orientation, regardless of whether they endorse a stable binary gender identity. See Welsh, supra note 4, at 1460.

362 See sources cited supra note 36i. Of course, as Welsh observes, more radically non-assimilationist parts of the movement often also view rights-based claims as ineffective and even harmful. See Welsh, supra note 4, at 1459-64. It is unclear whether that may make those with non-binary, gender fluid or otherwise non-assimilationist gender identities less likely to rely on constitutional litigation in the first instance.

363 As Marie-Amélie George has observed, “[m]ore than one-third of the transgender community does not identify as either male or female, or presents elements of both genders.” See Marie-Amélie George, Framing Trans Rights, 114 NW. L. REV. 555, 560 (2019). Youth, including youth who also identify as sexual minorities, may be especially likely to identify as non-binary. See, e.g., Diversity of Nonbinary Youth, TREVOR Proj. (July 2021), https://www.thetrevorproject.org/wp-content/uploads/2021/07/Diversity-of-Nonbinary-Youth_-_July-Research-Brief.pdf [https://perma.cc/RR3D-P4DJ] (finding that twenty-six percent of LGBTQ youth surveyed identified as non-binary and an additional twenty percent were not sure or were questioning whether they are non-binary).
The study cases also suggest that there may be more room for “risky” legal arguments by movement lawyers.364 While sex discrimination equal protection arguments are the strongest established basis for securing transgender constitutional rights, the study suggests that other approaches are also highly likely to be successful, and could potentially be stressed more often.365 As described in Section III.B, infra, it may be that movement lawyers should, for example “lean in” to protected class status arguments that directly argue for trans equality on its own terms.366 It is also the case that due process arguments relating to a potential fundamental right to gender autonomy could potentially be raised in a greater number of cases, even post-Dobbs.367 Both of these doctrines were recognized as viable in one-hundred percent of the study cases in which they were addressed.368 This suggests that perhaps more room exists for litigators to take risks and seek to expand the law in new directions.

In the following Section, I take up what a specifically trans-focused equal protection doctrine might offer that arguably goes beyond what a sex-focused equal protection doctrine alone could afford. With respect to gender autonomy arguments, such arguments seem both riskier than either of these equality-based alternatives, but also important to genuinely meaningful constitutional rights for the transgender community. As Scott Skinner-Thompson has observed, equality arguments, while important, are often most accessible to those members of the trans community who can and do conform to a particular type of gender presentation and performance.369 A due process right of gender autonomy—perhaps after Dobbs, pursued in the state courts, under state constitutions—seems to be an important adjunct to such equality arguments insofar as it centers the inquiry precisely on trans autonomy and on the value afforded to individual self-determination with respect to sex and gender.370 The study cases—which all embraced such an argument in the limited contexts in which it was raised—suggest that there may be greater room for movement lawyers to make and develop such an argument, even

364 See Goldberg, supra note 355, at 2138-40.
365 See supra Sections I.B–C.
366 See infra Section III.B.
367 See sources cited infra notes 369–371 and accompanying text.
368 See Appendix B.
369 See Skinner-Thompson, supra note 4, at 48-51 (suggesting an argument based on First Amendment expressive rights as another pathway to greater gender autonomy for non-conforming students).
370 See Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327, 332-33 (D. P.R. 2018); Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305, at *8 (W.D. Wash. Dec. 11, 2017), vacated on other grounds, 926 F.3d 1180 (9th Cir. 2019); D.T. v. Christ, 552 F. Supp. 3d 888, 894-98 (D. Ariz. 2021); see also infra Section III.E (discussing the possibility of bringing due process claims in state court); Levi & Barry, Transgender Tropes, supra note 4, at 618 (making a similar argument about the importance of substantive due process arguments to transgender rights litigation).
though it is currently not well-established, and even though Dobbs may counsel in favor of a shift to state courts for the near future.

Thus, the overwhelming success of the study cases provide ample reason for celebration of the movements’ victories—but also a moment for asking whether the movement can and should adjust its approach to case selection and framing in the future. While some post-study decisions, especially the Eleventh Circuit en banc opinion in Adams, make clear that the movement should not be over-confident in the security of protections, even for the most “conservative” plaintiffs on the most “conservative” claims, there may nevertheless be some room for movement litigators to embrace a more expansive group of plaintiffs and claims. While it is too soon to declare victory even in the most assimilationist of constitutional transgender rights cases—and capacity surely limits the ability of the movement to take on all cases—the high case victory rates described herein suggest the movement may have the room to expand its case selection and framing practices.

B. Should More of the Focus Be on Anti-Transgender Bias (and Protected Class Status)?

As described in Part I, supra, while arguments that the transgender community should be deemed a suspect or quasi-suspect class under equal protection law have gained traction during the study period, they continue to be dwarfed in number by cases relying on a sex discrimination rationale. Although I did not conduct a survey of the briefing, it seems highly likely that movement attorneys are raising both arguments in most cases, and thus that the success of the sex discrimination rationale is an artifact of judicial framing or judicial choices regarding what arguments to take up. Nevertheless, this Part suggests that—especially with respect to the most recent wave of anti-transgender legislation—it may be worth pushing to try to encourage courts to take up more central arguments regarding anti-transgender bias and transgender protected class status.

The idea that sex discrimination arguments may have limitations as a vehicle for LGBTQ rights is of course not new. Most prominently, Ed Stein, though writing in the context of sexual minority claims, argued that sex discrimination arguments make a “moral mistake,” situating the

371 See sources cited supra note 370.
373 See supra Section I.A.
constitutional harm in sex discrimination, not anti-LGBTQ bias. Stein suggested:

Laws that discriminate against lesbians, gay men, and bisexuals should be overturned on the grounds that they make invidious distinctions on the basis of sexual orientation, not on other grounds. Overturning laws that discriminate on the basis of sexual orientation because they discriminate on the basis of sex (or gender) mischaracterizes the core wrong of these laws. Laws restricting the rights of gay men and lesbians violate principles of equality primarily because such laws discriminate on the basis of sexual orientation, not because they discriminate on the basis of sex. By failing to address arguments about the morality of same-sex sexual acts and the moral character of lesbians, gay men, and bisexuals, the sex discrimination argument “closes,” rather than confronts, homophobia.

I do not agree with Stein’s ultimate conclusion, which is that LGBTQ rights advocates should not rely on sex discrimination arguments. But I do agree that something important can be lost when LGBTQ cases are framed exclusively around a sex discrimination inquiry. For example, almost all of the wave of current anti-transgender legislation has been enacted against a backdrop of an explicit intent to target the transgender community; indeed, much of it discriminates on its face against the transgender community. While I fully agree that such discrimination is sex discrimination, and that courts ought to recognize it as such, failing to also recognize it as violating equal protection values because of its targeting of the transgender community omits something important about the nature of the constitutional harm. The transgender community continues today to be singled out for distinctive

375 Id.
376 Id. at 503-04.
377 See id. at 518 (arguing that LGBTQ rights litigators should avoid making the sex discrimination argument for lesbian and gay rights).
forms of bigotry and discrimination and it is important for contemporary constitutional law to recognize that.\textsuperscript{379}

Moreover, redirecting more of the focus away from sex discrimination arguments and back to anti-transgender discrimination could also allow advocates to sidestep what has, in the months since the study's conclusion, become an increasing legal concern: some courts' unwillingness to entertain as applied sex discrimination challenges. As described infra Part IV, three decisions in the post-study period have—unlike the consistent results during the study itself—affirmed explicitly sex-discriminatory laws against a sex discrimination challenge, largely by refusing to engage with the plaintiffs' as applied challenges.\textsuperscript{380} While these post-study cases represent a small minority of the cases decided in this area (the vast majority of which have embraced the as applied sex discrimination arguments of transgender plaintiffs), it is a development that is important to take seriously.\textsuperscript{381}

But, significantly, it is also a development that arguably has an obvious solution. Recentering the equal protection analysis on anti-transgender

\textsuperscript{379} By way of example, consider the Arkansas “Save Adolescents from Experimentation (SAFE) Act”, the first state law to outlaw providing gender affirming care for transgender youth. See Arkansas Save Adolescents from Experimentation (SAFE) Act, H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021), (codified at Ark. Code Ann. § 20-9-1500 (2022)). The Arkansas law explicitly classifies on the basis of transgender status, banning the use of numerous medical treatments in the context of trans youth, while allowing unlimited use of those same treatments by (and on) non-transgender and intersex youth. \textit{Id}. Moreover, while nominally branded as an effort to “save” transgender youth, the legislative history makes clear that the law was animated by anti-transgender bigotry—and was pushed through despite consistent testimony that it would harm transgender children. See Eyer, \textit{Arkansas Ban}, supra note 378.

The Arkansas law of course also classifies on sex-based grounds. And in \textit{Brandt} \textit{v. Rutledge}, a challenge to the SAFE Act, the trial court judge properly ruled that heightened scrutiny was warranted on both grounds. See \textit{Brandt} \textit{v. Rutledge}, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021). But on appeal, the Eighth Circuit relied exclusively on the fact that the statute classified on the basis of sex, declining to reach the alternative grounds of heightened scrutiny for the transgender community. See \textit{Brandt} \textit{v. Rutledge}, 47 F.4th 661, 669 (8th Cir. 2022). Perhaps in part for this reason, the Eighth Circuit’s reasoning on appeal included little discussion of the anti-transgender origins of the law. \textit{Id.} at 667–68.


\textsuperscript{381} For cases that have embraced plaintiffs’ as applied approach to constitutional sex discrimination arguments, \textit{see, e.g.}, note 124, supra and accompanying text.
discrimination would, in most cases, obviate the need to debate whether or not the proper focus of a sex discrimination challenge is facial or as applied. For example, in cases like the post-study decision in *B.P.J. v. West Virginia State Board of Education*, the law at issue was enacted with the admitted purpose of dealing with the “problem” of transgender girls participating on girls’ athletic teams.\(^{382}\) Regardless of the resolution of the sex discrimination claim, such a law ought to be subjected to heightened scrutiny because it was enacted with a discriminatory purpose vis-à-vis the transgender community.\(^{383}\) And analyzed through this lens, the focus of the back-end scrutiny in such a case is naturally directed at the right issue—i.e., whether the “problem” the law sought to solve (transgender youth’s participation in gender-identity appropriate athletics) satisfies intermediate scrutiny.

Such an inquiry, when properly directed at the anti-transgender purposes that motivated the law, leads quite easily to the conclusion that the law is invalid. As the District Court noted in *B.P.J.*, “[t]he record makes abundantly clear . . . that West Virginia had no ‘problem’ with transgender students playing school sports and creating unfair competition or unsafe conditions.\(^{384}\) This of course is true in most instances in which states have enacted recent anti-transgender bills: there simply was no “problem” to solve, and certainly not an “important” one that could not be addressed through less discriminatory means. When the obvious anti-transgender purpose behind a law like that at issue in *B.P.J.* is centered in the analysis, the insufficiency of the government’s reasons to justify its purposeful anti-transgender discrimination will often be self-evident, regardless of whether the analysis is facial or as applied.

As observed above, the focus of ultimate decisions in the courts is of course not under the control of movement lawyers. And I would not advocate for failing to raise sex discrimination arguments, which are well-supported and provide an important avenue to success. But both the study cases and those cases post-dating the study suggest that continuing to work to ensure that anti-transgender discrimination is not marginalized in transgender constitutional litigation is important. Especially in view of the surge in current legislation targeted the transgender community, it seems critical to ensure that the target of such legislation—the transgender community—is not lost in making the moral and legal case for transgender constitutional equality.

\(^{382}\) See *B.P.J.*, 2023 WL 111875, at *4 (observing that there were “several instances where legislators made clear that the purpose of the bill was to address transgender participation in sports.”)

\(^{383}\) See Section I.B.1., *supra* (describing the recent trend in cases holding that the transgender community itself qualifies as a suspect or quasi-suspect class).

\(^{384}\) See *B.P.J.*, 2023 WL 111875, at *4.
C. Should the Movement Facially Challenge Sex-Based Systems?

As described supra, many of the study cases arose in contexts in which explicit sex classifications were at issue.\(^\text{385}\) Thus, for example, many of the study cases involved sex-separated facilities or programs, such as prisons, restrooms, or athletics, or sex-based restrictions on access to medical procedures or coverage.\(^\text{386}\) As such cases make clear, despite the advent of intermediate scrutiny for sex-based classifications, government-imposed sex distinctions remain common—and to some extent unremarkable—in our modern society.\(^\text{387}\)

Nevertheless, in many instances, it appears that transgender litigants are not globally challenging state-enforced systems of sex distinctions, but instead only the manner of the application of such systems to them.\(^\text{388}\) Sex-based restrictions on medical care or insurance are a notable exception to this.\(^\text{389}\)

This Section takes up the possible reasons why the movement may be avoiding facial challenges to state-enforced systems of sex differentiation and questions whether and in what circumstances such challenges ought to be brought.

One reason why the movement may currently be avoiding facial challenges to sex-based systems is simply strategic: at least in some circumstances, such challenges seem highly likely to lose.\(^\text{390}\) Thus, for example, at least at this moment, it is hard to imagine a court finding that sex-segregated prisons do not bear a substantial relationship to important government interests. Because the public has thus far widely viewed such sex-separation as natural and desirable, it is unlikely to be struck down. Insofar as such challenges are likely to fail—and might cause a judge to view litigants’ cause as excessively radical—it may be that it is not strategically advisable to raise such challenges, even in the alternative.\(^\text{391}\)

\(^{385}\) See supra subsection I.B.2.

\(^{386}\) See supra subsection I.B.2.

\(^{387}\) Id.; see also CURRAH, supra note 102, at 23.

\(^{388}\) See supra subsection I.B.2; see also George, supra note 4, at 277-80 (making a similar observation in prior work).

\(^{389}\) It is important to note, however, that sex-based restrictions on medical care or insurance reimbursement also typically align exclusively (or almost exclusively) with care that is provided to transgender individuals. See, e.g., Brandt, 551 F. Supp. 3d at 882, aff’d, 47 F.4th 661 (8th Cir. 2022). Thus, challenging the sex-based classification behind the law or policy typically is no more expansive in its implications than a challenge the application of the policy to the transgender community would be. Id.

\(^{390}\) See, e.g., Schoenbaum, supra note 4, at 55 (noting the wide public attachment to certain types of sex separation). Notably, the post-study cases that have come out adversely to plaintiffs have often involved common sex-segregated spaces. See sources cited supra note 141.

\(^{391}\) Of course, the fact that a number of courts have issued decisions since the date of the study rejecting plaintiffs’ as applied sex discrimination challenges may be reason to rethink this strategic calculation. While the most high-profile of these, the en banc decision in Adams v. School Board of
Nevertheless, it is also possible that such arguments are not being brought for reasons other than strategic concerns, including client preferences. Many transgender youth and adults do not desire to eradicate systems of sex differentiation, but rather simply wish to be assimilated into such systems in a manner consistent with their gender identity. Where clients come to litigation with this perspective, it would be inappropriate and indeed arguably unethical for a litigator to seek a result that their client does not want.

Still, it is important to recognize that these types of client preferences are not fully representative of the LGBTQ community as a whole. As other scholars have observed, there are many members of the transgender community—especially those who are gender fluid, non-binary, or genderqueer—who are unlikely to benefit equally (if at all) from an as applied approach, which often stresses factors such as medical interventions and the long-term consistency of the individual’s gender identification and presentation. Moreover, some members of the movement may simply prefer more radical arguments for disrupting of sex-segregation in society (though such movement members are disproportionately likely to view rights-based movement strategies like constitutional law with skepticism).

This Section thus poses the question of whether the movement ought to be making greater efforts to ensure that individuals who have a stake in the eradication or limitation of systems of sex segregation have representation in constitutional litigation, and thus in the development of constitutional law.

St. Johns County, seems unlikely to have turned on litigation strategy, both of the other decisions at least facially appeared to have greater sympathy for the transgender plaintiffs, and yet to feel (inaccurately) bound to reject an as applied challenge. See D.H. v. Williamson Cnty., No. 3:22-cv-00570, 2022 WL 16639994, at *9-10 (M.D. Tenn. Nov. 2, 2022); B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316, 2023 WL 118757, at *4, *7 (S.D. W. Va. Feb. 7, 2023). As described supra Section III.B, refocusing the analysis in such cases on anti-transgender discrimination may be the best approach to addressing this issue. But it may also be worthwhile for litigators to consider including a facial sex discrimination challenge, especially in view of the representational concerns described infra.

See, e.g., CURRAH, supra note 102, at 42, 44, 48, 50, 67-69, 96-97, 101-102, 145 (describing the variety of positions within the transgender community on how to address sex classifications by the government); Welsh, supra note 4, at 1452-57 (describing what Welsh describes as the “assimilationist,” “expansionist” and “ambivalent utilitarian” threads of the pro-trans legal movement and transgender community).

See, e.g., John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation, 100 COLUM. L. REV. 370, 417 (2000) (“Client autonomy . . . is the baseline norm of legal ethics.”).

See, e.g., Skinner-Thompson, supra note 4, at 48-50 (raising concerns that not all members of the transgender community are equally protected by approaches which prioritize gender-conforming and medically diagnosed transgender individuals); George, supra note 4, at 277-280 (same); Welsh, supra note 4, at 1499-1500 (same); see also Jessica Clarke, They, Them, and Theirs, 132 HARV. L. REV. 894, 966-73, 981-83 (2019) (describing the ways of addressing sex-segregation in athletics, restrooms, and housing that would most benefit non-binary individuals).

See sources cited supra note 392.
transgender constitutional law

As noted supra, it appears that only one study case—which was not brought by an LGBTQ rights organization—included a non-binary or gender fluid plaintiff. Moreover, even among binary-identified transgender individuals, those seeking assimilationist, rather than abolitionist aims, appear to be far more extensively represented in contemporary constitutional litigation. Thus, in order to ensure the adequate representation of the diverse array of interests that members of the LGBTQ community may have in the maintenance or eradication of sex-based systems, it may be important for the movement to self-consciously seek out diverse plaintiffs along this axis of difference.

In sum, while there may be good reasons why LGBTQ rights organizations are largely avoiding facially challenging systems of sex separation today, the failure to do so may also leave behind parts of the community that would benefit from the dismantling of such systems—or at least limiting the government’s ability to police access to them. As other scholars have observed, these omissions are far from minor—non-binary and other gender-nonconforming individuals represent a large and growing sub-segment of the LGBTQ community. It is thus important to consider greater representation of such individuals among the plaintiffs in constitutional cases in order to ensure that their distinctive interests are adequately represented in the development of trans-specific constitutional doctrine.

D. What Role for Similarly Situated Inquiries in Equal Protection?

An additional question that the study cases raise for the movement relates to the role of “similarly situated” inquiries in equal protection doctrine. The role of “similarly situated” inquiries in equal protection analysis remains undertheorized in both the courts and in the legal academy. It thus is perhaps unsurprising that courts in the studied cases used “similarly situated” reasoning in a variety of ways, often without fully explaining the role of “similarly situated” inquiries in their reasoning. This Section suggests that in order to prevent inappropriate uses of the amorphously deployed “similarly

396 See Doe v. Pa. Dep’t of Corrs., C.A. No. 20-23, 2021 WL 1115373, at *1 (W.D. Pa. Mar. 24, 2021). As noted supra note 360, some movement organizations did bring constitutional claims on behalf of non-binary, gender fluid, and/or intersex plaintiffs during the study period, but none were ultimately adjudicated on constitutional grounds. Even if these cases are included, it still appears that non-binary people are significantly under-represented in study litigation. See sources cited supra note 363 (noting that non-binary and other gender non-conforming individuals represent a large and possibly growing part of the trans community).

397 See sources cited supra note 363.


399 See sources cited infra notes 416–420 and accompanying text.
“similarly situated” construct, it may be important for the movement to have a vision for the appropriate role for “similarly situated” inquiries in modern equal protection doctrine—and to argue that vision consistently in the courts.

As Giovanna Shay has explored, “similarly situated” is a construct with a long history in equal protection doctrine, much of it predating (and largely superseded by) the advent of the modern tiered scrutiny system. Indeed, prior to the tiered system of scrutiny, the “similarly situated” construct was central to the equal protection inquiry, as the defining metric by which courts evaluated constitutionality. If a disfavored group was deemed “similarly situated” to a favored group with respect to the government’s reasons for the law, the classification was generally deemed unconstitutional.

Today, this use of the “similarly situated” construct has largely (though not entirely) been superseded by the tiers of scrutiny. While an inquiry remains as to the connection between the government’s justifications and the exclusion of a disfavored group, the structure of this inquiry is generally governed by the tiers of scrutiny, not an independent similarly situated inquiry. Thus, today, the contexts in which the similarly situated construct remains arguably relevant to equal protection analysis are far more limited—and largely inapplicable to the vast majority of transgender constitutional law cases.

So in what limited ways might the “similarly situated” inquiry remain applicable in the transgender constitutional law context? The most significant arises from the potential relevance of the “similarly situated” construct in the Supreme Court’s “real differences” sex discrimination cases (although as Naomi Schoenbaum has recently observed, the “real differences” line of cases).

There are four primary contexts in which the Supreme Court has continued to recognize a “similarly situated” inquiry as potentially relevant to modern equal protection doctrine: as an exception to the “real differences” justification for sex discrimination, as a limitation on where defendants can prevail on rational basis review, as a way of framing the inquiry in “Class of One” cases, and as a part of the proof in selective prosecution cases. See, e.g., Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692 n.12 (2017); Cleburne v. Cleburne Living Ctr., 473 S. 432, 448 (1985); Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); United States v. Armstrong, 517 U.S. 456, 465-66 (1996). Only the first two of these were arguably implicated in a significant number of the study cases, though the other two could potentially be implicated in a narrower group of cases. In addition, as I discuss infra notes 414–415 and accompanying text, broader anti-discrimination law recognizes a potential role for “similarly situated” inquiries—though not a mandatory one—in covert discrimination cases.

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400 See Shay, supra note 398, at 600-06, 613-14 (detailing the history of the phrase “similarly situated” from its first appearance in an 1884 Supreme Court decision through the Lochner era and into the modern era of tiered scrutiny).
401 Id. at 600-06.
402 Id.
403 Id. at 615-16.
404 Id.
405 Id.
itself rests on shaky doctrinal ground).\textsuperscript{406} In this set of cases, the Supreme Court has suggested that it is not invidious discrimination, and thus not unconstitutional, to treat men and women differently under the law where “real [biological] differences” underlie those distinctions.\textsuperscript{407} However, there are important limits on this reasoning: the Court has stated that where men and women are “similarly situated” with respect to the government’s interests—or even where an individual member of the group is so situated—that categorical sex-based distinctions remain unconstitutional.\textsuperscript{408} Thus, in the “real differences” cases, “similarly situated” operates as a \textit{limitation} on what are permissible contexts in which the government can justify sex-based disparate treatment.\textsuperscript{409}

In the transgender constitutional law context, this “similarly situated” limitation on “real differences” reasoning ought to generally benefit transgender plaintiffs. For example, to the extent the government seeks to justify sex separation in prisons by arguing that it promotes safety and prevents sexual assault of female inmates, transgender women will generally be “similarly situated” with respect to those government interests.\textsuperscript{410} Thus, the very reason behind the “similarly situated” limitation on the “real differences” case law—to prevent “real differences” justifications from devolving into gender stereotypes—is centrally implicated to the extent defendants in transgender constitutional law cases attempt to invoke the “real differences” framework.

\textsuperscript{406} As Naomi Schoenbaum has recently observed, it is unclear whether the “real differences” approach is (or ever really was) a meaningful limitation on where sex classifications will be found to be unconstitutional. \textit{See} Schoenbaum, \textit{supra} note 4, at 30-38 (“From [the early 1980s], every equal protection challenge to a sex classification the Court considered was defended on the ground of biology, and all but one such challenged classification was struck down.”) Thus, it may also be worthwhile for litigators to more fundamentally challenge the underlying vitality of this line of argument. \textit{Cf. id.} at 55-58 (discussing the implications of an approach to sex that is decoupled from biology for LGBTQ rights). My discussion of the potential salience of “similarly situated” arguments to the “real differences” set of cases obviously depends on the courts’ continuing to view this body of cases as viable.

\textsuperscript{407} \textit{See}, e.g., Tuan Anh Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 60-70 (2001) (“Fathers and mothers are not similarly situated with regard to the proof of biological parenthood.”).

\textsuperscript{408} \textit{See} Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692 n.12 (2017) (“[L]aws treating fathers and mothers differently may not be constitutionally applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child.” (quoting Lehr v. Robertson, 463 U.S. 248, 267 (1983))); \textit{see also} Reed v. Reed, 404 U.S. 71, 77 (1971).

\textsuperscript{409} \textit{See}, e.g., Levi & Barry, \textit{supra} note 4, at 139-40. It should be noted that a number of scholars have questioned whether sex-separation is in fact required to fulfill these interests across a number of the contexts in which sex-separation remains pervasive. \textit{See}, e.g., Clarke, \textit{supra} note 394, at 981-86; Laura Portuondo, \textit{The Overdue Case Against Sex-Segregated Bathrooms}, 29 YALÉ J.L. & FEMINISM 405, 499-514 (2018).
Though the role for “similarly situated” inquiries is less well established in the rational basis context, some modern Supreme Court cases also suggest that where an individual is “similarly situated” with respect to government interests implicated by a classification, they may not arbitrarily be treated differently—even on rational basis review.\(^\text{411}\) This role for “similarly situated” is in some tension with more deferential versions of rational basis review that the Supreme Court has employed, insofar as it suggests that government must have some factually justifiable basis for disparate treatment, even in the context of minimum tier scrutiny.\(^\text{412}\) Nevertheless, it too ought to generally benefit transgender plaintiffs, in those contexts where courts have decided to rely on rational basis review, rather than some form of heightened scrutiny.\(^\text{413}\) This is because, as noted above, transgender plaintiffs are often similarly situated with respect to the interests that government seeks to advance in contexts where it engages in anti-transgender discrimination.

Finally, in addition to these two potential back-end roles for the similarly situated inquiry—making clear that where individuals are in fact similarly situated with respect to government interests, they may not be treated differently on any level of review—there is another, very different, front-end role that similarly situated inquiries can play. Specifically, where group-based disparate treatment is not explicit or admitted, there may be a need to prove disparate treatment based on protected class status through other evidentiary means—even before the level of scrutiny can be ascertained.\(^\text{414}\) In this context, similarly situated comparators are well-established as a valuable form of evidence of disparate treatment—though they are only one of many types of evidence that can potentially be probative of group-based discrimination.\(^\text{415}\) Importantly, this front-end role should be irrelevant in most contemporary


\(^{412}\) Cf. Fed. Commc’ns Comm. v. Beach Commc’ns, 508 U.S. 307, 313 (1993) (“[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

\(^{413}\) As noted supra Section I.B, courts relied on heightened scrutiny in the vast majority of cases.

\(^{414}\) In cases where discrimination is explicit or admitted, there is no need to establish disparate treatment separately. Rather, one simply proceeds directly to whether the classification is justified under the applicable level of scrutiny. See, e.g., Loving v. Virginia, 388 U.S. 1, 8 (1967); United States v. Virginia, 518 U.S. 515, 531-33 (1996); Romer v. Evans, 517 U.S. 620, 631-32 (1996).

\(^{415}\) See, e.g., Suzanne B. Goldberg, Discrimination by Comparison, 120 YALE L.J. 728, 745-50 (2011). It is important to note that while lower courts do sometimes treat similarly situated comparators as if they played a talismanic role in this context, this is no doubt erroneous. See Eyer, The But-For Theory of Anti-Discrimination Law, supra note 149, at 1657-60.
transgender constitutional law cases, which tend to involve explicit classifications based on sex and/or transgender status—though it may play a role in the more limited number of covert discrimination cases.

There thus are limited ways that a “similarly situated” inquiry could be relevant to some transgender constitutional law cases, but it should rarely occupy a central role. Yet none of these doctrinally justified roles for “similarly situated” inquiries actually represent the primary way that the “similarly situated” construct was utilized in study cases. Rather, much as Giovanna Shay observed in the context of the earlier same-sex marriage cases, many state and lower courts in the transgender constitutional law cases appear to be deploying the “similarly situated” construct as a threshold requirement for stating an equal protection claim.416 This is undoubtedly incorrect, and has no grounding in modern equal protection doctrine.417 Indeed, many modern equal protection cases—at all levels of scrutiny—have been won without any reference to a “similarly situated” showing at all.418 In particular, where group-based classifications appear on the face of the statute or otherwise amply proven—as they were in the vast majority of the study cases—a frontend “similarly situated” inquiry is wholly superfluous.419

Study cases thus appear to be simply wrong in essentializing the role of frontend “similarly situated” inquiries as if they were a separate threshold requirement for an equal protection claim to proceed. While transgender plaintiffs have won the vast majority of even those cases where a threshold “similarly situated” requirement was applied—proving to the court’s satisfaction that they were “similarly situated” to the group that the court deemed appropriate—allowing such an additional requirement to proliferate


417 See, e.g., Shay, supra note 398, at 598 (thoroughly canvassing the use of “similarly situated” in the Supreme Court’s equal protection caselaw and observing that “[t]hroughout all this time, [similarly situated] has never been viewed by the U.S. Supreme Court as a threshold hurdle to obtaining equal protection review on the merits”).

418 See, e.g., Loving v. Virginia, 388 U.S. 1, 8 (1967) (applying strict scrutiny to a race classification, and invalidating the classification, without a similarly situated inquiry); United States v. Virginia, 518 U.S. 515, 531-33 (1996) (applying intermediate scrutiny to a sex classification, and invalidating the classification, without a similarly situated inquiry); Romer v. Evans, 517 U.S. 620, 631-32 (1996) (applying rational basis review to a sexual orientation classification, and invalidating the classification, without a similarly situated inquiry); Gratz v. Bollinger, 539 U.S. 244, 268-75 (2003) (applying strict scrutiny to a race classification, and invalidating the classification, without a similarly situated inquiry).

419 See sources cited supra note 418; see also Shay, supra note 398, at 588 (“[P]roperly understood, ‘similarly situated’ is not a threshold hurdle to equal protection analysis on the merits in cases involving facial classifications.”).
in the case law holds real risks. Most obviously, it provides another extraneous hurdle for a plaintiff to jump over, and thus another opportunity for an unsympathetic judge to rule against the plaintiff. It thus may be important for the movement to develop its own clear theory of where such “similarly situated” inquiries are appropriate, and to do their best to encourage courts to limit their use of the construct to those contexts.

Of course, the movement may be constrained in its ability to do this by the diversity of approaches that different circuits and states take to the issue of where “similarly situated” inquiries are appropriate. It appears that several states and circuits have deviated from the Supreme Court’s own approach on this issue in ways that unnecessarily complicate the equal protection analysis and may even conflict with the inquiries that the courts are supposed to undertake. But at a minimum, movement litigators can and should ensure that the issue is framed correctly from the start of their cases, so as to attempt to persuade the courts and preserve arguments for any cases that may go up on appeal.

E. Where are the State Court Cases, and Should There Be More?

One of the surprising findings of this study was the relative paucity of state court cases bringing transgender constitutional rights claims. In total, there were only six state court cases identified that met the study criteria during the whole of the five-year period, and only a few more that raised state constitutional claims in federal court. Given the long and successful history of the LGBTQ rights movement in raising state constitutional claims in state court, it was surprising to find so few state constitutional claims.

This overwhelming tendency of movement litigators to currently file in federal court may be justified, as I explore herein. But this Section also poses the question of whether the current moment may provide a time to reevaluate this strategy and to perhaps strike more of a balance between federal and state court litigation. As I describe below, there are reasons to think that the federal courts may in the short to medium term become at least somewhat less favorable to civil rights claims of all kinds, and especially substantive due process claims. Given this fact, it may be worth diversifying the fora in which transgender constitutional rights claims are being brought.

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420 See sources cited supra note 416.
421 Shay, supra note 398, at 592-93.
422 See Appendix B.
Why might it be that movement litigators are bringing cases so consistently in federal court? One obvious reason is that such litigators are currently winning in federal court (as observed above, at overwhelmingly high levels during the study period), so there is no reason to contemplate state court. Federal court litigation is generally (all other things being equal) preferred by civil rights litigators because federal courts provide a potentially broader impact, allow for greater systemic capacity and procedural regularity (especially in complex cases at the trial level), and insulate judges with life-tenure.424

Thus, there may be good reasons why LGBTQ rights litigators are consistently choosing federal fora in current transgender constitutional litigation. Nevertheless, this Section raises the question of whether it may be worth devoting movement resources to developing a state constitutional jurisprudence of transgender liberty and equality. There are currently very real reasons to worry that there will, at a minimum, be a retrenchment in the willingness of the lower federal courts to recognize new substantive due process rights after Dobbs; in contrast, state courts have shown themselves to be willing to develop a substantive due process jurisprudence independent of the Supreme Court.425 Persuading even one or two state Supreme Courts to recognize a fundamental right of gender autonomy under their state constitutions would be significant in and of itself, and could offer a doctrinal roadmap for a future return to the federal courts. Indeed, the example of state court cases like Kentucky v. Wasson and Goodridge v. Department of Public Health show that initial successes in the state courts can pave the way to important movement victories nationwide.426

424 See, e.g., Michael T. Morley, Litigating Imperfect Solutions: State Constitutional Claims in Federal Court, 35 CONST. COMMENT. 401, 417-18 (2020) ("[M]any public interest organizations that bring constitutional challenges would often prefer to generate favorable precedents in federal courts of appeals or the Supreme Court under the federal Constitution, because they would be much more widely applicable than a state supreme court's ruling."); Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1120, 1122-23, 1127-28 (1977) (discussing the factors that may make federal courts institutionally preferable from the perspective of civil rights and civil liberties litigators); cf. William Rubenstein, The Myth of Superiority, 16 CONST. COMMENT. 599, 599-600 (1999) (recognizing the conventional preference to file public interest claims in federal court, but complicating it based on the success of the LGBTQ rights movement in state courts).


Moreover, given the large number of federal judges appointed by former President Trump, and the fact that some of those judges had explicitly anti-LGBTQ backgrounds before they came to the bench, there are reasons to be concerned that the federal courts may become less receptive to the claims of transgender plaintiffs, at least temporarily.427 Turning to state constitutions and state court to continue to build doctrinal and practical success is a tried and true strategy of the movement in such circumstances. While it seems unlikely that the federal courts will wholly change direction in the area of transgender rights, the risk of retrenchment suggests that an increased focus on state constitutions to ensure a diversity of avenues for the growth of transgender constitutional rights may be advisable.

F. Are Political Solutions to Ongoing Unconstitutional Conduct Needed?

As described in Part I, transgender litigants have been enormously successful over the last five years in their constitutional law claims. Nevertheless, there is currently a wave of anti-transgender legislation sweeping the nation—much of which seems likely to be patently unconstitutional.428 Thus, it appears that constitutional rulings in the courts have not necessarily translated into the type of lived equality and liberty for the transgender community that movement litigators presumably are trying to achieve. This Section takes up the question of whether it will be necessary to involve the federal political branches in addressing ongoing unconstitutional conduct against the transgender community.

It is important to observe as an initial matter that it is possible that existing constitutional law victories for transgender rights are playing some role in deterring the actual enactment of unconstitutional state laws. There are far more anti-transgender state bills pending across the United States than have actually been enacted (or show any realistic possibility of enactment), and one factor that may be responsible for this is the perception that these
laws would be unconstitutional. Nevertheless, it is clear that such “constitutional deterrence” is not nearly at the level that the movement might desire or expect, given the consistent trend of victories for transgender litigants in constitutional litigation in recent years.

This problem of inadequate constitutional deterrence is of course not a new one—the most prominent historical example being the wave of unconstitutional state laws enacted in the aftermath of Brown v. Board of Education. As such laws demonstrated, states can do much to practically frustrate the lived reality of nominal constitutional rights, simply by continuing to enact unconstitutional legislation and profiting from the inherent delays of litigation. Indeed, it is widely accepted that meaningful desegregation under Brown did not occur until the enactment of Title VI of the Civil Rights Act of 1964 and the institution of aggressive enforcement efforts by the Department of Justice, because of this practical problem with private litigation-focused solutions.

Today, the time may have come to once again question whether the participation of the federal political branches is important to ensuring that the transgender community actually experiences the benefits of the constitutional victories that they are currently securing in the courts. States can and have continued to harass and demean the transgender community through successive anti-transgender laws, at times targeting the very issues on which states have already lost in court. Moreover, as observed above, some states appear to be poised to adopt state laws structured to make them deliberately difficult to challenge under federal courts doctrines. As in the civil rights era, meaningful equality and liberty for the transgender community may only be possible with the participation of the federal political branches.

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429 See sources cited supra note 378.
430 See supra Section I.A.
434 See, e.g., F.V. v. Barron, 477 F. Supp. 3d 1131, 1144-46 (D. Idaho 2020) (holding that the Barron defendants remained bound by the permanent injunction in Barron and thus could not comply with the new Idaho law seeking to reinstate pre-Barron law without violating the injunction).
435 See generally Legislative Tracker: Anti-Transgender Legislation, supra note 13 (listing pending anti-transgender legislation nationwide).
436 Even then, it is of course important to note that the existence of rights—even ones supported by federal enforcement—does not necessarily translate into lived equality or the ability
Fortunately, there are signs that the executive branch may be willing to initiate constitutional enforcement efforts to support those of movement litigators, although that support has waxed and waned by administration. Thus, for example, the Obama-era Justice Department expressed its strong support for transgender constitutional rights on the same day that it filed suit challenging North Carolina’s so-called bathroom bill.437 In contrast, the Trump administration was actively hostile to transgender rights, and found itself the subject of constitutional challenges for its discriminatory policies.438

But with the return of a Democratic administration, support for transgender constitutional rights has again been on the rise within the Department of Justice. On March 31, 2022, the Biden Justice Department sent a letter to state attorneys general specifically advising them of the Department’s view that discrimination against the transgender community—as discrimination based on sex—triggers intermediate scrutiny under the Equal Protection Clause. The letter also explicitly warned state attorneys general that “[i]ntentionally erecting discriminatory barriers to prevent individuals from receiving gender-affirming care implicates a number of federal legal guarantees.”439 Finally, on April 29, 2022, just after the study period, the Justice Department filed a constitutional lawsuit challenging Alabama S.B. 184, which makes it a felony for any person to “engage in or cause” certain types of medical care for transgender youth.440

Ultimately, the legislative enactment of a version of the Equality Act that includes government services, and/or a separate statute that ties federal funding to LGBTQ anti-discrimination guarantees (as Title VI does for race) seems likely to be important to truly deterring states from continuing to enact

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437 See CURRAH, supra note 102, at 62.
438 Most infamously, former President Trump banned transgender servicemembers from the military by tweet, an action that was subsequently challenged in multiple constitutional lawsuits, and that was ultimately repealed by the Biden administration. See Timeline, GLAD LEGAL ADVOCATES & DEFNS. & NAT’L CTR. FOR LESBIAN RTS., https://notransmilitaryban.org/timeline [https://perma.cc/4YEQ-H94Q].
unconstitutional trans-discriminatory legislation. While such federal legislation may not be possible in the current political landscape, it seems likely to be an important component of clearly delineating transgender rights, and providing real penalties for such violations. Of course, the willingness of the federal government to actually withdraw funding in cases of a violation may temper how effective legislation tying non-discriminatory conduct to federal funding would be. Regardless, in the meantime, more targeted laws such as Title VII, Title IX and Section 1557 of the Affordable Care Act, which prohibit sex discrimination in particular contexts where state government actors may act, can provide (and indeed are already providing) legislative support for constitutional litigation efforts in some contexts.

Ultimately it is of course not within the control of the movement whether the federal political branches step up to address the continuing onslaught of anti-transgender legislation. But the movement can decide to devote greater or lesser resources to things like lobbying, get out the vote, and other forms of political advocacy, and individual movement participants can decide whether to prioritize government service at this time. The continued wave of anti-transgender legislation suggests that the movement may need allies in the federal political branches in order to quell the continuing onslaught on transgender rights.

IV. THE FUTURE OF TRANSGENDER CONSTITUTIONAL LAW

What do the five years of cases studied here portend for the future of transgender constitutional law? This is the most important, but arguably most difficult question to arise from the instant study. This Part contends that while the future of transgender constitutional law is ultimately not wholly knowable, the study cases described herein—as well as the more limited case law post-dating the study’s conclusion—suggest that the constitutional tide

441 The Equality Act is the current version of legislation that would add explicit protections against sexual orientation and gender identity discrimination to federal statutory law. The current version would, among other things, amend Title VI of the Civil Rights Act of 1964 to include sex (and sexual orientation and gender identity) as groups that entities receiving federal funding are prohibited from discriminating against. See Equality Act, 117 H.R. 5, 117th Cong. (2021). On the importance of Title VI to addressing unconstitutional laws in the wake of Brown, see sources cited supra note 433 and accompanying text.

442 See supra note 433 and accompanying text.

443 See, e.g., Eloise Passachoff, Agency Enforcement of Spending Clause Statutes: A Defense of Funding Cut-off, 124 YALE L.J. 248, 260 (2014) ("[A]n increased willingness to [withhold federal funds] could lead to more compliance.").

444 See, e.g., Title VII, 42 U.S.C. § 2000e-2(a) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin); Title IX, 20 U.S.C. § 1681 (prohibiting sex discrimination in education programs receiving federal funding); Affordable Care Act § 1557, 42 U.S.C. § 18116 (prohibiting sex discrimination in federally funded health programs).
has turned for the transgender community. Thus, while it is likely that the future will bring some constitutional losses for the transgender community, it also seems highly likely that most courts—including ultimately the Supreme Court—will find that the transgender community warrants meaningful protections as constitutional subjects.

The most obvious support for this conclusion comes from the study cases themselves. Across dozens of cases, in every part of the country, judges in the study consistently ruled in favor of transgender constitutional rights. This was true for both equal protection and due process claims, and across judges appointed by presidents of all political parties. It was true across nearly every subject area, including school restroom access, medical coverage bans, transgender athlete bans, access to identity documents, and government employment discrimination.

Thus, while there were limited losses for transgender plaintiffs in the study cases—including most notably where those plaintiffs faced covert discrimination, or where courts adjudicated federal courts defenses—courts from 2017 to 2021 overwhelming endorsed the idea that the discrimination against the transgender community is presumptively constitutionally invalid. If "past is prologue," the past described here seems to inescapably lead to the conclusion that meaningful constitutional protections for the transgender community have arrived, at least in the lower federal courts.

Developments during the thirteen months since the study’s endpoint (January 2022 to January 2023) also generally provide cause for optimism for transgender rights—though not as overwhelmingly as the study cases themselves. In 2022 to 2023, new restrictions in Texas and Alabama on gender-affirming care for youth were quickly enjoined on constitutional grounds at the trial court level, including in one instance by an appointee of former President Donald Trump. The Eighth Circuit affirmed the grant of

445 See supra Part I.
446 See supra Part I.
447 See supra Part I.
448 Id.
449 WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1, l. 986.
450 In order to ascertain any potential changes in the direction of the federal courts, I replicated the study search for the time from the start of 2022 until the date of the most recent revision, January 31, 2023.
a preliminary injunction on equal protection grounds in relation to Arkansas’s ban on gender-affirming care for youth.\textsuperscript{452} A fully Republican-appointed panel of the Ninth Circuit (including one Trump appointee) chastised a district court for its “narrow” reading of \textit{Bostock} and its implications for the plaintiffs’ equal protection rights, while sending the case back for further proceedings.\textsuperscript{453} The Fourth Circuit strongly intimated that it would violate the Equal Protection Clause to exclude gender dysphoria-based disabilities from the Americans with Disabilities Act of 1990.\textsuperscript{454} And most other courts have continued to, as during the study period, hold for transgender plaintiffs on their constitutional arguments.\textsuperscript{455}

\textsuperscript{452} See Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022).

\textsuperscript{453} See Doe v. Snyder, 28 F.4th 103, 113-14 (9th Cir. 2022).

\textsuperscript{454} See Williams v. Kincaid, 45 F.4th 759, 772 (4th Cir. 2022), reh'g denied en banc, 50 F.4th 429 (4th Cir.).

\textsuperscript{455} \textit{See}, e.g., Grimes v. Cnty. of Cook, No. 19-C-6091, 2022 WL 1641887, at *4-6 (N.D. Ill. May 24, 2022) (holding that the plaintiff’s due process right of informational privacy claim was cognizable and survived summary judgment, including as against a qualified immunity challenge); Kadel v. Folwell, No. 1:19-CV-272, 2022 WL 3326731, at *22-24, *31 (M.D.N.C. Aug. 10, 2022) (granting summary judgment and a permanent injunction to the plaintiffs on their equal protection claim, finding that anti-transgender discrimination was sex discrimination and subject to heightened scrutiny in its own right, and concluding that heightened scrutiny was not met); L.O.K. \textit{ex rel}. Kelsey v. Greater Albany Pub. Sch. Dist. 8J, No. 6:20-cv-00529, 2022 WL 2341855, at *13-14 (D. Or. June 28, 2022) (denying qualified immunity on the plaintiff’s equal protection claim, in a case where a school district allegedly did not respond to the harassment of a non-binary intersex student, though granting summary judgment on a \textit{Monell} claim); Fain v. Crouch, No. 3:20-0740, 2022 WL 3051015, at *5-6, *14 (S.D. W. Va. Aug. 2, 2022) (applying intermediate scrutiny to the plaintiffs’ equal protection claim, awarding summary judgment to plaintiffs and entering a permanent injunction); Meints v. City of Wymore, No. 4:21-CV-3090, 2022 WL 3088556, at *7, *10 (D. Neb. Aug. 3, 2022) (denying a motion to dismiss the plaintiffs’ equal protection claim based on qualified immunity on the grounds that the right to be free from sexual harassment was clearly established); Beard v. Falkenrath, No. 21-CV-04211, 2022 WL 3159277, at *1, *3 (W.D. Mo. Aug. 8, 2022) (denying motion to dismiss plaintiff’s equal protection claim); Doe v. Pa. Dept' of Corrs., No. 4:19-CV-01584, 2022 WL 3219952, at *5, *11 (M.D. Pa. Aug. 9, 2022) (denying the defendants’ motion for summary judgment but allowing the plaintiff’s hostile work environment and constructive discharge equal protection claims to go to trial in an employment discrimination case); Brown v. Chi. Transit Auth., No. 12-C-675, 2022 WL 16856400, at *7 (N.D. Ill. Nov. 10, 2022) (denying the defendants’ motion to dismiss on \textit{Monell} liability); A.C. v. Metro. Sch. Dist. of Martinsville, No. 1:21-cv-02965, 2022 WL 1289352, at *1 (S.D. Ind. Apr. 29, 2022) (granting a preliminary injunction based on the plaintiff’s equal protection claims in a case involving gender-identity appropriate restroom access); Smith v. Diaz, No. 20-CV-04335, 2022 WL 827644, at *1, *4 (N.D. Cal. Mar. 18, 2022) (denying a motion to dismiss an incarcerated trans plaintiff’s procedural due process claim); Hundley v. Aranas, No. 21-15757, 2023 WL 1664241, at *1-2 (9th Cir. Jan. 12, 2023) (reversing § 1983 dismissal of transgender prisoner’s claims because the denial of female undergarments to a transgender woman because she is a transgender woman “is a violation of her Fourteenth Amendment right to equal protection”); \textit{see also} Lange v. Houston Cnty., No. 5:19-cv-392, 2022 WL 1812306, at *8 n.8, *9 (M.D.
But transgender constitutional law decisions from January 2022 to January 2023 also raised potential signs of concern from the perspective of transgender rights. Most notably, several opinions rejected transgender litigants’ equal protection claims in the context of sex-segregated institutions (like restrooms or athletics), reasoning that such sex-segregation is generally capable of surviving intermediate scrutiny, and that nothing further is required.\footnote{456} Moreover, the fallacious argument that \textit{Geduldig v. Aiello} means that anti-transgender discrimination cannot be recognized by the courts was embraced for the first time in a Circuit opinion during the post-study period.\footnote{457} While the reasoning underlying these holdings appears to be erroneous, for reasons set out more fully \textit{supra}, it nonetheless suggests that transgender constitutional rights victories may not be fully secure.\footnote{458} While it remains to be seen whether these opinions represent the beginning of a counterright, or simply a few idiosyncratic losses, it is important to note that they color the study’s otherwise optimistic assessment of the future prospects for transgender constitutional rights.

On the other hand, it is also important not to make too much of a small handful of cases, only one of which was decided at the circuit level. The overall thrust of the post-study cases remained overwhelmingly favorable to transgender litigants, even given the transition of the federal courts towards a significantly greater representation of Trump-appointed judges during this time frame.\footnote{459} And most losses (aside from those described \textit{supra}), remained


\footnote{457}{\textit{Adams}, 57 F.4th at 809.}

\footnote{458}{For further discussion of why an as applied approach should be fully cognizable under the Equal Protection Clause, and thus the reasoning of the cases cited \textit{supra} note 456 is erroneous, see \textit{supra} notes 125–136 and accompanying text. For a discussion of why arguments based on Geduldig ought to fail in the transgender rights context, see notes 241–244 and accompanying text as well as Eyer, \textit{Transgender Equality and Geduldig 2.0, supra} note 142.}

\footnote{459}{\textit{See supra} notes 451–455 and accompanying text.}
clustered around less substantive grounds, such as failure to satisfy the requisites of qualified immunity, or a failure on the facts to plead or prove discrimination.\textsuperscript{460}

Finally, as described \textit{supra} in Sections I.B and I.C, doctrine itself strongly supports the claims of future transgender constitutional plaintiffs. Taking seriously the criteria that the Supreme Court has said should decide what groups are entitled to suspect or quasi-suspect class status (history of discrimination, immutability/distinguishing characteristics, political powerlessness, lack of relationship to ability to contribute), discrimination against transgender people should clearly qualify for heightened scrutiny.\textsuperscript{461} Sex discrimination arguments for heightened scrutiny are also exceptionally strong, and have long been supported by the overwhelming trend of authority in the lower courts—even prior to the Supreme Court’s ruling in \textit{Bostock v. Clayton County}.\textsuperscript{462} And many of the recently enacted (and proposed) anti-transgender laws lack even a rational basis, as their purported legitimate justifications are often utterly spurious, with the real justifications for the laws residing in anti-transgender stereotypes and bias.\textsuperscript{463}

\textsuperscript{460} See, e.g., Doe v. Gray, No. 3:20-cv-129, 2022 WL 602919, at *5 (N.D. Ind. Mar. 1, 2022) (granting qualified immunity at summary judgment in a due process informational privacy case because, although case law generally recognized the right of informational privacy, there was no case law addressing the specific circumstances of the case); Dana v. Tewalt, No. 1:18-cv-00298, 2020 WL 3598311, at *14, *21 (D. Idaho Apr. 1, 2020) (granting the defendant’s motion to dismiss without leave to amend based on impermissible “group” pleading and failure to show any defendants intentionally discriminated); Sunshine v. Jividen, No. 1:18-cv-00298, 2022 WL 3367533, at *1, *6 (S.D. W. Va. July 25, 2022) (recommending denial of an incarcerated plaintiff’s pro se motion for a preliminary injunction based on an equal protection claim because mere verbal harassment is insufficient to make out a claim), rep. & recommendation adopted, 2022 WL 3365071 (S.D. W. Va. Aug. 15, 2022); Minor v. Dilks, No. 19-18261, 2022 WL 32657970, at *5-6 (D.N.J. Aug. 6, 2022) (granting defendants’ motion to dismiss plaintiff’s due process claim based on qualified immunity and equal protection claim based on failure to show a similarly situated comparator); Grace v. Bd. of Trs., No. 19-10930, 2022 WL 3754756, at *2, *16 (D. Mass. Aug. 30, 2022) (awarding summary judgment to defendants on the plaintiff’s equal protection claim because the plaintiff did not show that he was treated differently than others similarly situated and because the plaintiff failed to prove a basis for \textit{Monell} liability); Diamond v. Smith, No. 5:21-cv-378, 2022 WL 4607733, at *7 (M.D. Ga. Sept. 7, 2022) (granting summary judgment on an individual defendant’s motion for summary judgment on plaintiff’s right to privacy claim based on qualified immunity); People v. Zarazua, 301 Cal. Rptr. 3d 434 (Cal. Ct. App. 2022) (finding that misgendering was harmless error in the context of the case and did not deprive transgender criminal defendant of their right to due process); Hunter v. U.S. Dep’t of Educ., No. 6:21-cv-0474, 2023 WL 172199, *10-12 (D. Or. Jan. 12, 2023) (rejecting LGBTQ plaintiffs’ equal protection challenge to Title IX’s exemption for religious institutions on the grounds that they had not shown discriminatory intent in the enactment of the exemption and rejecting due process claim for failure to adequately plead and argue it).

\textsuperscript{461} See \textit{supra} subsection I.B.1.

\textsuperscript{462} See \textit{supra} subsection I.B.2.

\textsuperscript{463} See \textit{supra} subsection I.B.3. I focus here on equal protection doctrine. As I observe \textit{supra} Section I.C, current doctrine also, although less consistently and clearly, supports the due process claims of members of the transgender community.
But what of the Supreme Court? Conventional wisdom is that the Supreme Court currently has an “ironclad 6–3 supermajority made up of more conservative justices.” For those who believe strongly in legal realism and the political polarization of the federal courts, this may seem to be bad news indeed for transgender constitutional rights. For if we assume that all six Republican-appointed justices will be inclined to vote against transgender rights when this issue arises, advocates will be left in the unenviable position of having to attract not only one, but two votes away from the conservative block. Moreover, commentators have observed that the current Court appears eager to “flex its muscle” by taking up controversial political issues, which might suggest that the court will soon take up and decide transgender constitutional rights issues.

But there are reasons to believe that the potential threat of Supreme Court intervention is neither so clearly imminent, nor so obviously adverse in its likely outcome as the above account might suggest. As an initial matter, it is not clear that the Supreme Court wishes to take up the issue of transgender constitutional rights at this moment. Indeed, the Supreme Court has had several opportunities to grant certiorari review over the last several years, and it has declined to do so. Moreover, if the Court’s approach to the LGB community is any indication, even if it ultimately grants certiorari review in a transgender constitutional law case, it may leave unresolved as many issues as it decides.

There are also reasons to be skeptical that the Court as currently comprised—even with six Republican appointees—would be as decisively unfavorable to transgender constitutional rights as some commentators seem to assume. Four of the current Justices voted in Bostock that anti-transgender discrimination is necessarily sex discrimination—and newly-appointed Justice Brown Jackson seems most likely to join that group if faced with the question of whether anti-transgender discrimination is constitutional sex discrimination. While Bostock was a statutory opinion, relying on the

466 See infra notes 467–468 and accompanying text.
467 See sources cited supra note 29.
468 See sources cited supra note 267.
specific language of Title VII, its basic principles seem highly likely to extend to the constitutional context, as most lower court judges have found.\textsuperscript{470}

And while we have less clear indications of the likely outcome of other possible grounds on which the Supreme Court might be called upon to rule (except due process claims, which seem most profitably pursued at this juncture in the state courts under state constitutions), it is important to note that the same basic factors that likely have led to the lower courts ruling consistently in favor of transgender litigants will also extend to the Supreme Court. Existing doctrine strongly supports the claims of transgender plaintiffs in most of their constitutional challenges.\textsuperscript{471} And such claims are no longer “off the wall” such that judges (or Supreme Court justices) can reject them out of hand.\textsuperscript{472} Instead, judges must in the current constitutional culture, afford them real, substantive consideration.\textsuperscript{473} And faced with such a

\textsuperscript{470} See sources cited supra note 153; cf. Bostock, 140 S. Ct. at 1783 (Alito, J., dissenting) (predicting that the lower courts will rely on the Bostock opinion to find that anti-LGBTQ discrimination is sex discrimination in the constitutional context). Prior to Bostock, the Supreme Court had already held that the core language of Title VII, “because of . . . [protected class status]” connotes but-for causation, meaning that the statute is violated where an individual would have been treated differently but-for their protected class status. See, e.g., City of Los Angeles v. Manhart, 435 U.S. 702, 708-11 (1978); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176-77 (2009); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350-52 (2013). In Bostock, the Supreme Court recognized that it is impossible to discriminate on the basis of sexual orientation or gender identity without acting but-for sex. See Bostock, 140 S. Ct. at 1738-43. Thus, for example, a transgender man who is fired for identifying as a man would not have been fired if his employer perceived him as a man (instead of a woman), or if he were assigned the male sex at birth (instead of female).

While Bostock’s reasoning was tied to the statutory language of Title VII, there are good reasons to think it also is likely applicable to the context of the Equal Protection Clause. As an initial matter, the Court has already held that Section 1981—which the Court typically construes as coextensive with the Fourteenth Amendment Equal Protection Clause—also includes the but-for principle. See Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013-19 (2020). Moreover, the Court typically construes disparate treatment principles comparably across the statutory and constitutional contexts, unless there is a clear reason for differentiation. See, e.g., Richard Primus, The Future of Disparate Impact, 108 MICH. L. REV. 1341, 1354-55 (2010). Finally, there is language in the Comcast opinion which suggests that where the Court itself has used the term “because of” to describe causation standards in its opinions, this connotes but-for causation. See Comcast, 140 S. Ct. at 1016-17. If this is true, there is ample equal protection precedent that also makes clear that the but-for principle extends to the equal protection context. See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227, 235 (1995); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). For a longer discussion of the reasons why the “but-for” principle seems likely to be extended to the constitutional context, see Eyer, The But-For Theory, supra note 149, at 1650-53.

\textsuperscript{471} See supra notes 461-463 and accompanying text.

\textsuperscript{472} Cf. Balkin, supra note 181, 1445-47 (explaining the meaning of the "off the wall"—"on the wall" paradigm in law).

\textsuperscript{473} See, e.g., Eyer, Lower Court Popular Constitutionalism, supra note 261, at 208-14 (describing how judges engaging meaningfully with the issue of protected class status for gays and lesbians shifted the trajectory of case law in that area).
meaningful inquiry, it is hard to deny the entitlement of the transgender community to constitutional protections.474

Of course, there are both more and less sympathetic contexts in which transgender equal protection and due process rights could come up to the Court. As several of the post-study cases rejecting transgender plaintiffs’ equal protection claims suggest, arenas in which sex segregation is widely viewed as permissible may be less favorable terrain for disputes over transgender equality rights (though again, many of cases arising in these contexts also prevailed in the study sample).475 In particular, disputes over gender-identity-related restroom access appear to remain highly politically polarized at the appellate level—something that could bode poorly for the resolution of such issues at the current Supreme Court, where the majority of justices are Republican-appointed.476

It is also of course the case that the constitutional culture around transgender rights could always shift again in a different direction. Especially if we see major changes in the trajectory of the transgender rights movement—or the backlash movement—in winning public support, it is certainly possible that this could impact adversely the ultimate resolution of transgender constitutional rights at the Supreme Court. But such an outcome seems fairly unlikely, especially as more and more transgender people come out to their friends, their family members, their coworkers, and their neighbors.477 The law is on the side of the transgender community. And so is time.

It thus seems likely that the Supreme Court will eventually rule in favor of transgender constitutional rights. But until it takes up the issue, the law of the lower federal and state courts will remain the law of transgender constitutional rights. And, as the study conducted herein makes clear, the law of the lower federal and state courts is at this time highly supportive of transgender equality and liberty rights. Thus, the future of transgender constitutional rights, while still unfinished and uncertain, currently leans toward forward progress.

474 See supra notes 461–463 and accompanying text.
475 See sources cited supra note 456.
476 See Rothschild, supra note 305, at 1130 n. 343.
477 See, e.g., Gregory M. Herek, Sexual Prejudice, in HANDBOOK OF PREJUDICE, STEREOTYPING & DISCRIMINATION 441, 458 (Todd D. Nelson ed. 2009) (explaining that close personal relationships with openly lesbian, gay, or bisexual individuals can reduce sexual orientation-based prejudice); Thomas F. Pettigrew & Linda R. Tropp, A Meta-Analytic Test of Intergroup Contact Theory, 90 J. PERSONALITY & SOC. PSYCH. 751, 763, 766 (2006) (finding that intergroup contact is associated with lower levels of prejudice).
CONCLUSION

At a time when many are despairing of the future of U.S. constitutional law, the transgender constitutional law cases studied herein provide an important reminder: taken seriously, existing constitutional doctrine still favors equality and liberty rights. And while the Supreme Court may not always take doctrine seriously, the lower federal and state courts most often do. Just as the “deep state” has proven resistant to sharp and politically motivated shifts in the execution of the law, the lower federal and state judiciaries provide innumerable sites within which liberty and equality norms can continue to flourish today—even as aspects of constitutional doctrine face retrenchment at the Supreme Court level.478

But when juxtaposed against the current political landscape, study cases also remind us that even assuredly unconstitutional laws can do real harm. Currently, transgender people, and especially transgender youth, have become the favorite objects of political attack across many state legislatures in the United States.479 The cases studied here suggest that many of these laws are likely to be eventually found unconstitutional. But this has not prevented the states from continuing—and even escalating—their attacks on the transgender community.

The transgender constitutional cases described in this Article are thus a reminder of both the power and the limits of constitutional law. Constitutional law can provide a powerful vehicle for both legal and social change—but it is also ultimately incapable of generating lived equality on its own. For the transgender community today, constitutional victories are an important part of the work of building a society in which transgender lives are fully valued and respected—but they are just one small part of the work that remains.

479 See sources cited supra note 13.
APPENDIX A: STUDY METHODOLOGY AND LIMITATIONS

This study provides a comprehensive survey of transgender constitutional law decisions arising under the Equal Protection and/or Due Process Clauses of the federal Constitution (under the Fifth and Fourteenth Amendments) and their state counterparts over the last five years (from 2017 to 2021). Note that although I refer to success rates and other descriptive statistics in my discussion, this study is qualitative in nature, and I do not make claims about statistical significance. Below, the study methodology is elaborated as well as limitations of the study.

I. STUDY METHODOLOGY

A. Initial Search and Criteria for Case Inclusion

The initial search performed to produce possible results was as follows:

In All State & Federal Databases on Westlaw:


This search produced 804 results. These results were then sorted with the following opinions excluded:

- Opinions unrelated to transgender constitutional law, either because they did not address the rights of the transgender community, or because they did not include constitutional law claims. These opinions were excluded because they did not meet the primary study criteria of being related to transgender constitutional rights.
- Opinions that did not raise any issue of equal protection or due process law. Although there are also some recent decisions addressing other areas of transgender constitutional rights, especially under the Eighth Amendment, a decision was made to restrict the study to equal protection and due process cases. This was partly to make the scope of the study manageable, but was also because the treatment of equal protection and due process claims most closely track the overall constitutional stature of the group, as opposed to the more specific claims of subgroups.
- Opinions which raised a due process issue, but only as a surrogate for Eighth Amendment claims in the context of pretrial detention. A decision was made to exclude due process claims that were Eighth
Amendment-equivalent claims raised on behalf of pretrial detainees. Although such claims are formally due process claims, the reasons for their exclusion tracked the reasons for excluding Eighth Amendment claims, and it was deemed more systematic to exclude this type of claims for both pretrial detainees and prisoners, rather than only prisoners.

- Opinions in which there was no ruling on the merits of the equal protection or due process claim (for example, discovery rulings, or rulings based exclusively on standing or mootness). Because this study is intended to address the contours of substantive constitutional law, opinions in which there was no ruling on the merits of an equal protection or due process claim were not included in the analysis, although they were sometimes a part of cases in which other merits opinions were coded. This was one of the hardest categories to draw boundaries with respect to, and ultimately, I erred on the side of caution and included merits-adjacent rulings (such as a dismissal for lack of Monell liability, or a finding under Antiterrorism & Effective Death Penalty Act that a right was not clearly established), while excluding grounds such as mootness and standing as well as entirely procedural rulings like discovery.

- Cases where every opinion during the study period was one in which the plaintiff was pro se, mostly pro se prisoner litigation. Because of the large volume of pro se prisoner litigation, and the propensity of such litigation to skew the study results, cases in which the plaintiff was pro se for the entire study period were excluded from consideration. Note however, that cases were included in the study results if the plaintiff had counsel at the time of any merits opinion during the study period.

While the primary source of cases was from the above Westlaw search, this search produced a very low number of state law cases, especially state trial level decisions, something that seemed potentially attributable to the content limitations of Westlaw. It was also noted that a significant number of the cases in the existing case set involved the participation of one of the major impact organizations litigating cases on behalf of LGBTQ rights (American Civil Liberties Union, Lambda Legal, GLAD, National Center of Lesbian Rights, Transgender Law Center, Transgender Legal Defense Equality Fund). Therefore, where available, the public case information of these organizations was also surveyed to search for state law cases that also fit the

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480 Transgender Legal Defense Equality Fund (TLDEF) does not include a case listing on its webpage, and therefore could not be included in the supplemental search described below.
study criteria. This review produced only one additional case meeting the study criteria. It thus suggested that the data set was not substantially underinclusive because of the limitations of Westlaw with respect to state court opinions.

B. Case Review, Coding and Analysis

After the above searches and opinion exclusions, the remaining opinions were grouped by case (several cases had multiple opinions), and all cases were searched to ensure that no opinions meeting the study criteria had been omitted because of a lack of search terms. This produced the ultimate pool of cases/opinions studied, which was comprised of ninety opinions, spread over sixty-six total cases.

All merits opinions in the included cases decided during the study period were then reviewed and coded for the following criteria.

- Case Name
- Docket Number and Court
- Citations to Merits Opinions & Procedural Posture. Where there was more than one merits opinion during the study period, all of them were separately listed and coded. Note that only rulings on the merits of equal protection and/or due process claims were included, though it was noted if a studied decision was later reversed or affirmed on non-merits grounds.
- Whether an Impact Group or Nonprofit Lawyer Participated in the Litigation. This criterion was included for study due to the findings of prior scholars that the participation of law reform groups can materially affect litigant success.
- Judge and Appointing President/Appointing President’s Party. This criterion was included for study due to the findings of prior scholars that the party of the appointing president is correlated with outcomes in polarizing legal contexts.
- Whether the Plaintiff Had Another Intersectional Status. This criterion was included to try to examine the impact of the existence of other subordinated statuses on the part of the

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plaintiff, including race, disability, low-income status, youth, prisoner status, and others. Efforts were made to code for race in particular, based on information available through case opinions, as well as other information available on the internet (though this approach had significant limitations, as described further below).

- Social/Scientific Experts/Expertise Discussed or Relied on by the Court. This criterion was included to try to assess the prevalence and impact of social/scientific expertise in study cases.

- Issue Area of the Litigation. Litigation was classified based on its primary subject area such as: Student Locker Room and Restroom Access, Health Care and Health Insurance, Identity Documents, etc., so as to allow qualitative study of different areas of litigation.

- Equal Protection (Heightened Scrutiny): Whether Transgender People Should (or Should Not) be Considered a Suspect or Quasi-Suspect Class. In cases where the issue of whether transgender people should be considered a suspect or quasi-suspect class was considered, this was coded for, and whether the plaintiff was successful or not in arguing for this status was indicated.

- Equal Protection (Heightened Scrutiny): Whether Anti-Transgender Discrimination Should (or Should Not) be Considered Sex Discrimination. In cases where the issue of whether discrimination against transgender people should be considered sex discrimination for equal protection purposes, this was coded for, and whether the plaintiff was successful or not in arguing for this status was indicated.

- Equal Protection (Rational Basis). In cases where the judge addressed the viability of the challenged actions on rational basis review, this was coded, together with information on whether the court found rational basis review to be satisfied, or not.

- Equal Protection (Other). This catchall category was included in order to allow for coding of reasoning that did not fall within the above equal protection categories.

- Due Process (Fundamental Rights/Privacy/Liberty). In cases where an issue of fundamental rights/privacy rights/liberty was raised in the due process context, this was coded for, and whether the plaintiff was successful or not on this basis was indicated.

- Due Process (Other). This catchall category was included to allow for coding of reasoning that did not fall within the above due process category.
• Whether Nonmonetary Relief Was Achieved.482 Because many cases settle and it can be difficult to assess the level of success achieved through such settlements, it seemed useful to also include a harder metric of success, represented here by whether nonmonetary relief was achieved by the litigation. This category included awards of preliminary injunctions, permanent injunctions, and known substantive changes to policies resulting from the settlement or otherwise catalyzed by the litigation.

• Resolution/Status as of End of Study (December 31, 2021).483 Cases were coded as “Plaintiff Victory” if they resulted in relief through litigation or settlement on any grounds. Because of the limitations of assessing the level of success in settled cases, the above metric (whether the litigation resulted in nonmonetary relief, such as policy reform) was considered a “harder” metric of success in the discussion and analysis. Cases that were not fully resolved as of the end of the study were listed as “Litigation Ongoing” with a note regarding their most recent status as of December 31, 2021.

• Merits Decision(s) Postdating Study Period. The study analysis was conducted only with data current as of December 31, 2021. Therefore, merits decisions in study cases that postdate December 31, 2021 are not included in the analysis. This column lists such post-study period merits decisions as of the most recent prepublication update (January 31, 2023), so that they are easily accessible to readers.

II. STUDY LIMITATIONS

A. Limits of Westlaw in Locating Cases

The most obvious limitation of the study is that it was limited to cases that produced merits decisions reproduced in the Westlaw database. This no doubt led to some degree of underinclusion, especially in relation to decisions made by state trial-level courts (which are poorly represented in the Westlaw databases). However, as noted above, efforts were made to ascertain the extent of the underinclusivity by surveying public websites of major nonprofit organizations litigating LGBTQ rights cases. Because such organizations represented litigants in a substantial number of the cases represented in the

482 This information was researched through Westlaw dockets, Public Access to Court Electronic Records (PACER) and other internet sources such as news accounts or press releases.
483 This information was researched through Westlaw dockets, PACER and other internet sources such as news accounts or press releases.
known data set (obtained via Westlaw), it seems likely that they also would be well-represented in any cases that were missed because of database limitations. As described above, only one further case was located through this methodology, which suggests that database limitations did not constitute a major constraint on the comprehensiveness of the survey.

B. Limitation of Focus to Equal Protection and Due Process Claims

Another important limitation of the study was that it did not include an analysis of all constitutional claims raised on behalf of transgender litigants, but rather was restricted to those claims most centrally related to the rights of transgender community as a group, namely equal protection and due process claims. For this reason, First Amendment claims, which as some scholars have observed can provide an important alternative constitutional approach to transgender equality, were not included in the analysis (although they were also sparsely represented in the case law). More significantly, Eighth Amendment claims, which were common, were also excluded from the analysis. Future research could benefit from further exploring these additional areas of transgender constitutional litigation.

C. Exclusion of Entirely Pro Se Cases

There were a large number of entirely pro se cases in the data set (overwhelmingly pro se prisoner cases) that were omitted from the analysis. It is no doubt the case that success rates would be significantly lower if these cases were included, though they were by no means universally unsuccessful. The decision was made to exclude these decisions both for reasons of manageability of study size, and because they would otherwise skew the results by virtue of factors that were not the intended focus of the study (such as pro se parties’ relative lack of knowledge of the law and legal process, and potential judicial biases against pro se litigants). Note that cases were included in the study data if there was a counseled merits opinion at any time during the study period, thus the study data does include cases in which some of the coded opinions were litigated by the litigant pro se.

D. Exclusion of Early Settlement Cases

Several of the cases that were located through the study were settled very early, before any court issued a merits opinion. Because the focus of the survey was on merits opinions, these cases were excluded, even though they provide a strong indicator of the viability and success of transgender constitutional rights claims. It is also the case that the study data does not reflect successful resolutions without litigation, nor the many individuals who
may experience unconstitutional conduct, and yet be unable or uninterested in pursuing litigation resolution. Thus, what the study provides is a view of current litigated merits decisions in the context of transgender constitutional law, not a global picture of how transgender rights issues are being dealt with by private and public actors, and resolved by lawyers.

E. Exclusion of Affirmative Litigation by Opponents of Transgender Rights

Because the study was concerned with the affirmative constitutional claims of the transgender community, cases were excluded where they dealt with affirmative litigation by opponents of transgender rights. It is important to note however, that opponents of transgender rights have also been deploying constitutional arguments in opposition to transgender rights, sometimes successfully, in recent years. This also is an area that would benefit from further in-depth study.

F. Coding for Outcome

As noted above, the decision was made to code all cases as “Plaintiff Victory” where the plaintiff obtained relief through litigation or settlement. As noted above, this may be a misleading designation, insofar as settled outcomes, in particular, may represent only partial or marginal success, for example, a small monetary settlement.

In order to address this concern, and provide a more meaningful metric of success, all cases were also coded where information was available for whether or not the case resulted in any form of nonmonetary relief. Because such forms of relief provide a metric of more systemic change, are generally much desired by plaintiffs, and are often least amenable to defendants, this seemed likely to represent a better metric of the substantiality of the success achieved by the plaintiff in resolving the matter.

It is also important to note that data on levels of success with respect to particular arguments (for example whether transgender individuals should be considered a suspect or quasi-suspect class) is not susceptible to the settlement ambiguity problem. As described in the body of the article, the comparative success of these doctrinal arguments provides another clear metric of litigant success in this context.

Finally, because of the difficulties in many instances of coding for the basis for success, cases were coded as “Plaintiff Victory,” even where the basis for success may have been other grounds than an equal protection or due process claim. Where it was obvious that the success was based on grounds other than a study claim (such as an Eighth Amendment claim), this is noted in Appendix B.
G. Coding for Race

As noted above, attempts were made to code for the race of the plaintiff or plaintiffs across all study cases, based both on information from the study cases themselves, and more often from information available on the internet (either photographs or self-identification). Because photographs, in particular, are a notoriously unreliable manner of assessing race and ethnicity, the designations of plaintiff race in Appendix B should not be considered conclusive, and I have not attempted to draw significant conclusions from this data collection, given its likely unreliability. I nevertheless share it here for the limited insights it can afford into the apparent racial composition of contemporary transgender constitutional rights litigation.

H. Coding for Court Discussion of/Reliance on Social/Scientific Expertise

As noted above, attempts were made to code for whether social/scientific expertise was relied on or discussed by the court in the context of study decisions. In many cases, this was relatively obvious—courts often discussed social/scientific expertise at length. However, in some contexts at the margins it could be difficult to assess, such as where a plaintiff relied on a medicalized account of their own experience (e.g., that they had been diagnosed with gender dysphoria and were undergoing appropriate medical treatments), but did not otherwise rely on expertise. I erred on the side of overinclusion, and thus all judicial reliance on or discussion of medical or social scientific frameworks was coded as “Yes,” even where the discussion entered in as a result of facts individualized to the plaintiff. In addition, cases were coded as “Yes” even when the discussion of social/scientific expertise was pursuant to the plaintiff’s allegations at the motion to dismiss stage, rather than evidentiary submissions, because such allegations appear to have played a role in framing courts’ analysis even at that early stage.