As-Applied Equal Protection

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Abstract

Do as-applied Equal Protection claims exist? Few legal scholars have even endeavored to answer this question, as the vast majority of modern Equal Protection claims have been brought—and addressed—as facial challenges. But the propriety of as-applied Equal Protection claims has gained new importance, with a spate of recent transgender rights claims challenging systems of sex separation on an as-applied basis. As such claims recognize, while governments may possess important reasons for maintaining some continued systems of sex separation, they ordinarily lack comparably important reasons for excluding transgender individuals from gender-identity-appropriate access.

This Essay takes up the question of whether as-applied Equal Protection claims exist, and it finds that—under the Supreme Court's precedents—the answer is clearly "yes." Indeed, in the context of intermediate scrutiny, the availability of as-applied administrative consideration is a central feature of what the Court has found will render a sex or illegitimacy classification constitutional. And where a government entity fails to provide such as-applied consideration itself, the Supreme Court has made clear that as-applied constitutional invalidation is the appropriate remedy.

While intermediate scrutiny is the dominant context in which the Supreme Court has recognized as-applied Equal Protection claims, it has relied on as-applied reasoning in other Equal Protection contexts as well. Most notably, administrative applications of a law (i.e., applications of a law to a particular context by an administrator) and unusual or out-of-the-ordinary applications of a law have also been the basis for as-applied Equal Protection rulings. As-applied transgender rights challenges to systems of sex separation are also consistent with these other recognized as-applied contexts.

Thus, while as-applied Equal Protection claims have rarely been the subject of scholarly study or discussion, the Supreme Court has clearly recognized such claims. As such, courts must, under existing Supreme Court precedents, address transgender litigants' arguments on their own terms—as as-applied challenges to the assimilation of transgender individuals into systems of sex separation, rather than facial challenges to systems of sex separation themselves. As case law in this area shows, assessed on those terms, government entities can rarely demonstrate that they possess the requisite "exceedingly persuasive justification."

Introduction

As-applied Equal Protection claims remain one of the most under-theorized areas in Equal Protection doctrine. Addressed only rarely in the legal literature—and even then typically only as a small part of a broader

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exploration of as-applied constitutional claims—scholars have been unable to agree on the basic question of whether as-applied Equal Protection claims should even exist.[1] For most of modern constitutional history, this lacuna in theorizing has seemed relatively unimportant, as the vast majority of Equal Protection claims have been brought—and decided—as facial challenges.[2]

But recent developments have made the question of whether and how as-applied Equal Protection claims should be adjudicated one of renewed importance. In recent years, transgender litigants have filed Equal Protection claims challenging their manner of assimilation into a host of contexts in which governments continue to openly enforce sex segregation: school restrooms, prisons, homeless shelters, athletics, and more.[3] In most of these cases, the nature of the challenge has been "as-applied": transgender litigants are not arguing for the constitutional invalidity of systems of sex separation, but

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[1] *See, e.g.,* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, (1994) (briefly discussing Equal Protection in the context of a much broader discussion of facial and as-applied challenges); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1329 (2000) (same); David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L. Q. 689, 713–14 (2009) (same); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1381–85 (2005) (same); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 421–31 (1998) (same); *see also* John D. Wilson, Comment, Cleburne*: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163, 186–91 (1986) (analyzing the viability of as-applied Equal Protection claims in the context of the decision in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)); Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1668–71 (2009) (discussing the possibility of an as-applied Equal Protection challenge to voter ID laws in the aftermath of the Court's decision in Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008)).

[2] *See, e.g.,* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 37 n.144 (1998) (noting that "[a]s-applied challenges virtually never arise under the Equal Protection Clause").

[3] *See, e.g.*, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1050–54 (7th Cir. 2017) (school restrooms); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 718–26 (D. Md. 2018) (school locker rooms); *Doe v. Mass. Dep't of Corr.*, No. CV 17-12255-RGS, 2018 WL 2994403, at *9–11 (D. Mass. June 14, 2018) (sex-based prison assignment); *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *10–12 (S. D. Ill. Nov. 7, 2018) (sex-based prison assignment); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 843 (S.D. Ind. 2019) (school restrooms); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 575–76 (M.D. Pa. 2019) (sex-separated restrooms); *Tay v. Dennison*, 457 F. Supp. 3d 657, 680–82 (S.D. Ill. 2020) (sex-based prison assignment); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–10 (4th Cir. 2020) (sex-separated restrooms); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 771-772 (7th Cir. 2023) (sex-separated restrooms); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc) (sex-separated restrooms); *Iglesias v. Fed. Bureau of Prisons*, No. 19-CV-415-NJR, 2021 WL 6112790, at *24–25 (S.D. Ill Dec. 27, 2021), modified, 598 F. Supp. 3d 689 (S.D. III. 2022) (sex-separated prisons); *D.H. ex rel. A.H. v. Williamson Cnty. Bd. of Ed.*, 638 F. Supp. 3d 821, at 833-34 (M.D. Tenn. 2022) (sex-separated restrooms); *B. P. J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875, at *6–8 (S.D. W. Va. Jan. 5, 2023) (sex-separated athletics); *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *15–19 (D. Ariz. July 20, 2023) (sex-separated athletics); *Hecox v. Little*, 79 F.4th 1009, 1021 (sex-separated athletics).

rather are challenging their *own* treatment within such systems (for example, the assignment of a transgender woman to a men's prison).[4]

For the most part, the federal courts have found these "as-applied" sex discrimination claims to be cognizable, and have addressed them as they have been presented: as as-applied challenges to the assimilation of transgender people into systems of sex separation.[5] So framed, courts have typically found that government entities lack the requisite "exceedingly persuasive justification" for excluding transgender people from gender-identity appropriate facilities.[6] However, in a number of recent cases, courts have expressed skepticism as to the propriety of such "as-applied" claims or have simply declined to address the plaintiffs' as-applied arguments.[7] And as these cases demonstrate, the global or facial arguments in favor of existing systems of sex separation are typically stronger than the arguments against gender-identity-based assimilation.[8]

This Essay argues that not only are as-applied Equal Protection claims cognizable but indeed that the availability of as-applied assessment of individual circumstances is a defining feature of intermediate scrutiny.[9] Thus, while the Supreme Court has more frequently permitted classifications triggering intermediate scrutiny (as compared, for example, to suspect classifications such as race), it has treated the availability of an individualized method to show one's similarity to a favored group as a key feature of what will allow a discriminatory scheme to satisfy intermediate review.[10] For example, the Court has treated the ability of non-marital fathers to establish on an individualized basis that they possess a genuine familial relationship (a relationship

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[4] *See* cases cited *supra* note 3. As noted *infra* Part V, some of these challenges could also be conceptualized as facial challenges, insofar as they challenge rules specifically targeted at the transgender community. In either instance, the analysis properly focuses just on the treatment of the transgender community, rather than the broader permissibility of sex separation in general.

[5] *See, e.g., Whitaker*, 858 F.3d at 1050–54; *M.A.B*, 286 F. Supp. 3d at 718–26; *Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *9–11; *Hampton*, 2018 WL 5830730, at *10–12; *J.A.W*, 396 F. Supp. 3d at 843; *A.H.*, 408 F. Supp. 3d at 575–78; *Tay*, 457 F. Supp. 3d at 680–82; *Grimm*, 972 F.3d at 607–15; *A.C.*, 75 F.4th at 772-773; *Iglesias*, 2021 WL 6112790, at *24–25; *Doe v. Horne*, 2023 WL 4661831, at *15–19; *Hecox*, 79 F.4th at 1028-1033.

[6] *E.g., Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *9–11; *Doe v. Horne*, 2023 WL 4661831, at *15–19; *see also, e.g., Whitaker*, 858 F.3d at 1050–54 (finding that the exclusion of transgender individuals from gender-identity-appropriate access did not satisfy intermediate scrutiny, but not using "exceedingly persuasive justification" language); *M.A.B*, 286 F. Supp. 3d at 718–26 (same); *Hampton*, 2018 WL 5830730, at *10–12 (same); *J.A.W*, 396 F. Supp. 3d at 843 (same); *A.H.*, 408 F. Supp. 3d at 575–78 (same); *Tay*, 457 F. Supp. 3d at 680–82 (same); *Grimm*, 972 F.3d at 607–15 (same); *A.C.*, 75 F.4th at 772-773 (same); *Iglesias*, 2021 WL 6112790, at *24–25 (same); *Hecox*, 79 F.4th at 1028-1033 (same).

[7] *See, e.g., Adams*, 57 F.4th at n. 3, 804–08; *B. P. J.*, 2023 WL 111875, at *6–8; *D.H.*, 638 F. Supp. 3d 821, at 833-834 ; *cf. B. P. J. v. W. Va. State Bd. of Educ.,* 550 F. Supp. 3d 347, 355–56 (S.D. W. Va. 2021) (initially granting a preliminary injunction as to B.P.J.'s "as-applied" Equal Protection claim).

[8] *See* sources cited *supra* note 7.

[9] *See infra* Part II.

[10] *See infra* Part II.

that non-marital mothers are assumed to possess) as a key feature of what may render a discriminatory law acceptable on intermediate scrutiny.[11]

This feature of intermediate scrutiny appears to be largely forgotten in the modern era, perhaps because many scholars of Equal Protection have paid scant attention to the most relevant body of cases—the non-marital father cases.[12] It is also the case that as intermediate scrutiny has evolved, there have been ever-fewer contexts where sex or illegitimacy-based[13] distinctions have been permitted at all.[14] Thus, in many modern sex and illegitimacy cases plaintiffs have sought—and courts have granted—facial invalidation, without regard to the availability of as-applied consideration.[15]

But as described herein, this as-applied aspect of intermediate scrutiny is both well-established and directly pertinent to the current wave of as-applied transgender rights cases. As such, the Supreme Court's existing intermediate scrutiny jurisprudence ought to compel the as-applied consideration of transgender litigants' claims to be included in sex-separated programs and facilities in a gender-identity appropriate way. And as numerous courts have reasoned, such as-applied consideration will typically lead to the conclusion that gender-identity appropriate inclusion is constitutionally required.[16]

The remainder of this Essay proceeds as follows: Part I, by way of background, introduces academic debates regarding the existence and propriety of as-applied Equal Protection claims. Part II turns to intermediate scrutiny and the central relevance of as-applied assessments to Supreme Court jurisprudence in that context. Part III takes up the modern transgender rights disputes and explains why the Court's intermediate scrutiny jurisprudence demands as-applied consideration of the government's reasons for excluding transgender people from gender-identity appropriate programs and facilities. Part IV addresses other contexts in which the Supreme Court has recognized as-applied Equal Protection claims, and discusses their relevance

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[11] *See infra* Part II.

[12] *See, e.g.,* Serena Mayeri, *Foundling Fathers and (Non)Marriage and Parental Rights in the Age of Equality*, 125 YALE L. J. 2292, 2391 (2016) (noting that "[t]he unwed fathers cases receive little attention from constitutional scholars, and they are often relegated to a footnote in the history of sex equality law").

[13] Although it is no longer preferred terminology, for the purposes of clarity and consistency, this Essay uses the terminology "illegitimacy" discrimination, which is the language used by the Supreme Court in the relevant body of cases. When I refer to "illegitimacy" discrimination, I am referring to laws that discriminate based on the marital status of a child's parents. Thus, for example, a law might treat the inheritance rights of non-marital children vis-à-vis their biological fathers less favorably than the rights of children born into a lawful marriage. *See, e.g., Trimble v. Gordon*, 430 U.S. 762, 771–74 (1977). Conversely, a law might treat the parental rights of non-marital fathers vis-à-vis their children less favorably than marital fathers. *See, e.g., Caban v. Mohammed*, 441 U.S. 380, 388–94, 393 n.15 (1979).

[14] *See* sources cited *infra* note 15.

[15] *See, e.g., Sessions v. Morales*, 582 U.S. 47 (2017); *United States v. Virginia*, 518 U.S. 515 (1996); *Clark v. Jeter*, 486 U.S. 456 (1988); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142 (1980).

[16] *See* sources cited *supra* note 6.

to modern transgender rights disputes. Part V describes alternatively why certain transgender rights challenges ought to be understood as facial, rather than as-applied. Part VI briefly concludes.

I. Debates Over As-Applied Equal Protection

In the 1987 case of *United States v. Salerno*, the Supreme Court explained the difficulty of prevailing in a facial constitutional challenge, emphasizing that "the challenger must establish that no set of circumstances exists under which the Act would be valid."[17] Since that time, scholars have grappled with whether and to what extent *Salerno*'s ruling ought to *compel* as-applied constitutional challenges.[18] While Equal Protection has received comparatively little attention in these scholarly debates, a number of scholars have attempted to situate as-applied Equal Protection claims within *Salerno*'s expressed preference for as-applied adjudication.[19]

Such scholars have generally concluded that Equal Protection is at least a partial exception to *Salerno*'s articulated preference for as-applied constitutional challenges.[20] As David Gans has explained, because the doctrinal tests for Equal Protection violations (i.e., the tiers of scrutiny) "lead inexorably to facial review in almost all equal protection challenges . . . the distinction between facial and as-applied adjudication rarely surfaces."[21] Thus, for example, "[a] statute that contains a [race-] discriminatory classification and is not narrowly tailored to serve governmental interests of the highest order will generally be invalid in all circumstances."[22]

Scholars have clearly been correct that Equal Protection is an exception to the Supreme Court's general preference for as-applied adjudication and that that exceptionality arises in significant part from the structure of the tiers of scrutiny. As Gans notes, for example, a race classification that is insufficiently tailored or does not further compelling governmental interests will be invalid as to all applications—conversely, an age classification that furthers legitimate government objectives rationally will generally be valid as to all applications.[23] By virtue of the tiers of scrutiny, facial adjudication

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[17] *United States v. Salerno*, 481 U.S. 739, 745 (1987). *Salerno* was a Due Process and 8th Amendment challenge, and did not include Equal Protection claims. *See id.* at 746.

[18] Given *Salerno*, such scholars have typically been writing from the perspective of whether and where *facial* constitutional challenges are permissible, rather than whether *as-applied* challenges are allowed. *See, e.g.,* Dorf, *supra* note 1, at 238–39; Gans, *supra* note 1, at 1335–37.

[19] *See* sources cited *supra* note 1.

[20] *See, e.g.,* Gans, *supra* note 1, at 1381–85; Isserles, *supra* note 1, at 430–31; Franklin, *supra* note 1, at 707–14.

[21] Gans, *supra* note 1, at 1381–82.

[22] *Id.* at 1382.

[23] Gans, *supra* note 1, at 1381–85; *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (concluding that age-based mandatory retirement provision was valid, even in the context of those who continued to pass their employer's physical examination).

(i.e., the validation or invalidation of a rule in all its applications) is thus the norm across most areas of Equal Protection adjudication.[24]

But the fact that Equal Protection is an exception to the Court's *preference* for as-applied reasoning does not mean that such as-applied challenges *cannot* be brought in the Equal Protection context (the question presented in recent transgender rights cases). While it is clearly true (as scholars have observed) that in many Equal Protection cases facial and as-applied challenges will be effectively subsumed into one another, that is not true in all cases, as the Supreme Court's precedents show. Rather, there are a number of contexts where the Court has recognized that as-applied Equal Protection reasoning should not only be available, but indeed may be central, to its modern Equal Protection jurisprudence.

Parts II–III take up the most important of these contexts, and the one completely ignored by most scholars: intermediate scrutiny. As set out *infra*, requirements of as-applied consideration have been central to the Court's intermediate scrutiny jurisprudence in both the sex and illegitimacy contexts.[25] Indeed, requirements of such as-applied consideration are a key feature of how the Court ensures that its greater solicitude for classifications in the intermediate scrutiny context does not devolve into impermissible stereotypes.[26] Scholars have apparently missed this feature of the jurisprudence because—to the extent they have addressed as-applied Equal Protection at all—they have focused on cases arising at Equal Protection doctrine's poles of strict scrutiny and rational basis review.[27]

Part IV then turns to two other contexts in which the Court has recognized as-applied Equal Protection claims: administrative applications of a law, and unusual or out-of-the-ordinary applications of a law. In both of these contexts, the Court has also recognized the importance of as-applied Equal Protection consideration in some instances.

II. Intermediate Scrutiny and Requirements of As-applied Consideration by the Government

Intermediate scrutiny arose in the mid-1970s as the Supreme Court grappled with Equal Protection cases in the sex and illegitimacy contexts.[28]

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[24] *See* sources cited *supra* note 23.

[25] *See infra* Part II.

[26] *Id.*

[27] As noted in *supra* note 1 and its accompanying text, scholars have paid scant attention to the question of the availability of as-applied Equal Protection claims *in general*. However, to the extent they have addressed the issue, they have tended to focus on strict scrutiny or rational basis review, without meaningfully engaging with intermediate scrutiny. *See, e.g.,* Gans, *supra* note 1, at 1381–85; Franklin, *supra* note 1, at 707–14.

[28] *See, e.g.,* Katie Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1324–35 (2018). In an effort to attack gender stereotyping from all angles, sex cases brought by advocates in the 1970s challenged both legal discrimination disadvantaging women and legal discrimination disadvantaging men. *See, e.g.,* Cary Franklin, *The Anti-Stereotyping Principle in*

While initially deciding cases in favor of sex and illegitimacy litigants under rational basis review, the Court gradually evolved from a two-tier system of Equal Protection scrutiny to a three-tier one.[29] And one of the distinctive features of this new tier of "intermediate scrutiny" was the special significance that the Court afforded to the availability of "as applied" consideration.[30] Thus, on intermediate scrutiny the Court permitted a greater number of group-based classifications than it would on strict scrutiny—but also demanded the availability of as-applied consideration where the generalizations that permitted such classifications did not hold.[31]

This feature of the Court's intermediate scrutiny jurisprudence can be seen most distinctively in the Court's non-marital father cases.[32] Raising issues of both sex and illegitimacy discrimination, cases brought by non-marital fathers played an outsized (but largely forgotten) role in the Court's intermediate scrutiny jurisprudence—a role that has extended into the present.[33] In such cases, non-marital fathers argued that their less favorable treatment as compared to non-marital mothers, and as compared to marital fathers, could not survive intermediate scrutiny.[34]

While the non-marital father cases have often been viewed as inconsistent and inscrutable by scholars, Professor Earl Maltz has observed that there is in fact a consistent feature that unifies them.[35] Specifically, the Court has often been willing to countenance differential treatment of non-marital

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Constitutional Sex Discrimination Law, 85 N.Y.U. L. Rev. 83, 84– 88 (2010). Illegitimacy cases from the 1970s challenged laws affording unfavorable treatment to non-marital children (such as laws barring non-marital children from inheriting from their fathers), as well as laws disadvantaging their parents (such as laws denying non-marital parents parental rights). *See, e.g., Trimble v. Gordon*, 430 U.S. 762, 771–774 (1977) (invalidating on Equal Protection grounds a law disallowing intestate succession by non-marital children from their fathers); *Caban v. Mohammed*, 441 U.S. 380, 388–94, 393 n.15 (1979) (finding state statute affording non-marital mothers but not non-marital fathers the absolute ability to veto adoption violated Equal Protection as applied to involved non-marital fathers). The illegitimacy cases often also raised complex issues of race, class and sex, although such intersectional considerations generally did not surface in the Supreme Court's decisions. *See, e.g.,* Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 Const. Comm. 377, 377–378 (2017).

[29] *See, e.g.,* Katie Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. Davis L. Rev. 527, 554-564 (2014) (describing the Court's transition from a two-tier system of Equal Protection to a three-tier one as early sex and illegitimacy rational basis precedents were gradually reimagined as a separate intermediate tier of scrutiny).

[30] *See infra* notes 32–46 and accompanying text.

[31] *Id.*

[32] *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 63–64, n.12 (2017); *Nguyen v. I.N.S.*, 533 U.S. 53, 60–71 (2001); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983); *Parham v. Hughes*, 441 U.S. 347, 349–58 (1979) (plurality opinion); *Id.* at 359–61 (Powell, J., concurring); *Caban v. Mohammed*, 441 U.S. 380, 388–94, n.15 (1979); *Lalli v. Lalli*, 439 U.S. 259, 266–74 (1978) (plurality opinion); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978); *Stanley v. Illinois*, 405 U.S. 645, 654–58, n. 10 (1972).

[33] *See* cases cited *infra* note 36.

[34] *Id*.

[35] *See* Earl M. Maltz, *Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification Problem*, 40 Ohio State L.J. 941, 950–57 (1979).

fathers—recognizing that such fathers are often not comparably situated to non-marital mothers (or marital fathers), given that they may not even be aware of a child's birth—but only insofar as the law affords such fathers an opportunity to show that they are similarly situated with respect to their children.[36] That is, fathers must be afforded an opportunity on an as-applied basis to show that they have a relationship to their child warranting equal treatment.[37]

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[36] *Id.*; *see also Sessions*, 582 U.S. at 63–64, n.12 (finding gender distinction unconstitutional where no such opportunity was provided, and noting that where non-marital fathers are in fact similarly situated to non-marital mothers Equal Protection bars treating them differently); *Nguyen*, 533 U.S. at 60–71 (finding sex differentiation in citizenship law constitutional where non-marital fathers had several straightforward methods to establish their rights); *Lehr*, 463 U.S. at 267 (finding no Equal Protection violation where putative father had not supported child or established relationship with them and also did not take advantage of simple procedure that would have afforded him notice of adoption proceedings—but also noting that "[w]e have held that [statutes differentiating between the rights of non-marital mothers and fathers] may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with respect to their relationship with the child"); *Parham*, 441 U.S. at 349–58 (plurality opinion); 359–61 (Powell, J., concurring) (stressing the availability of an easy procedure under state law for legitimation in finding law barring non-marital fathers from suing for child's wrongful death constitutional where the father had not legitimated the child before death); *Caban*, 441 U.S. at 388–94, n.15 (finding state statute affording non-marital mothers but not non-marital fathers the absolute ability to veto adoption violated Equal Protection as applied to involved non-marital fathers); *Lalli*, 439 U.S. at 266–74 (plurality opinion) (stressing availability of easy method of establishing paternity and thus allowing inheritance by non-marital child in finding statute constitutional); *Quilloin*, 434 U.S. at 256 (finding state law affording marital fathers but not non-marital fathers the right to object to adoption was constitutional "as applied" to non-marital father who had not sought legitimation before the filing of an adoption proceeding, and had never "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child"); *Stanley*, 405 U.S. at 654–58, n.10 (finding that state violated both Equal Protection and Due Process where it afforded non-marital father who was actually highly involved in raising his children with no opportunity to demonstrate an established parental relationship and right to custody of his children); sources cited *infra* note 38. The Court also has relied on this as a relevant dividing factor in the related context of discrimination against non-marital children. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461–65 (1988) (in the context of the rights of non-marital children, holding that a six-year statute of limitations on bringing a paternity action did not survive intermediate scrutiny, where marital children could seek the support of their parents at any time during minority, and problems of proof did not necessitate the time limitation); *Pickett v. Brown*, 462 U.S. 1, 11–18 (1983) (same, with respect to a two-year statute of limitations); *Mills v. Habluetzel*, 456 U.S. 91, 97–101 (1982) (same, with respect to a one-year statute of limitations); *United States v. Clark*, 445 U.S. 23, 26–34 (1980) (construing statute to allow non-marital children who had lived with father at any time to receive benefits to avoid constitutional problems that would be created by a blanket assumption that non-marital children are not dependent on their fathers); *Matthews v. Lucas*, 427 U.S. 495, 510–16 (1976) (stressing the availability of a number of means for non-marital children to prove their actual dependence on father—or to obtain the benefit of a law presuming dependency—in finding law presuming some but not all non-marital children to be dependent constitutional); *Jimenez v. Weinberger*, 417 U.S. 628, 635–36 (1974) (stressing the lack of any available mechanism for non-marital children to establish actual dependence in finding provision treating non-marital children differently invalid as a matter of Equal Protection); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169–70 n.9 (1972); *Weber*, 406 U.S. at 176 (Blackmun, J., concurring) (emphasizing the actual parental relationship between non-marital father and his children, and the inability under state law for the father to legitimate the child given the limited circumstances in which state law allowed legitimation).

[37] *See* sources cited *supra* note 36.

As the cases have made clear, there are a number of ways in which a government entity may afford such opportunities for fathers to show on an as-applied basis that they have a comparable relationship to their children and thus satisfy the requisites of intermediate scrutiny. For example, the Court has generally found that it is acceptable for the government to establish procedures that a non-marital father must follow to establish the existence of a comparable parental relationship, such as signing an attestation of paternity or joining a putative father registry—provided those procedures are not unduly onerous.[38] As such, what non-marital fathers must be afforded is simply a fair *opportunity* to establish that they are similarly situated vis-à-vis their children—where there are reasonable government procedures that they have failed to comply with, their Equal Protection claims ordinarily fail.[39]

Where however, the law fails to provide such an as-applied opportunity—or only provides an unduly onerous one—and a non-marital father is in fact similarly situated to a non-marital mother, the Court has made clear that an Equal Protection challenge will prevail.[40] Thus, on intermediate scrutiny, an

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[38] *See, e.g., Nguyen*, 533 U.S. at 60–71; *Lehr*, 463 U.S. at 250–51, 265–68; *Parham*, 441 U.S. at 349–58 (plurality opinion); *id.* at 359–61 (Powell, J., concurring); *Lalli*, 439 U.S. at 266–74 (plurality opinion); *Quilloin*, 434 U.S. at 256; *see also Califano v. Boles*, 443 U.S. 282, 288–97, 305–06 (1979) (majority concluded that a law which excluded non-marital parents from parental SSI death benefits did not classify based on illegitimacy and thus was not subject to heightened scrutiny. Dissent reached the opposite conclusion, and thus argued that at least an "opportunity" to "establish their dependence" was required); *Califano v. Westcott*, 443 U.S. 76, 85 (1979) (stressing that "[t]he deprivation imposed by [an AFDC provision providing for benefits in the context of unemployed fathers but not unemployed mothers] is not a mere procedural barrier, like the proof-of-dependency requirement in *Frontiero* and *Goldfarb*, but is an absolute bar to qualification for aid"); *Jimenez*, 417 U.S. at 635–36 (stressing the lack of any available mechanism for non-marital children to establish actual dependence in finding provision treating non-marital children differently invalid as a matter of Equal Protection); *Weber,* 406 U.S. at 169–71, n.9, 176 (Blackmun, J., concurring) (stressing the lack of a realistic way for non-marital father to establish parental stature vis-à-vis children for the purposes of workers' compensation benefits given the strict provisions of state law for legitimation in finding law invalid); *Tineo v. Att'y Gen. U.S. of Am.*, 937 F.3d 200, 212–15 (3d Cir. 2019) (noting that the Court has sustained burdens imposed on unwed fathers, but not unwed mothers "so long as they were not 'onerous'" but finding in this case, where father who had an actual relationship to his child lacked "any practicable way . . . to demonstrate that the requisite relationship existed" that the statute was unconstitutional as applied); c*f. Orr v. Orr*, 440 U.S. 268, 281–83 (1979) (where the state *already* conducted individualized assessments of need in all cases, finding that law requiring alimony of divorcing male spouses but not female spouses was unconstitutional and observing that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing [] stereotypes"). On what can render a procedure unduly onerous, *see infra* notes 62–63.

[39] *See* sources cited *supra* note 38.

[40] *See Caban,* 441 U.S. at 388–94, n.15 (finding state statute affording non-marital mothers but not non-marital fathers the absolute ability to veto adoption violated Equal Protection as applied to involved non-marital fathers); *Lehr*, 463 U.S. at 267 (noting that "[w]e have held that [statutes differentiating between the rights of non-marital mothers and fathers] may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with respect to their relationship with the child"); *Sessions*, 582 U.S. at n.12 (observing that "laws treating fathers and mothers differently 'may not constitutionally be applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child'") (quoting *Lehr v. Robertson*); *Jimenez*, 417 U.S. at 635–36 (stressing the lack of any available mechanism for non-marital children to establish actual dependence in finding provision treating

entity must either provide its own reasonable opportunities for those fathers who are in fact similarly situated to mothers to obtain access to the same benefits, or risk a successful "as applied" constitutional challenge.[41] As such, a defining feature of intermediate scrutiny itself is the opportunities—or lack thereof—that an entity affords for as-applied, individualized consideration.[42] When an entity classifies based on sex or illegitimacy—and fails to provide such as-applied opportunities—the courts will provide them directly.[43]

This as-applied aspect of intermediate scrutiny has been most obvious in the non-marital father cases largely because these cases are one of the few contexts in which the Court has continued to find sex or illegitimacy classifications to be permissible at all.[44] But the Court has also noted this principle in other contexts, observing for example in *Craig v. Boren* that as a matter of modern sex discrimination law legislatures must "either . . . realign their substantive laws in a gender-neutral fashion, or . . . adopt procedures for identifying those instances where [a] sex-centered generalization actually comport[s] with fact."[45] While it is clear from a number of the Court's cases

non-marital children differently invalid as a matter of Equal Protection); *Weber*, 406 U.S. at 169–71, n.9, 176 (Blackmun, J., concurring) (stressing both the actual relationship of father to children and the lack of a realistic way for non-marital father to establish parental stature vis-à-vis children for the purposes of workers' compensation benefits given the strict provisions of state law for legitimation—finding law invalid as a matter of Equal Protection); *Stanley*, 405 U.S. at 654–58, n.10 (finding that state violated both Equal Protection and Due Process where they afforded non-marital father who was actually highly involved in raising his children with no opportunity to demonstrate an established parental relationship and right to custody of his children); *Tineo*, 937 F.3d at 212–15 (noting that the Court has sustained burdens imposed on unwed fathers, but not unwed mothers, "so long as they were not 'onerous'" but finding in this case, where father who had an actual relationship to his child lacked "any practicable way . . . to demonstrate that the requisite relationship existed" that the statute was unconstitutional as applied); *cf. United States v. Clark*, 445 U.S. 23, 26–34 (1980) (construing statute to allow non-marital children who had lived with father at any time to receive benefits to avoid constitutional problems that would be created by a blanket assumption that non-marital children are not dependent on their fathers); *Quilloin*, 434 U.S. at 256 (finding provision distinguishing between marital and non-marital fathers in their ability to veto adoption constitutional "as applied" to a father who "has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child").

[41] *See* sources cited *supra* notes 35–40 and accompanying text.

[42] *Id.*

[43] *Id.*

[44] In many modern cases, the Court has simply found sex or illegitimacy classifications to be categorically impermissible. *See*, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 541–42, 550 (1996) (observing that "generalizations about 'the way women are' [and] estimates of what is appropriate for *most women* no longer justify denying opportunity to women whose talent and capacity place them outside the average description" and invalidating male-only admission requirement for Virginia Military Institute) (emphasis in original); *Miss. U. for Women v. Hogan*, 458 U.S. 718, 725–26 (1982) (stressing the importance of intermediate scrutiny "to assure that the validity of a [sex] classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women"); *Trimble v. Gordon*, 430 U.S. 762, 774 (1977) (where a father's paternity had been established before death, emphasizing that the availability of other alternatives through which he could have ensured the inheritance of his non-marital child did not obviate the discrimination against her in the law, and finding that that discrimination violated Equal Protection).

[45] *Craig v. Boren*, 429 U.S 190, 199 (1976).

that the latter alternative will not always be *adequate* to avoid constitutional invalidation—it will almost always be *necessary* to satisfy intermediate scrutiny, at least where the challenge is brought by an individual who is in fact comparably situated vis-à-vis the government's interests.[46]

Thus, unlike the other tiers of scrutiny where as-applied claims have been rare, the availability of as-applied consideration has been a central feature of the Supreme Court's intermediate scrutiny jurisprudence. While there are comparatively few contexts today in which the Court permits sex or illegitimacy classifications in the first instance, in those few contexts where it continues to permit such classifications, it has typically made clear that some opportunity for as-applied consideration must be afforded.[47] In some instances this opportunity may be afforded by the government—but where it is not, the Court will entertain as-applied Equal Protection challenges itself.

III. Intermediate Scrutiny and As-Applied Transgender Rights Claims

As described *supra,* the question of whether and where as-applied Equal Protection claims are cognizable has gained new urgency in the modern era as a result of a spate of as-applied Equal Protection cases brought by transgender rights litigants. Such cases have typically challenged the treatment of transgender individuals within existing systems of sex-separation, such as prisons, restrooms and homeless shelters—but only on an as-applied basis.[48] That is, in such cases, litigants have not sought to challenge the government's ability to continue to rely on sex to sort people into sex-separated

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[46] For cases where the Court has gone farther and said that even *with* an opportunity to prove one's exceptional stature a sex classification was unconstitutional—generally in contexts that arguably disadvantaged women. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150–52 (1980); *Kirchberg v. Feenstra*, 450 U.S. 455, 459–61 (1981); *Califano v. Goldfarb*, 430 U.S. 199, 210–17 (1977) (plurality opinion); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

[47] There are very limited circumstances in which the Court has not required some sort of as-applied consideration on intermediate scrutiny, and those have all involved circumstances in which the Court assumed that the factors rendering men and women differently situated were absolute, *i.e.*, that there were no exceptions *factually* and thus no need for as-applied consideration. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981) (validating men-only Selective Service registration at a time when women were excluded from combat roles and the purpose of the draft was to provide combat troops); *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 478–79 (1981) (plurality opinion) (validating statutory rape provision only criminalizing men because men are not similarly situated to women with respect to the risk of pregnancy); *cf. Califano v. Webster*, 430 U.S. 313 (1977) (apparently allowing absolute sex classification in the context of a statute that was intended to compensate for discrimination against women in the workplace); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (same, in the context of a statute that was intended to compensate for lesser opportunities for women to seek promotion in the military); *Kahn v. Shevin*, 416 U.S. 351 (1974) (same, on rational basis review in the context of a small property tax exemption for widows that was based on women's relative disadvantage in society).

[48] *See* sources cited *supra* note 5.

facilities; instead, they have challenged their own assimilation into such systems on an as-applied basis.[49]

Transgender rights litigants' preference for as-applied adjudication in these contexts likely arises from realistic concerns about the probable outcome of facial challenges.[50] While some scholars have offered critiques of the government interests underlying continuing systems of sex-separation—and there may be viable arguments that such systems lack adequate justification in certain contexts—many members of society, including many federal judges, continue to assume that such systems serve important purposes.[51] Thus, for example, many individuals likely share the assumption that, as the Eleventh Circuit recently held, sex-separated restrooms serve important interests in privacy in general.[52]

But it is far less clear that the way that government entities have applied such systems to transgender people, either individually or as a group, serve comparably important interests. Indeed, to the contrary, the vast majority of courts that have addressed the government's asserted interests in, for example, excluding transgender youth from gender-identity-appropriate restrooms, have found that such exclusion does not meaningfully implicate the government's asserted interests.[53] Similarly, for example, the government's interests in generally excluding those assigned male at birth from girls' athletics simply do not apply to the exclusion of a transgender girl who will never undergo endogenous male puberty (but who was also assigned male at birth).[54] Thus, the availability of as-applied Equal Protection challenges may well determine whether a particular sex discrimination challenge will be deemed viable by the courts (although, as described *infra* Part V, this is not universally true).

For this reason, the availability of as-applied Equal Protection challenges has become an important area of dispute in recent transgender rights litigation.[55] But as the foregoing discussion in Part II ought to make clear,

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[49] *Id.*

[50] *See, e.g.*, Katie Eyer, *Transgender Constitutional Law*, 171 U Pa. L. Rev. 1405, 1485-86 (2023) (discussing the likely reasons for the movement's preference for as-applied claims).

[51] *See, e.g.,* Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 Yale J. L. & Fem. 465, 499–514 (2018); Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 981–86 (2019).

[52] *See, e.g.*, Adams *v. Sch. Bd. of St. Johns*, 57 F.4th 791, n.3, 804–808 (11th Cir. 2022) (en banc).

[53] *See, e.g.*, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1050–54 (7th Cir. 2017); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 843 (S.D. Ind. 2019); *A.H. v. Minersville Area Sch. Dist.,* 408 F. Supp. 3d 536, 575–76 (M.D. Pa. 2019); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–10 (4th Cir. 2020); *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772-773 (7th Cir. 2023).

[54] *See, e.g.*, *Doe v. Horne*, 2023 WL 4661831, at *15–19 (D. Ariz. July 20, 2023); *Hecox v. Littl*e, 79 F.4th 1009, 1027-28 (9th Cir. 2023).

[55] *See, e.g.*, Response/Reply Brief of Plaintiff-Appellant/Cross-Appellee B.P.J., *B.P.J. v. W. Va. State Bd. of Ed.*, 2023 WL 3735874, at *10–13 (4th Cir. 2023) (responding to Defendant's arguments that an as-applied Equal Protection claim was not available); *Adams*, 57 F.4th at n.3,

this dispute should be an easy one for the courts to resolve. Among other things, all of the recent transgender rights cases in which this issue has arisen are cases in which there is a facial sex classification, thus implicating intermediate scrutiny.[56] Thus, under the Supreme Court's precedents defendants must "either . . . realign their substantive laws in a gender-neutral fashion, or . . . adopt procedures for identifying those instances where [a] sex-centered generalization actually comport[s] with fact."[57]

In the context of modern transgender rights cases, this means that government entities must either: (1) adopt meaningful opportunities for transgender individuals to demonstrate that they are comparably situated to those possessing their gender identity (but not their sex assigned at birth); or (2) risk as-applied constitutional invalidation as to such individuals.[58] As described *supra* Part II, this is the *minimum* baseline that the Court has set for validating sex classifications in the modern era—in a number of contexts the Court has found such classifications invalid, even in the presence of such as-applied opportunities.[59]

Thus, under the Supreme Court's intermediate scrutiny precedents, it is a constitutional requirement for government entities to adopt procedures for identifying those individuals who should have access to facilities or programs (restrooms, prisons, athletics) inconsistent with their sex assigned at birth.[60] Under the Court's precedents, these procedures cannot be unduly burdensome or restrictive relative to the opportunities afforded to cisgender individuals to access such facilities or programs.[61] Rather, they must, to the extent possible, afford truly comparable opportunities to demonstrate one's entitlement to access the facilities that align with gender identity, or else risk constitutional invalidation.[62]

804–808 (declining to meaningfully engage with the as-applied question of whether exclusion of transgender boy was supported by important government interests, and instead focusing generally on the idea that sex-separated restrooms are supported by important government interests).

[56] *See* sources cited *supra* note 3.

[57] *Craig v. Boren*, 429 U.S 190, 199 (1976).

[58] *Id.*; *see also* sources cited note 40 (invalidating the application of sex or illegitimacy-differentiating laws on an as-applied basis where no opportunities were provided within the law itself for individual demonstration that an individual was similarly situated to the favored class).

[59] *See supra* note 46. There are a few contexts where the Court has not demanded this type of as-applied consideration, but they have involved situations where the Court has assumed that there will be no exceptions to the differences between how men and women are situated vis-à-vis the relevant government interest. *See supra* note 47.

[60] *See supra* Part II.

[61] *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461–65 (1988); *Pickett v. Brown,* 462 U.S. 1, 12–18 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 97–101 (1982); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 170–71, n.9 (1972); *Tineo v. Att'y Gen. U.S. of Am.*, 937 F.3d 200, 212–15 (3d Cir. 2019); *see also* Serena Mayeri, *The State of Illegitimacy After the Rights Revolution*, *in* Intimate States: Gender, Sexuality and Governance in Modern U.S. History 235, 241–44 (Margot Canaday et al. eds., 2021) (describing the Supreme Court's willingness to require non-marital fathers to comply with state procedures for establishing paternity or legitimating children, but only where those procedures were easily accessible and not unduly onerous).

[62] *See* sources cited *supra* note 62.

In the transgender rights context, this means, for example, that schools can and should adopt processes for transgender students to gain access to gender-identity-appropriate restrooms, athletics, and other facilities.[63] Such a process might, for example, take the form of a procedure by which a transgender student could fill out a form attesting to their gender identity.[64] However, the Supreme Court's precedents make clear that any especially intrusive or difficult procedure would not be constitutionally acceptable.[65] In particular, where it appears to the Court that opportunities for as-applied access have been tailored to limit, rather than promote access to those similarly situated, the Court has invalidated those procedures.[66] Thus, an effort by a government entity to apply a pretextual procedure, which imposes invasive and burdensome requirements (for example, requiring genital surgery which many transgender people cannot obtain) would not pass constitutional scrutiny.[67]

If an entity lacks such procedures and simply possesses a blanket sex-based rule that may inaccurately sort some people relative to the government's interests, then the Court's intermediate scrutiny precedents clearly call for as-applied invalidation.[68] This is of course precisely the posture in

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[63] *Id.*

[64] *See, e.g.,* National Center for Transgender Equality, *Comments in Support of Proposed Amendments to 7.2.2 NMAC Vital Records and Statistics*, https://www.nmhealth.org/publication/view/rules/5420/[https://perma.cc/3XLR-ANY9] (observing that "[s]elf-attestation reflects the most accurate information about a person's gender identity").

[65] *See* sources cited *supra* note 62.

[66] *Id.*

[67] *Id.*; *cf. A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 766 (7th Cir. 2023) (recognizing that school district rule that "insisted that surgical change was required before a transgender student could use gender-affirming bathrooms . . . rendered most of the policy nugatory" since "Indiana prohibits such surgery for patients younger than 18 (the great majority of high school students) and some transgender persons opt not to undergo surgical transition given the risks and costs of the procedure"); *Hecox v. Little*, 79 F.4th 1009, 1022 (9th Cir. 2023) (recognizing that "[t]he plain language of Section 33-6203 bans transgender women from 'biologically female' teams" in part because although "reproductive anatomy" was a basis for sex-verification under the law "most gender-affirming medical care for transgender females, especially minors, will not or cannot alter the characteristics in the only three verification methods prescribed by the Act").

[68] *See Caban v. Mohammed*, 441 U.S. 380, 388–94, n. 15 (1979) (finding state statute affording non-marital mothers but not non-marital fathers the absolute ability to veto adoption violated Equal Protection as applied to involved non-marital fathers); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (noting that "[w]e have held that [statutes differentiating between the rights of non-marital mothers and fathers] may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with respect to their relationship with the child"); *Sessions v. Morales*, 582 U.S. 47, n.12 (2017) (observing that "laws treating fathers and mothers differently 'may not constitutionally be applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child'") (quoting *Lehr*, 463 U.S. at 267); *Jimenez v. Weinberger*, 417 U.S. 628, 635–36 (1974) (stressing the lack of any available mechanism for non-marital children to establish actual dependence in finding provision treating non-marital children differently invalid as a matter of Equal Protection); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169–70, n.9 (1972); *Weber*, 406 U.S. at 176 (Blackmun, J., concurring) (stressing both the actual relationship of father to children and the lack of a realistic way for non-marital father to establish parental stature vis-à-vis children for the purposes

which the vast majority of recent transgender rights cases described herein have arisen: absolute sex classifications that are alleged to sort some people (i.e., transgender people) inaccurately.[69] In this context, the Supreme Court's precedents make clear that the courts must afford as-applied consideration, and that the relevant sex-based rules "may not constitutionally be applied . . . where [the individual is] in fact similarly situated" with regard to the relevant government interests.[70]

In the context of sex-separated facilities or programs, this means that the overwhelming majority of courts—which have afforded the claims of transgender litigants as-applied consideration—have properly applied intermediate scrutiny.[71] In contrast, those few courts that have declined as-applied consideration to transgender plaintiffs—looking only at the general interests of the government in sex classification—are improperly applying the Court's precedents.[72] As the Court has recognized, even where sex classifications may be generally acceptable, they must never be permitted to devolve into gender stereotypes.[73] To this end, where the government fails to provide its *own* opportunities for individualized consideration, the courts must do so.[74]

IV. Other As-Applied Equal Protection Contexts

The structure of intermediate scrutiny alone should compel the courts to recognize as-applied Equal Protection challenges to the assimilation of transgender individuals into systems of sex separation. But it is also important to note that as-applied Equal Protection challenges have been endorsed

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of workers' compensation benefits given the strict provisions of state law for legitimation and finding law invalid as a matter of Equal Protection); *Stanley v. Illinois*, 405 U.S. 645, 654–58, n. 10 (1972) (finding that state violated both Equal Protection and Due Process where they afforded non-marital father who was actually highly involved in raising his children with no opportunity to demonstrate an established parental relationship and right to custody of his children); *cf. United States v. Clark*, 445 U.S. 23, 26–34 (1980) (construing statute to allow non-marital children who had lived with father at any time to receive benefits to avoid constitutional problems that would be created by a blanket assumption that non-marital children are not dependent on their fathers); *Quilloin v. Walcott*, 434 U.S. 246, 256 (finding provision distinguishing between marital and non-marital fathers in their ability to veto adoption constitutional "as applied" to a father who "has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child").

[69] *See* sources cited *supra* note 3.

[70] *Lehr v. Robertson*, 463 U.S. 248, 267 (1983); *see also Sessions v. Morales*, 582 U.S. 47, n.12 (2017) (quoting *Lehr*).

[71] *See* cases cited *supra* note 5.

[72] *See* cases cited *supra* note 7.

[73] *See, e.g., Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (observing that many modern sex distinctions were based on "archaic and overbroad generalizations" and "outdated misconceptions" and that "[i]n light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact").

[74] *See* sources cited *supra* note 69.

by the Supreme Court in other contexts (outside of the realm of intermediate scrutiny) as well.[75] Among other things, as described herein, the Court has invalidated laws on an as-applied basis where a challenge is to an administrative application of a law, and where an out-of-the-ordinary application of the law is at issue.[76] As set out herein, these other contexts *also* ought to compel the consideration of recent as-applied transgender rights claims on their own terms: as challenges to the assimilation of transgender individuals into existing systems of sex separation, rather than to those systems of sex separation themselves.[77]

A. Cleburne and As-Applied Challenges to Administrative Applications

City of Cleburne v. Cleburne Living Center is perhaps the best-known example of the Supreme Court adjudicating an Equal Protection claim on an as-applied basis.[78] In *Cleburne*, the City denied a special use permit to a group home for people with intellectual disabilities.[79] The group home sued, challenging both the ordinance requiring the special use permit (which applied only to people with intellectual disabilities) as well as the administrative determination denying the group home a permit (which they alleged "was motivated by an intent to discriminate against [intellectually disabled] people").[80]

At the Supreme Court, the Court declined to address the facial challenge to the ordinance, but concluded that "the ordinance is invalid as applied in this case."[81] Reasoning that adjudicating claims on an as-applied basis is "the preferred course of adjudication since it enables courts to avoid

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[75] *See infra* Parts IV A–B.

[76] *Id.*

[77] *Id.*

[78] *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) ("We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R–3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments."); *see also, e.g.*, Adler, *supra* note 2, at n.144 (referring to *Cleburne* as "the exception that proves the rule" that "as-applied challenges virtually never arise under the Equal Protection clause.").

[79] *Cleburne*, 473 U.S. at 435.

[80] *See* Complaint ¶¶ 28–29, *City of Cleburne v. Cleburne Living Ctr.*, Civ. Act. No. CA3-80-1576-F, *available in* Joint Appendix, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (No. 84-468).

[81] *Cleburne*, 473 U.S. at 435. Another major issue in *Cleburne* was the applicable level of scrutiny, since the Court of Appeals below had concluded that people with intellectual disabilities should qualify as a quasi-suspect class. *Id.* A majority of the Supreme Court rejected that conclusion, ruling that discrimination against people with disabilities should only receive rational basis review. *See id.* at 442–46.

making unnecessarily broad constitutional judgments,"[82] the Court focused on the administrative denial of the permit—but also, in evaluating the City's proffered reasons, considered the numerous other non-disability uses that did not require a permit at all.[83] It ultimately concluded that the law was invalid on an as-applied basis, because "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[84]

As *Cleburne* illustrates, one important context in which as-applied and facial Equal Protection challenges will not necessarily merge (and where both should thus be cognizable) is in the context of challenges to the administrative application of a rule.[85] Thus, a Court might conclude that a general rule is sufficiently justified, but that the way it has been applied by administrators in a particular context is not. As Professor Bill Araiza has written, this appears to in fact be what animated the Court's as-applied approach in *Cleburne*—it was a compromise between those Justices who believed that the general rule requiring a special use permit for disability group homes was reasonable, and those who believed that the denial of the permit *in this instance* was based on irrational bias against the disabled.[86]

Of course, many of the recent as-applied transgender rights challenges also involve precisely this type of administrative application context. Thus, for example, a case may challenge a determination by an administrator that a transgender student will not be permitted to access the restroom consistent with their gender identity—without challenging the background rule of sex-separated restrooms.[87] Just as in *Cleburne*, there is a meaningful distinction here between the rule itself (sex-separated restrooms) and the administrative application of the rule to deny a transgender student gender-identity appropriate access.[88] Similarly, a challenge to the administrative decision to place a transgender woman in a men's prison involves two logically distinguishable legal predicates: the rule requiring sex separated prisons, and the specific administrative determination of *where* within this

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[82] *Id.* at 447.

[83] *Id.* at 447–50.

[84] *Id.* at 450.

[85] *See id.* at 447–50; *see also W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 997–1002 (9th Cir. 2005) (finding national affirmative action program insufficiently tailored as-applied to its implementation in the state of Washington); *McClesk ey v. Kemp*, 481 U.S. 279, 292–99, n.21 (1987) (addressing both a challenge to Georgia's death penalty statute as well as a challenge to its specific application in McCleskey's case, though rejecting both challenges).

[86] *See* William D. Araiza, *Was* Cleburne *An Accident?*, 19 U. Pa. J. Const. L. 621, 650 (2017).

[87] In fact, challenges related to sex-separated facilities like restrooms have overwhelmingly taken this form. *See* Eyer, *supra* note 50, at 1485-1486.

[88] *See, e.g., Whitaker*, 858 F.3d at 1040 (describing student's efforts to obtain access to gender identity-appropriate restroom, and the administration's decision that such requests would be denied).

system transgender prisoners (or a particular transgender prisoner) ought to be placed.[89]

In these contexts, *Cleburne* makes clear that an as-applied Equal Protection challenge is not only possible, it is "preferred."[90] This is because, as the Court observed, it "enables courts to avoid making unnecessarily broad constitutional judgments."[91] This observation seems especially apt in the circumstance of many of the recent transgender rights challenges, in which a facial approach would require the courts to adjudicate the overall validity of long-standing and pervasive systems of sex separation. Precisely the considerations of judicial restraint that the Court has suggested favor as-applied adjudication generally are at issue in many of the transgender rights cases—where a narrower assessment of the administrative application of a rule to a particular plaintiff or a particular sub-group is available.

B. As-Applied Challenges to the Application of a Law to Specific Sub-Contexts or Groups

Cleburne is the most well-known case outside of the intermediate scrutiny context to take an as-applied approach to Equal Protection, but it is of course not the only one. Other Supreme Court cases have also recognized as-applied Equal Protection claims, even outside of the context of a meaningfully separable administrative process.[92] Especially where the sub-group or context at issue is out of the ordinary—or unexpected—both the Supreme Court and the lower courts have found "as applied" Equal Protection challenges to be both appropriate and cognizable.[93]

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[89] *See, e.g., Doe v. Mass. Dep't of Corr.*, No. CV 17-12255-RGS, 2018 WL 2994403, at *9-11 (differentiating between general policy placing those born female or male according to sex assigned at birth and whether there was a sufficiently individualized assessment in actuality of where to place specific transgender inmate).

[90] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985).

[91] *Id.*

[92] *See, e.g.*, *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183–87 (1979) (holding election requirement invalid "as applied" to the City of Chicago); *Cabell v. Chavez-Salido*, 454 U.S. 432, 441–47 (1982) (evaluating Equal Protection challenge both as facial challenge and as-applied to specific sub-group, but ultimately rejecting both challenges); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199–200, n.19 (2008) (plurality opinion) (suggesting that although facial challenge to voter ID provision failed, a challenge might succeed as applied to a limited subgroup of those affected).

[93] *See, e.g.*, *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183–87 (1979) (holding election requirement invalid "as applied" to the City of Chicago where application of law to Chicago elections produced perverse results); *Cabell v. Chavez-Salido*, 454 U.S. 432, 441–47 (1982) (evaluating Equal Protection challenge both as facial challenge and as-applied to specific sub-group, but ultimately rejecting both challenges); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199–200, n.19 (2008) (plurality opinion) (suggesting that although facial challenge to voter ID provision failed, a challenge might succeed as applied to a limited subgroup of those affected); *see generally* sources cited notes 106 & 108, *infra* (describing case law in the lower and state courts taking an "as applied" Equal Protection approach to unusual or unexpected applications of a law).

One example of this type of as-applied approach can be seen in the Supreme Court's 1979 decision in *Illinois State Board of Elections v. Socialist Workers Party*.[94] At issue in *Socialist Workers Party* was a state law that required new parties or candidates for local office to obtain signatures of a fixed percentage of prior local voters in order to gain access to the ballot—while permitting those seeking access to the ballot for state-wide elections to secure such access by obtaining 25,000 signatures.[95] As the Court observed, it had in the past recognized the importance of state interests in regulating access to the ballot by requiring a showing of sufficient support, given the risk of overwhelming voters and of spurring the need for runoff elections.[96]

But in *Socialist Workers Party*, the Court concluded that while the reasons behind restricting ballot access were important and "the distinction between state and city elections undoubtedly is valid for some purposes," the fixed percent signature requirement was invalid "as applied" to the City of Chicago.[97] Because candidates for local office in Chicago would have to obtain many more signatures than those for state office (in the case of a candidate for Mayor, for example, 35,000 more), the fixed percentage requirement was "plainly not the least restrictive means of protecting the State's objectives."[98] It thus was invalid "as applied" to the City of Chicago.[99]

As *Socialist Workers Party* illustrates, there are contexts in which the Supreme Court has recognized that as-applied assessment of the Equal Protection validity of a law makes sense, even outside of the administrative application and intermediate scrutiny contexts.[100] Where, as in *Socialist Workers Party*, the sub-context or sub-group at issue is out-of-the-ordinary or produces unusual results, it often will serve the same values of judicial modesty and restraint that the Court stressed in *Cleburne* to assess a claim on an as-applied, rather than a facial basis.[101] In cases where heightened scrutiny applies (such as *Socialist Workers Party* itself), this may avoid unnecessary invalidation of an otherwise valid (and potentially important) rule.[102] And in the context of rational basis review, it honors the basic principle that "'[t]he purpose of the equal protection clause of the Fourteenth

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[94] *Socialist Workers Party*, 440 U.S. at 183–84.

[95] *Id.* at 183–87.

[96] *Id.* at 185.

[97] *Id.* at 184, 187.

[98] *Id.* at 181–82, 186.

[99] *Id.* at 183–87.

[100] *See supra* notes 94–100 and accompanying text.

[101] *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (observing that as-applied adjudication "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.").

[102] *See supra* notes 95–100 and accompanying text.

Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination.'"[103]

The lower and state courts have also recognized as-applied Equal Protection challenges to otherwise constitutional laws where out-of-the-ordinary sub-groups or sub-contexts are at issue.[104] For example, many of the state and lower court cases involving the rights of committed same-sex couples in the era before *Obergefell v. Hodges*[105] were as-applied Equal Protection challenges: they looked at whether family law or benefits provisions were constitutionally invalid "as applied" to such couples given their unique circumstances.[106] As these and other courts have concluded, where a particular sub-group or sub-context is differently situated than most others with respect to a rule, an as-applied Equal Protection analysis will be appropriate.[107]

Just as in the other contexts described herein, Supreme Court cases such as *Socialist Workers Party*—and the lower and state court cases adopting a similar approach—strongly point to the availability of as-applied equal protection analysis in the recent transgender rights cases. The assimilation of transgender individuals into existing systems of sex separation raises distinctive constitutional concerns from most run-of-the-mill applications of publicly mandated sex-separation rules.[108] It is not the ordinary context that public entities had in mind when they designed overarching systems of sex separation.[109] (To the extent it *is* the context that public entities have in mind

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[103] *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota Cn ty.*, 260 U.S. 441, 445 (1923)).

[104] *See, e.g.*, *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 257–58 (4th Cir. 2010) (finding affirmative action program invalid as-applied to certain sub-groups); *see also* sources cited *infra* note 108.

[105] *See Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding that laws excluding same-sex couples from the institution of marriage violate the 14th Amendment of the Constitution).

[106] *See, e.g.*, *Harris v. Millennium Hotel*, 330 P.3d 330, 334–38 (Alaska 2014) (reaffirming that marriage requirement for Workers' Compensation benefits was generally valid, but finding it violated federal and state Equal Protection clauses as-applied to same-sex couples who were prohibited from marrying under state law); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 344 (Fla. 2013) (invalidating on an as-applied basis statutory rule that permitted opposite sex but not same-sex biological gamete donors in a couple conceiving an intended child to avoid relinquishing parental rights); *Diaz v. Brewer*, 656 F.3d 1008, 1010–15 (9th Cir. 2011) (analyzing the constitutionality of a rule eliminating healthcare benefits for domestic partners as applied to committed same-sex couples who were unable to marry because of state law barring same-sex marriage); *see also* Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act (concluding that Section 3 of the Defense of Marriage Act violated the Equal Protection component of the 5th Amendment, "as applied to same-sex couples who are legally married under state law").

[107] *See* sources cited *supra* 108.

[108] *See* sources cited *supra* note 5.

[109] This is not to suggest that transgender people were absent from history, nor that they were unknown in broader public knowledge, but rather that most background systems of sex separation were not adopted with transgender people specifically in mind. *Cf.* Ezra Young, *Transgender Originalism*, at 34–38 (work in progress),https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3967605 (describing historically important instances of transgender legal

in enacting more recent laws or subsidiary rules targeted specifically at the transgender community, such challenges are properly conceptualized as facial, not as-applied, as I explore further *infra* Part V).

Recent transgender rights cases thus also fit comfortably within the solicitude for as-applied Equal Protection challenges that both the Supreme Court and the lower courts have shown where an out-of-the-ordinary context or group is at issue. In such contexts, the courts have recognized that it may well be appropriate to address just the unusual or unexpected context that is at issue on an as-applied basis, rather than the constitutional validity of the overarching rule.[110] This of course is precisely what transgender litigants are asking the courts to do.[111]

V. Not All Transgender Rights Claims are As-Applied

As described above, to the extent transgender rights litigants are making as-applied Equal Protection arguments, such arguments ought to be cognizable under existing Supreme Court precedents.[112] This is important, insofar as the government interests in excluding transgender people from gender-identity appropriate facilities or programs (such as gender identity -appropriate restrooms or athletics) are generally far weaker than the government interests undergirding continued systems of sex separation *en toto* (such as sex-separated prisons or restrooms).[113] But it is *also* important to recognize that some of the arguments that are being raised by transgender rights litigants in recent cases should not be understood as "as applied" in the first instance.[114] The viability of such claims thus ought not turn on debates over the propriety of as-applied claims at all.

In what contexts are transgender rights claims properly conceptualized as facial rather than as-applied? In an increasing number of circumstances, state and local entities have targeted the transgender community *directly* with rules purposefully directed at them.[115] In the context of challenges to such targeted

representation); Brief of Law & History Professors as Amici Curiae in Support of Respondent at 6–31, *R.G. & G.R. Harris Funeral Homes*, 590 U.S.__ (2020) (No. 18-107) (discussing in depth the history, awareness, and consideration of transgender people in law-making relating to sex); Jesse Bayker, Dissertation, Before Transsexuality: Transgender Lives and Practices in Nineteenth Century America (2019), *available at* https://rucore.libraries.rutgers.edu/rutgers-lib/60594/PDF/1/play/ (detailing how "individuals changed their gender socially without changing their bodies" during the "antebellum era to the turn of the twentieth century.").

[110] *See* sources cited *supra* notes 95–108 and accompanying text.

[111] *See* sources cited *supra* note 5.

[112] *See supra* Parts III–IV.

[113] *See* sources cited *supra* note 5.

[114] *See* sources cited *infra* notes 118–19 and accompanying text.

[115] *See, e.g.*, *Grimm*, 972 F.3d at 599–600; *Horne*, 2023 WL 4661831, at *16–17; *Hecox v. Little*, 79 F.4th 1009, 1022-1023 (9th Cir. 2023); *see generally* Scott Skinner-Thompson, *Trans Animus*, __ Boston College L. Rev. __ (2023) (forthcoming) (detailing the recent avalanche of legislation directly targeted at the transgender community).

rules (as opposed to challenges to the ad hoc extension of a longstanding system of sex separation to the transgender community), what is being challenged is typically the rule (or the portion of the rule) specifically applicable to the transgender community.[116] As described below, this ought not be characterized as an as-applied challenge at all, but rather a facial challenge to an *additional* rule that has been overlaid onto an existing system of sex separation.

Thus, for example, if a government entity were to adopt a rule requiring all girls with short hair who wear pants to be designated as boys and use the boys' restroom, we would easily recognize that this subsidiary rule itself could be challenged, and the challenge would be a facial one. (It is, moreover, highly likely that a rule such as this would be deemed constitutionally invalid by the courts as being based on gender stereotypes).[117] For the same reason, a challenge to a government rule specifically addressing how transgender individuals will be treated, even within existing systems of sex separation, is facial, not as-applied. Even more obviously, challenges to rules that specifically target the transgender community outside of the context of an existing system of sex separation, such as bans on gender affirming care, are generally facial, not as-applied.[118]

This means that whether a challenge is properly conceptualized as facial or as-applied can turn on nuances such as the structure of the background rules that the government has developed.[119] Where a long-standing system of sex separation is being applied to the transgender community in an ad hoc manner without further elaboration in a formal rule, it may often make sense to characterize the challenge as as-applied.[120] Or, where a challenge is being made on behalf of a subset of the transgender community, or to only a sub-part of a trans-targeted rule, it may also make sense to

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[116] *See* sources cited *supra* note 116.

[117] *See, e.g.*, *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 1790–91 (1989) (plurality opinion); *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1741, 1748–49 (2020); *see also* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, (2010) (describing the long-standing and important role of gender stereotyping doctrine in Equal Protection sex discrimination law).

[118] *See, e.g.*, *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). Of course, a litigant may still choose to challenge only a part of a trans-targeted law, or the law's application to only a subset of the transgender community, in which case the challenge might still be characterized as "as applied." *Cf. Eknes-Tucker v. Governor of Ala.*, 2023 WL 5344981 (11th Cir. 2023) (addressing a challenge to only certain portions of ban on gender-affirming care).

[119] At times, of course, it may be factually disputed or otherwise difficult to determine which of these circumstances are applicable, and thus how to characterize a particular challenge. *See, e.g.*, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 n.2 (7th Cir. 2017); *Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *11 (D. Mass. 2018). In either circumstance, however, the focus of the analysis should be the same: on the sufficiency of the government's reasons for refusing gender-identity appropriate access for transgender litigants, rather than the sufficiency of the government's reasons for sex-separation in general.

[120] *See, e.g., M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, n.4 (D. Md. 2018); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 839 (S.D. Ind. 2019); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 546–47 (M.D. Pa. 2019).

characterize the challenge as as-applied.[121] In contrast, where a government entity has developed a specific rule targeted at the transgender community, and that specific rule is what is being challenged, the challenge is not truly to the system of sex separation at all.[122] In such circumstances, the challenge is properly conceptualized as a facial challenge to the specific rule governing the transgender community.[123]

The formal structure of transgender rights claims thus may differ depending on an important background fact: whether the government entity has adopted a specific rule for the transgender community or simply has extended its system of sex separation to the transgender community without further elaboration. It is important to note, however, that in both instances the focus of the court ought to be the same: not on the reasons undergirding the system of sex separation itself (which in neither instance is under challenge), but rather on the reasons for excluding transgender individuals from gender-identity appropriate facilities or programs. And as most courts have concluded, those reasons can rarely satisfy the requisite level of scrutiny, *i.e.*, intermediate scrutiny.[124]

VI. Conclusion

As-applied Equal Protection claims have gained renewed importance in recent years as they have been an important feature of many recent transgender rights cases. In such cases, transgender litigants have often challenged systems of sex separation as they have been applied to them—rather than *en toto*. As such claims implicitly recognize, while there may be substantial government reasons underlying some remaining systems of sex separation, there are rarely comparably important reasons for how transgender individuals are often (mis-)assimilated into such systems.

As this Essay has described, such as-applied claims are clearly cognizable under existing Supreme Court jurisprudence. Indeed, as-applied consideration is a core feature of intermediate scrutiny: a form of scrutiny which permits greater use of (sex or illegitimacy) classifications, but only where an escape hatch of "as applied" consideration is available. So too, the other contexts in which the Supreme Court has recognized as-applied Equal Protection claims—administrative application, and unusual or out-of-the-ordinary applications—also extend to many transgender rights cases.

Finally, it is important to observe that in some instances, the challenges being raised by transgender litigants are not properly characterized as as-applied at all, even where they are related to underlying systems of sex separation.

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[121] *See, e.g.,* Response/Reply Brief of Plaintiff-Appellant/Cross-Appellee B.P.J., *B.P.J. v. W. Va. State Bd. of Educ.*, 2023 WL 3735874, *11–12 (4th Cir. May 26, 2023) (articulating claim on behalf of individual transgender girl who had not and would not undergo endogenous puberty).

[122] *See* sources cited *supra* note 116.

[123] *Id.*

[124] *See* sources cited *supra* 6.

Where a government entity has adopted a specific rule for how the transgender community will be assimilated into systems of sex separation, a challenge to that transgender-specific rule is facial, not as-applied. In such circumstances, as-applied claims are not needed: a focus on the general reasons undergirding systems of sex separation is simply misplaced when the general rule of sex separation is not the rule being challenged in the first instance.