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Legal Sidebar

Transgender Students and School Bathroom Policies: Equal Protection Challenges Divide Appellate Courts

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The Fourteenth Amendment's Equal Protection Clause prohibits states from denying individuals "the equal protection of the laws." Transgender students have brought a number of challenges under the Equal Protection Clause against public school boards' policies that prohibit them from accessing the bathroom consistent with their gender identity. Federal appellate courts reviewing such challenges have recently split on how constitutional protections apply. As discussed below, the Courts of Appeals for the Seventh Circuit and the Fourth Circuit have ruled that school policies prohibiting bathroom access consistent with a transgender student's gender identity can violate their right to equal protection of the laws, while the full Eleventh Circuit recently upheld such a school policy against an equal protection challenge. (A similar division has arisen with respect to whether such policies violate Title IX of the Education Amendments of 1972; this Sidebar does not address that issue.)

Courts reviewing challenges to governmental classifications based on sex review those policies under a searching inquiry known as intermediate scrutiny where the classifications allegedly deny equal protection. The appellate courts that have reviewed challenges to public schools' bathroom policies have applied this standard of review, although courts have taken different positions on the precise reason that intermediate scrutiny applies. Some courts take the view that these policies are subject to heightened scrutiny because they classify based on sex. An alternative position is that transgender individuals are a distinct "quasi-suspect class" for equal protection purposes. Further, appellate courts, in a series of split decisions, have divided as to whether and when intermediate scrutiny is satisfied in bathroom access cases.

This Sidebar provides a brief overview of equal protection analysis, including the three primary tiers of "scrutiny" applied by courts. It continues with an examination of the important features of intermediate scrutiny used in Supreme Court cases addressing sex classifications. The Sidebar then turns to a discussion of how federal appellate courts have approached claims transgender students have brought

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against public school policies that prohibit them from bathroom access consistent with their gender identity.

Background: Tiers of Scrutiny for Government Classifications

The Equal Protection Clause of the Fourteenth Amendment provides that states shall not deny individuals within their jurisdiction "the equal protection of the laws." In general, the principles that bind states under the Equal Protection Clause also apply to the federal government through the Fifth Amendment. The Supreme Court has described this mandate as "essentially a direction that all persons similarly situated should be treated alike." Most types of government classifications challenged under the Equal Protection Clause face rational basis review, under which a court will uphold statutory classifications, such as those in economic legislation, as long as they are reasonably related to a legitimate government purpose.

There are other types of government classifications that receive heightened scrutiny, however. Statutes or policies that involve "suspect classifications," such as race and national origin, are subject to strict scrutiny. That standard of review also applies to certain distinctions implicating fundamental rights like the right to vote. To withstand strict scrutiny, government classifications must be narrowly tailored to achieve a compelling government interest.

Falling in between these two standards of review, classifications based on sex or illegitimacy are subject to intermediate scrutiny. Sex and illegitimacy classifications are sometimes called "quasi-suspect" classifications. Beginning in the early 1970s, the Supreme Court began striking down certain government actions that discriminated on the basis of sex as a violation of the Equal Protection Clause. The Court eventually settled on the standard of review known as intermediate scrutiny for reviewing government classifications based on sex. Parties seeking to uphold government sex-based actions must show an "exceedingly persuasive justification" for the policy. Such classifications must serve an important government interest, and the "discriminatory means employed" must be "substantially related" to achieving that interest.

Although it has been some time since the Supreme Court last recognized that a specific classification qualified as suspect or quasi-suspect, some of the relevant factors courts have used in determining suspect or quasi-suspect status can include whether a class has been historically subjected to discrimination, whether a class shares a characteristic that usually has no relationship to the ability to contribute to society, whether a group has immutable characteristics that can "define them as a discrete group," and whether they are a minority or lack political power.

Supreme Court Application of Intermediate Scrutiny to Sex-Based Classifications

The Supreme Court's decisions applying the intermediate-scrutiny standard to governmental sex-based classifications often reflect a searching inquiry into the actual objectives behind a government classification and whether that classification is substantially related to the government's purposes, demanding a close fit between a statute's means and end. At the same time, intermediate scrutiny is not necessarily fatal to a governmental classification, as the Court has upheld certain sex distinctions, particularly when the Court concludes the sexes are not similarly situated for purposes of the classification.

In 1984, in *Mississippi University for Women v. Hogan*, the Court ruled that a female-only admissions policy at a public nursing school violated the Equal Protection Clause. The Court rejected the state's claimed justification that the policy remedied discrimination against women, as the state made no showing that women lacked opportunities in the nursing field; instead, the school's policy perpetuated the stereotype of nursing as a "woman's job." The state also failed the second part of the equal protection

analysis – it did not show that the classification was substantially and directly related to the remedial objective. Rather, the school's policy that permitted men to audit classes contradicted the claim that women are harmed by having men in class, so the record did not show that excluding men was necessary to reach any of the school's educational goals.

Slightly more than a decade later, the Court again examined an equal protection challenge to a sex-based collegiate admissions policy in United States v. Virginia. In that case, the Virginia Military Institute (VMI), a state military college, limited admissions to men. The Court emphasized that government sex classifications must be supported by an "exceedingly persuasive justification." Summarizing the Court's equal protection cases thus far, the majority opinion explained that justifications must be genuine, not "invented *post hoc* in response to litigation." Justifications must also not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females."

Virginia proffered two justifications for its exclusion of women from VMI. First, single-sex education provides educational benefits, and offering that option contributes to diversity in educational approaches. Second, the unique nature of VMI's harsh discipline, an "adversative" approach to schooling, would have to be modified, even transformed, if women were admitted, meaning that neither men nor women would have access to the school's unique approach. As to the first justification, the Court agreed that such a purpose could serve the public; but it concluded that Virginia had not shown that VMI was established or maintained to facilitate diverse educational approaches.

As to the second justification, the Court recognized that aspects of the program would have to be modified, perhaps with accommodations and physical training programs for women; but the Court also emphasized that it was "undisputed" that the VMI approach could be used to educate women. The issue, as framed by the Court, was whether Virginia could deny "women who have the will and capacity" the opportunities VMI offers. For the Court, the notion that admission of women would degrade the school's stature and destroy the adversative system was on par with other "self-fulfilling prophecies" that were once used to deny women opportunities, such as in law and medicine. Entrance of women into the federal military academies and their participation in the armed forces suggested, according to the Court, that Virginia's concerns for VMI "may not be solidly grounded." As such, the Court concluded that Virginia's justification for barring women, of which some are qualified, from training at VMI was not "exceedingly persuasive," and the policy violated the Equal Protection Clause.

While the above cases reflect that intermediate scrutiny of sex-based classifications is a searching standard of review, not all sex-based classifications subjected to this review will necessarily fail. In its 1981 decision *Michael M. v. Superior Court*, the Supreme Court upheld a state criminal law that punished males, but not females, for statutory rape. The Court's plurality opinion accepted the state's justification for the statute: prevention of illegitimate teenage pregnancies. The plurality also held that the statute's sex classification was sufficiently related to this purpose. The harmful consequences identifiable in a teenage pregnancy fell immediately on females, not males, the Court reasoned, so a criminal sanction for males, but not females, could help balance the deterrents for both sexes.

Federal Courts of Appeals: School Policies on Bathroom Access

Although intermediate scrutiny for sex-based classifications is well established, the Supreme Court has not addressed the proper standard of review for government classifications involving transgender individuals. Recently, a number of federal appellate courts have taken up this question in the context of transgender students' claims alleging discrimination when public schools bar them from accessing bathrooms consistent with their gender identity.

In 2017, the Seventh Circuit applied intermediate scrutiny in a case brought by a transgender boy challenging a school-district policy that barred him from using the boys' bathroom. The court initially observed that under intermediate scrutiny, because the state cannot defend a sex classification by relying

on overbroad generalizations about sex, sex-based stereotypes cannot sustain a sex classification. The court then reasoned that the school-district policy at issue inherently relied on sex in determining which bathroom a student must use. The school made its decision based on the sex listed on a student's birth certificate, which, according to the court, rendered the decision a sex classification subject to heightened scrutiny. The court rejected the argument that the policy did not violate equal protection because it treated boys and girls the same. In the court's view, the school district treated transgender students, who fail to conform to sex-based stereotypes that are associated with their sex assigned at birth, differently. The policy thus had to be supported by an exceedingly persuasive justification. The school district argued the policy was needed to protect the privacy rights of its students, but the court concluded that this argument amounted to "sheer conjecture and abstraction" and was ultimately "insufficient to establish an exceedingly persuasive justification." The panel ultimately affirmed the district court's grant of a preliminary injunction permitting the student who challenged the policy access to the boys' bathroom.

In 2020, the Fourth Circuit similarly applied intermediate scrutiny to application of a school-board policy preventing a transgender boy from using the bathroom consistent with his gender identity. The school board policy limited the use of bathrooms "to the corresponding biological genders," which apparently would be determined by the sex indicated on a student's birth certificate. The Fourth Circuit agreed with the Seventh Circuit that such a policy was a sex classification and should be reviewed under intermediate scrutiny. In addition, the court determined that the student was subjected to sex discrimination based on his failure to conform to the sex stereotype in the bathroom policy. The panel rejected the argument that there was no equal protection violation because the student "is not similarly situated to cisgender boys," and the proper comparison for the treatment of the transgender boy was thus "'biological' girls." That framing, the panel reasoned, revealed bias and stereotyped notions, privileging "sex-assigned-at-birth over [the student's] medically confirmed, persistent and consistent gender identity." Instead, according to the court, the proper comparison was to other boys who were allowed to use the boys' bathroom.

The panel also concluded in the alternative that heightened scrutiny applied because transgender individuals "constitute at least a quasi-suspect class" in their own right. Drawing on Supreme Court cases articulating when a group of people constitute a suspect or quasi-suspect class, the court concluded that the plaintiff showed the four relevant factors needed: transgender people have endured a history of discrimination; lack defining characteristics affecting their ability to perform or to contribute to society; are a discrete group with immutable characteristics; and are a minority lacking political power.

Applying intermediate scrutiny to the bathroom policy, the panel concluded the policy was not substantially related to the proffered important interest of student privacy. The school board did not show that a transgender student was likely to invade others' privacy, "rather than minding their business like any other student." Because the record showed that the privacy of other boys in the restroom did not increase when the transgender boy was barred, the policy was not substantially related to the school board's asserted goal.

The Fourth Circuit panel opinion drew a dissent by Judge Niemeyer, who reasoned that the transgender boy was not similarly situated to the "biologically male students" who could use the boys' restroom because at all times relevant to the case "he remained anatomically different from males."

Also in 2020, the Eleventh Circuit initially reached a similar result as the Seventh and Fourth Circuits, over a dissent, in another case challenging a school-district policy barring a transgender boy from using the bathroom consistent with his gender identity. The Eleventh Circuit panel decision applied intermediate scrutiny and concluded that the school district's policy violated the student's equal protection rights. That decision was then vacated in an opinion that reached the same result but on narrower grounds (also over a dissent). The Eleventh Circuit then vacated the subsequent decision and voted to rehear the case en banc (by the full court). In 2022, the en banc court issued a new decision.

The en banc majority opinion held that a school board policy separating bathrooms based on "biological sex" did not violate equal protection. The majority opinion concluded that the policy did not unlawfully discriminate based on either sex or transgender status. With respect to sex, although the court reasoned that the policy was a sex classification subject to intermediate scrutiny, it ruled that the policy "advances the important governmental objective of protecting students' privacy in school bathrooms." The court determined that the policy was also substantially related to that purpose as it "is clearly related to—indeed, is almost a mirror of—its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex." While the district court had found that allowing a transgender student to use the bathroom consistent with their gender identity did not affect the privacy protections in place because the student used the bathroom in a stall, the Eleventh Circuit majority determined that the sex-specific privacy interests for students "are not confined to the individual stalls in those bathrooms."

Having concluded that the policy did not unlawfully discriminate based on sex, the court also rejected the argument that the policy singled out transgender students for different treatment. The majority opinion reasoned that the policy did not facially discriminate on the basis of transgender status but simply classified students based on biological sex. For the court, because the policy divided students based on biological sex into two groups, both of which included transgender students, there was a "lack of identity" between transgender status and the policy. In addition, the court rejected the assertion that the policy relied on impermissible stereotypes connected with transgender status, concluding that separating bathrooms based on biological sex was not a stereotype. Finally, the court reasoned that "[a]t most," the plaintiff's challenge was a claim that the policy had a disparate impact on transgender students; but a disparate impact, without purposeful discrimination, would not violate equal protection.

The en banc majority opinion drew a number of dissents. Judge Jill Pryor, for instance, reasoned that the policy facially discriminated against transgender students because only "cisgender" (people whose birth-assigned sex and gender identity align) students could use the bathroom consistent with their gender identity. While she agreed that student privacy is an important government interest, she concluded that the policy was not substantially related to the asserted purpose. The school district produced no non-speculative evidence linking the privacy interest with the policy of barring transgender students from the bathroom consistent with their gender identity; and the majority opinion's assertions about privacy ignored that transgender students typically use the bathroom aligning with their gender identity discreetly. Further, application of the policy would force the transgender boy in this case to use the girls' bathroom while presenting as male, which would undermine the asserted privacy interests. Thus the policy lacked "fit" with the asserted privacy interests as it was "drastically underinclusive with respect to its stated purpose."

Judge Jordan also dissented, writing that while the policy barred the transgender student in the case from using the bathroom that aligned with his gender identity, it would allow another transgender boy to do so if that student had simply enrolled in the school after transitioning and obtaining appropriate documents listing him as male. Because that other student would pose the same privacy concerns as the student that was barred, the policy could only be justified based on administrative convenience, which could not survive intermediate scrutiny.

Considerations for Congress

The standards courts apply when transgender individuals allege discrimination in violation of equal protection can have important implications for various state and federal policies. As discussed above, although federal appellate courts thus far have applied intermediate scrutiny to school bathroom policies that bar transgender individuals from using bathrooms that align with their gender identity, whether such policies meet that standard is a question that has divided the courts. More broadly, given the varied state and local policies regarding transgender individuals that apply beyond school bathroom access, including

in health care services and access to gender-specific sports teams, the applicable equal protection standards may determine whether those policies withstand judicial scrutiny as well.

Although legislation may not alter the substantive meaning of the Equal Protection Clause as interpreted by the courts, Congress may define prohibited discrimination in various contexts, such as in employment and in federally funded education programs. The meaning of sex discrimination in those contexts has also been addressed by federal courts, including in claims brought by transgender individuals. Congress possesses substantial authority to alter the scope of prohibited conduct under civil rights statutes, such as Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Likewise, Congress has authority to provide exceptions to the application of those laws, such as the religious exception under Title IX.

Author Information

Jared P. Cole
Legislative Attorney

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