to them at birth.[94] To reach this conclusion, the courts relied on biological factors,[95] including chromosomes,[96] the absence of internal reproductive organs,[97] and the inability to reproduce.[98] To be constitutional under the Equal Protection Clause, the state must prove that its sex text—chromosomes, the absence of internal sex organs, or the inability to reproduce—accomplishes the important interest articulated by the state.

As discussed in the previous section, courts have asserted that three interests justify their refusal to recognize people's self-identified sex as their legal sex for purposes of marriage: (1) reproductive incapacity, (2) religious references, and (3) maintaining marriage as a heterosexual union of one man and one woman. The first two articulated state interests, reproductive capacity and religious references cannot be considered important or for that matter legitimate state interests.[99]

If the Supreme Court allows states to continue to bar same-sex couples from marrying, states may continue to argue that the state's interest in limiting marriage to one man and one woman qualifies as an important state interest.[100] But the tests that the courts have used to determine a person's sex do not pass equal protection scrutiny because they are not substantially related to the articulated state interest in deterring same-sex marriages. Some jurisdictions that have ruled that post-operative male-to-female transgender people are still males for the purposes of marriage are allowing post-operative male-to-female transgender people to marry women. In other words, two individuals who both appear to be women (even when they are undressed) are now legally allowed to marry each other in these jurisdictions that otherwise ban same-sex marriages.[101]

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94 *See, e.g.*, *In re* Nash, 2003 WL 23097095 at *5–7 (Ohio Ct. App. Dec. 31, 2003); Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999); Kantaras v. Kantaras, 884 So.2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re* Estate of Gardiner, 42 P.3d 120, 135–37 (Kan. 2002). Some courts that have ruled that a transgender person remains the sex assigned at birth have stated that they do not have the power to establish a test for determining a person's legal sex. They have concluded that it is the legislature's role to make such a determination and in the absence of legislative action specifically authorizing transgender people to change their sex, the court could not act. *See*, *In re* Nash, 2003 WL 23097095 at *6 (Ohio Ct. App. Dec. 31, 2003); Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999); Kantaras v. Kantaras, 884 So.2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002). When a court concludes that transgender people must remain the sex assigned on their original birth certificate because the legislature has not specifically addressed this issue, the court has established a sex test. The court's sex test is that people are the sex assigned to them at birth. Such a test must pass Equal Protection scrutiny.

95 The court in *In re* Marriage of Simmons, 825 N.E.2d 303, 308 (Ill. App. 2005) relied on biological factors, but did not state which biological factors should be used to determine sex. The court implied that the court would recognize a sex change for purposes of marriage if the person undergoes the proper medical treatment. The court stated, "while he has undergone surgeries to remove his internal female organs, he still possesses all of his external female genitalia and requires additional surgeries before sex reassignment can be considered completed." *Id.* at 309.

96 *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999); Kantaras v. Kantaras, 884 So.2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002). Some decisions do not specifically mention chromosomes; instead the court refers to "immutable traits determined at birth." *See, e.g.*, Kantaras v. Kantaras, 884 So.2d 155, 161 (Fla. Dist. Ct. App. 2004). The only immutable sex trait is chromosomes. All other sex and reproductive aspects can be surgically and hormonally altered.

97 In Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999), the court listed seven factors that supported its conclusion that Christie Littleton, a male-to-female transgender person, was not legally a male. One of the factors was the absence of female internal sexual organs. "Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a women (except for the vaginal canal). There is no womb, cervix or ovaries in the post-operative transsexual female." *Id.* at 230.

98 *See, e.g.*, *In re* Nash, 2003 WL 23097095 at *6 (Ohio Ct. App. Dec. 31, 2003); *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971); B v. B, 355 N.Y.S.2d 712, 716 (N.Y. Sup. Ct. 1974).

99 *See supra* notes 74–82 and accompanying text.

100 The likelihood that this argument will be persuasive has diminished with recent court rulings. *See*, *supra*, n.84.

101 *See*, Todd Ackerman, *Marriage, A Changing Union? Transsexual Wedding Shows Gender Can be a Complex Issue*, HOUS. CHRON., Sept. 17, 2000, at 1; Chris Beam, *For Better or For Worse?*, OUT, May 2000, at 60, 64; Afi-Odelia E. Scruggs, *Tying Legalities into Tangled Knot*, PLAIN DEALER (Cleveland), Oct. 7, 1996, at 1B. A male-to-female transsexual who identified as a lesbian and was in the process of undergoing surgical modification was allowed to marry another woman in Utah, a state that also bans same-sex marriage. See Michael Vigh, *Transsexual Weds Woman in Legally Recognized Union*, SALT LAKE TRIB., Feb. 5, 1999, at 1C.

These tests are also invalid because they rely on false sex stereotypes, which cannot be used to justify a state sex classification system.[102] When a state determines that it will classify only those individuals who are able to bear children, who have XX chromosomes, or who have a uterus and ovaries as women, it is engaging in impermissible sex stereotyping about what it means to be a "real" woman. These and other biologic tests effectively ignore scientific literature that clearly establishes that sex features are not binary and many people have incongruent sex attributes.[103]

Ability to reproduce, internal reproductive organs, and chromosomal structure are not more valid indicators of a person's sex than any other anatomical or physiological sex factors. For example, if a state adopted a sex determination test that defined men according to the size of their penis and women according to the size of their breasts, it would undoubtedly fail even the rational basis test. Although chromosomal make-up and ability to reproduce may be less variable than penis and breast size, courts relying on these sex indicators are still basing their determination on sex stereotypes. These stereotypes cannot be used to uphold a sex-based classification under the Equal Protection Clause. A sex classification system that rejects scientific developments in favor of stereotypes should be declared unconstitutional because the state can neither articulate an important state interest to support its system nor prove a substantial relationship between the state's interest and the means it uses to accomplish that interest.[104]

State sex classification systems that rely on chromosomal structure, the absence of internal sex organs, and reproductive incapacity to determine the validity of a marriage fail even rational basis scrutiny Even if a court were to determine that rational basis review is appropriate, states that have excluded scientific advances about sex and gender identity formation in favor of tests based solely on reproductive capacity, the absence of internal sex organs, or chromosomal structure would not pass rational basis scrutiny under recent U.S. Supreme Court equal protection jurisprudence. The United States Supreme Court's decisions in *Romer v. Evans*[105] and *United States v. Windsor*[106] suggest that, when examining laws purporting to violate the constitution under rational basis review, the Supreme Court may be moving toward affording greater protection to sexual minorities. Although the Court did not specifically rule that classifications harming sexual minorities should be subjected to heightened scrutiny, the court applied a more searching type of review in these cases. Some federal courts have interpreted the Court's decision in *Windsor* to require heightened scrutiny in cases involving classifications based on sexual orientation.[107]

In *Romer*, Colorado citizens voted to amend the Colorado Constitution to preclude all legislative, executive, or judicial action designed to protect the status of people based on their homosexual, lesbian or bisexual orientation, conduct, practices, or relationships. The Supreme Court found that this amendment violated the Equal Protection Clause because it imposed a broad and undifferentiated disability on a single group.[108] Furthermore, the Court found that the amendment was motivated by animus toward a particular group and it lacked a rational relationship to legitimate state interests. As the court stated: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[109]

The Court reinforced these principles in 2013, in *United States v. Windsor*, when it struck down DOMA, a federal law denying same-sex married couples federal rights granted to opposite-sex married couples. The

102 United States v. Virginia, 518 U.S. 515, 541–42 (1996) ("equal protection principles, as applied to gender classifications, mean state actors many not rely on 'overbroad' generalization to make 'judgments about people …'"). *Id.*

103 *See*, *Defining Male and Female*, *supra* note 3.

104 Even accurate stereotypes cannot be used to justify the state's interest. *See* United States v. Virginia, 518 U.S. 515, 542 (1996).

105 517 U.S. 620 (1996).

106 United States v. Windsor, 133 S.Ct. 2675 (2013).

107 *See*, *e.g.*, Smithkline Beecham Corp. v. Abbott Labs, 740 F.3d 471 (9th Cir. 2014). "*Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *Id.* at 481.

108 *Romer*, 517 U.S. at 635–36.

109 *Id.* at 634.

Court found that in determining whether a law is motivated by an improper animus or purpose, the court must carefully consider "[d]iscriminations of an unusual character."[110]

Therefore, even when analyzed under the lowest standard of review, states that refuse to recognize the right of transgender people to marry in the role that matches their self-identified sex may violate equal protection guarantees. When a state defines "male" and "female" in a way that is contrary to current science and visits a broad disability on transgender people, the state's action appears to evidence a bare "desire to harm a politically unpopular group."[111] Furthermore, the state cannot justify its decision on its public policy disfavoring same-sex marriages because its sex determination ruling in effect sanctions what appears to be a same-sex marriage. For example, if J'Noel Gardiner, a male-to-female transgender person with breasts and female appearing genitalia, is legally allowed to marry another woman, to most of society it would appear to be a same-sex union.[112] Thus, no rational relationship exists between a state sex classification system that relies solely on chromosomes or ability to reproduce and its interest in limiting marriage to opposite-sex couples.

Refusing to allow transgender people to marry in the gender role in which they live indicates that the state action is based solely on an irrational animus against a discrete group. When a state denies transgender people the right to marry in their self-identified gender role, the state is inhibiting personal relationships and the denial suggests the intent to deny equal protection to a politically unpopular group. This type of animus has led the Supreme Court to strike down laws even under a rational basis level of review, concluding, for example, that the bare "desire to harm a politically unpopular group" was not a legitimate interest when it involved hippies,[113] people with a mental or emotional impairment,[114] or gays and lesbians.[115] Limiting transgender people's right to marry in accord with their gender identity appears "not to further a proper legislative end, but to make them unequal to everyone else."[116]

The rational basis test the Court applied in *Romer* and *Windsor* supports the conclusion that state classification systems that discriminate against individuals who fail to conform to chromosomal or reproductive gender norms are unconstitutional even under rational basis review. If these state classifications fail to survive rational basis review, they would clearly fail under the heightened level of scrutiny traditionally applied to sex and gender classifications.

Rules that Bar Transgender People or People with an Intersex Condition from Accessing the Restrooms, Locker Rooms, and Housing that Comports with Their Gender Self-Identity May Violate the Equal Protection Clause

Restrooms and locker rooms Recently, some states have proposed bills that would bar people from accessing single-sex facilities if the person was not born a "biological member of that sex."[117] According to a Florida bill, the state's interests in creating such legislation include protecting the public's expectation of privacy in single-sex facilities, protecting users from exposure to people of the "opposite sex," and protecting the

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110 *Windsor*, 133 S. Ct. at 2692 (quoting Romer, 517 U.S. at 633).

111 *Windsor*, 133 S. Ct. at 2681 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

112 After the Texas decision in *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), two women, who to all outward appearances appear female, can now legally marry. *See, e.g.*, Todd Ackerman, *Marriage, a Changing Union? Transsexual Wedding Shows Gender Can be a Complex Issue*, Hous. Chron., Sept. 17, 2000, at 1.

113 *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

114 *See, e.g.*, Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

115 *Romer*, 517 U.S. 620; *Windsor*, 133 S. Ct. 2675 (2013).

116 *Romer*, 517 U.S. at 635.

117 *See, e.g.*, Florida's proposed legislation. http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0583__.docx&DocumentType=Bill&BillNumber=0583&Session=2015. Similar bills are also being considered in Texas, http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB01748I.pdf#navpanes=0, and Kentucky, http://www.lrc.ky.gov/record/15RS/sb76.htm. A comparable bill was considered in Arizona, but was withdrawn. These bills are being proposed in response to California passing a law that allows transgender students to use facilities and participate in programs that match their gender self-identity. *See*, Cal. Education Code § 221.5 (West 2015).

public in places of increased vulnerability where they could be subjected to assault, battery, molestation, rape, voyeurism, and exhibitionism.[118]

Assuming these purposes would qualify as "important" state interests,[119] the means the state is using to accomplish its goals would fail equal protection scrutiny because the means are not substantially related to the government's asserted interests. To accomplish its goal, Florida has proposed a test that establishes sex as the biological sex at birth.[120] In other words, all transgender people and people with an intersex condition whose sex was incorrectly identified at birth could be criminally and civilly liable for using the restroom or locker room that comports with their gender identity and appearance.[121] In a similar bill, Texas also proposed a "birth sex" standard, but defined birth sex in terms of chromosomes so that males include anyone with a Y chromosome and females exclude anyone with a Y chromosome.[122]

A biological birth sex test based on chromosomes or the sex indicated on the original birth certificate is not substantially related to the state's goal of protecting the public. First, such tests would mandate that some transgender and intersex people who appear male must use the women's restroom and some who appear female must use the men's restroom. It would also require transgender people who have undergone surgery so that their genitalia have a female appearance to use the men's locker room. Such results would not allay the privacy and vulnerability concerns of people who are not transgender or intersex.

More important, such legislation cannot survive equal protection scrutiny because it appears to be motivated by "a bare desire to harm a politically unpopular group." First, the legislation ignores the privacy and vulnerability concerns of the population that is most at risk; transgender people are repeatedly subjected to harassment, physical assault, and sexual violence.[123] In addition, by barring transgender people from appropriate sex-segregated facility use, it falsely implies that transgender people are more likely to engage in criminal acts such as assault, battery, molestation, rape, voyeurism, and exhibitionism. Such unsupported false stereotypes about people who fail to conform to gender norms cannot survive an equal protection challenge.

Dormitory housing College dormitory housing rules have undergone dramatic changes. Originally, males and females were housed in separate buildings. Over time, the rules were relaxed to allow men and women to share the same building, and then the same hall. Recently, some colleges have allowed students of different sexes to share the same room, but most colleges still require roommates to be of the "opposite" sex.[124]

Sex-segregated housing rules may be used to bar transgender students from living in housing that matches their gender self-identity.[125] If a state university with sex-segregated student housing refuses to allow a transgender student to choose the housing that is appropriate for the student's gender identity, the student may

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118 http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0583__.docx&DocumentType=Bill&BillNumber=0583&Session=2015.

119 Recently, the Equal Employment Opportunity Commission ruled that a civilian transgender employee of the army suffered employment discrimination when she was barred from using the women's restroom. The EEOC found that "supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment … Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome." Chris Geidner, *Army Discriminated Against Transgender Civilian Worker, Federal Agency Rules*, http://www.buzzfeed.com/chrisgeidner/army-discriminated-against-transgender-civilian-worker-feder#.mrzMrYPlA.

120 http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0583__.docx&DocumentType=Bill&BillNumber=0583&Session=2015.

121 *Id.*

122 http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB01748I.pdf#navpanes=0.

123 Jaime M. Grant, et al. National Center For Transgender Equality, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, Executive Summary, *available at* http://transequality.org/PDFs/Executive_Summary.pdf.

124 *See*, Larry Gordon, *Mixed-Gender Dorm Rooms are Gaining Acceptance*, http://articles.latimes.com/2010/mar/15/local/la-me-dorm-gender15–2010mar15.

125 *See, e.g.*, Emily Thomas, *Christian University Denies Transgeder Student's Request to Live in An All-Male Dorm*, http://www.huffingtonpost.com/2014/04/07/transgender-dorm-george-fox-university_n_5106075.html.

bring an equal protection challenge. If such a claim is raised, the school would likely assert the same concerns that are raised in the bathroom regulations—privacy and safety. The state's interest in protecting its citizens' rights to privacy and safety is much weaker in dormitories compared to the use of public restrooms and locker rooms. Public restrooms and locker rooms are open to all; college students, however, must agree to be housed with a person who is a different biological birth sex. Therefore, forbidding a transgender student from living with a student of the same gender identity, but different "birth" sex, does not protect anyone's interest in privacy or safety and should not survive an equal protection challenge.

Prisoner housing Prisoner housing presents a much more complicated case than housing in college dormitories. Transgender and intersex inmates have been subjected to horrific treatment, including harassment and rape, when they have been housed in a unit that does not match their gender identity. To protect them from abuse at the hands of male prisoners, some prisons place transgender and intersex prisoners in administrative segregation. Although administrative segregation is technically designed to protect the prisoner from harm that would be inflicted in the general population, conditions in administrative segregation units effectively constitute solitary confinement, a system designed to punish prisoners from misbehavior.

For example, Miki Ann DiMarco, a female who was born with an intersex condition, was convicted for check fraud and was placed on probation. When she violated the terms of the probation, she was imprisoned. Despite a security threat rating that indicated that she posed no risk to herself or others, she spent 438 days in solitary confinement in a maximum security prison. She was not allowed to interact with other inmates and she had limited access to the day room, the commissary, educational opportunities, haircuts, religious items, a radio, a lamp, or playing cards. She was forced to eat her meals alone in her cell, while sitting either on her bed or on the toilet. Miki was placed in solitary confinement because she was born with an intersex condition. Despite the fact that she had lived as a female since puberty and was not sexually functional as a male, she remained in isolation throughout her incarceration.[126]

DiMarco brought a number of constitutional claims, including an equal protection claim. The district court rejected DiMarco's equal protection cause of action. The court determined that "individuals born with ambiguous gender" are not members of a quasi-suspect or constitutionally protected class. Therefore, the court applied rational basis review and found no equal protection violation "because Defendants' actions in placing Plaintiff in segregated confinement was rationally related to the legitimate purposes of ensuring the safety of Plaintiff and other inmates and security of the facility."[127]

Similar equal protection housing challenges brought by transgender prisoners have been unsuccessful for a number of reasons.[128] First, courts have found that the government's decision to segregate prisoners by sex is "unquestionably constitutional."[129] Second, discrimination against transgender and intersex people traditionally has been analyzed under the least restrictive rational basis review.[130] Finally, even if courts are persuaded to apply intermediate scrutiny because these housing decisions constitute a sex-based classification,[131] the Supreme Court has ruled that courts should be particularly deferential to the informed decisions of corrections officials.[132]

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126 DiMarco v. Wyoming Dep't of Corrections, 300 F. Supp. 2d 1183 (D.Wyo. 2004).

127 *Id.* at 1196–97. DiMarco did not appeal the district court equal protection denial so the Tenth Circuit did not address her equal protection claim. DiMarco v. Wyoming Dep't of Corrections, 473 F.3d 1334, 1338 (10th Cir. 2007).

128 Challenges based on violation of the Eighth Amendment guarantee to be free from cruel and unusual punishment have met with moderately greater success. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994).

129 *See*, Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989); Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 926 (D.C. Cir. 1996).

130 *See infra* note 146.

131 *See infra* notes 153–69 and accompanying text.

132 Turner v. Safley, 482 U.S. 78, 90 (1987).

Differential Treatment of Transgender People and People with an Intersex Condition Constitutes Impermissible Sex Discrimination Under the Equal Protection Clause

In addition to the discrimination transgender people and people with an intersex condition experience under the sex classification systems discussed in the previous section, gender nonconforming people suffer discrimination in a number of other areas. They are subjected to harassment, physical assault, and sexual violence in the school system.[133] They experience unemployment at twice the rate of the general population.[134] Almost 50 percent have experienced job discrimination including job loss.[135] They have been subjected to housing discrimination and 20 percent have experienced homelessness.[136] More than 50 percent have been harassed or disrespected in a place of public accommodation, including hotels, restaurants, airports, and bus stations.[137] They also have suffered discrimination in the provision of health care.[138]

Discrimination against gender nonconforming people is not limited to the private sector. A recent study conducted by the Williams Institute indicates that the government discriminates on the basis of sexual orientation and gender identity as often as do private employers.[139] When the government engages in unlawful discrimination, a cause of action can be brought for violation of the right to Equal Protection.

No constitutional provisions and few state laws specifically bar discrimination against transgender people or people with an intersex condition.[140] Therefore, gender nonconforming people subjected to discrimination by a government official typically seek redress by asserting that the government violated the Equal Protection Clause by engaging in unlawful discrimination because of "sex."[141]

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133 JAIME M. GRANT, ET AL. NATIONAL CENTER FOR TRANSGENDER EQUALITY, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, EXECUTIVE SUMMARY, *available at* http://transequality.org/PDFs/Executive_Summary.pdf.

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *See*, Brad Sears, Nan D. Hunter, Christy Mallory, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, The Williams Inst. (Sept. 2009), http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in%20-state-employment/ (finding there is "a widespread and persistent pattern of unconstitutional discrimination by state governments on the basis of sexual orientation and gender identity, and there is no meaningful difference in the pattern and scope of employment discrimination against LGBT people by state governments compared to the private sector and other public sector employers.").

140 Some states, cities, and counties have adopted laws prohibiting discrimination based on gender identity or expression. *U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression,* Transgender Law and Policy Inst., http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions. President Obama signed an Executive Order prohibiting discrimination against gay, lesbian, bisexual, and transgender employees by the federal government and federal contractors. https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033888258&pubNum=0001043&originatingDoc=ID989F9F0124111E4A9C8EA69610B127A&refType=CA&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation). Although these laws would protect people with an intersex condition who are gender nonconforming, no federal, state, or local laws specifically protect people with an intersex condition. Therefore, people with an intersex condition who are comfortable with the gender assigned to them at birth do not receive specific protection.

141 If the government engages in invidious discrimination by depriving an individual of a constitutional or statutory right or privilege, the aggrieved party can bring a cause of action against the government official under 42 U.S.C. § 1983. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) ("42 U.S.C. § 1983 provides a civil cause of action for individuals who are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under color of state law.") *Id.* In determining whether an action qualifies as sex discrimination in a § 1983 Equal Protection case, courts rely on court interpretations of other laws prohibiting sex discrimination, such as Title VII. *See, e.g.*, Sorlucco v. N.Y. City Police Dep't, 888 F.2d 4, 7 (2d. Cir. 1989); Back v. Hastings on Hudson Union Free School Dist. 365 F.3d 107, 122 (2d Cir. 2004); Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004) ("As this court has noted several times, 'the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under § 1983." *Id. at* 577.

Although hundreds of statutes prohibit sex discrimination, the meaning of the term "sex" is far from clear. During the last 40 years, courts have been asked to determine exactly what types of acts violate constitutional and statutory prohibitions against sex discrimination.

Early Sex Discrimination Cases Narrowly Construed the Meaning of Discrimination Because of Sex

When legislation prohibiting sex discrimination was first adopted, courts tended to rule that the purpose of these laws was limited to providing equal opportunities for women and men. The typical early successful sex discrimination cases involved men or women who were treated differently because of their biological sex. For example, early decisions invalidated employer rules that provided only men could be airline pilots and only women could be flight attendants.[142]

During the first three decades after sex discrimination prohibitions were first enacted during the 1960s, courts generally refused to expand the meaning of the term "sex" beyond this simple approach. Courts protected men who had been treated differently from women and women who had been treated differently from men. Typically, however, the statutory ban against sex discrimination did not protect people from discriminatory treatment based on their status as a man or woman who failed to conform to gender role stereotypes,[143] a pregnant woman,[144] a gay or lesbian person,[145] a transgender person,[146] or a person with an intersex condition.[147]

During the 1990s the Meaning of the Term "Sex" Expanded to Include Discrimination Based on Sex Stereotyping

These limited visions of the scope of sex discrimination prohibitions began to dissolve in large part due to the feminist and LGBT movements and feminist and queer theorists, who helped to educate society and the judiciary about the complex nature of sex discrimination. These scholars and activists helped courts develop a more nuanced understanding of the meaning and harm of sex discrimination.

The major expansion of the meaning of the word "sex" and the acts that encompass sex discrimination came from the Supreme Court's 1989 ruling in *Price Waterhouse v. Hopkins*.[148] In *Price Waterhouse*, an accounting firm denied a partnership to Ms Hopkins, not because she was biologically a woman, but because she failed to meet the partners' stereotyped expectations of how a woman should behave. The partners implied that her failure to conform to stereotypes of femininity blocked her path to partnership. Specifically, Hopkins was told that she overcompensated for being a woman and was too "macho."[149] She was advised to stop

142 *See, e.g.*, Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971) (holding that Pan Am's policy of hiring only females for flight attendant positions violated Title VII).

143 *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 103 (2003) (citing Chi v. Age Grp., Ltd., No. 94 CIV 5253 (AGS), 1996 WL 627580, at *1 (S.D.N.Y. Oct. 29, 1996); Piantanida v. Wyman Ctr., Inc., 116 F.3d 340 (8th Cir. 1997); Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305 (S.D.N.Y. 1999); Bass v. Chem. Banking Corp., No. 94 Civ. 8833 (SHS), 1996 WL 374151, at *1 (S.D.N.Y. July 2, 1996); Fuller v. GTE Corp./Contel Cellular, Inc., 926 F. Supp. 653 (M.D. Tenn. 1996)).

144 Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

145 *See, e.g.*, Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 330–31 (9th Cir. 1979). A number of later cases have followed this approach. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 36–37 (2d Cir. 2000), Spearman v. Ford Motor Co., 231 F.3d 1080, 1085–86 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 (1st Cir. 1999).

146 *See, e.g.*, Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663–64 (9th Cir. 1977); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 285–86 (E.D. Pa. 1993); Doe v. U.S. Postal Serv., Civ. A. No. 84–3296, 1985 WL 9446, at *1–2 (D.D.C. June 12, 1985); Terry v. Equal Emp't Opportunity Comm'n, Civ. A. No. 80-C-408, 1980 WL 334, at *1–3 (E.D. Wis. Dec. 10, 1980); Powell v. Read's, Inc., 436 F. Supp. 369, 370–71 (D. Md. 1977); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978); Grossman v. Bernards Twp. Bd. of Educ., No. 74–1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975), *aff'd mem.*, 538 F.2d 319 (3d Cir. 1976).

147 Wood v. C.G. Studios, 660 F. Supp. 176 (E.D. Pa. 1987).

148 490 U.S. 228 (1989).

149 *Id.* at 235.

using profanity, to take a class at charm school, and to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[150] The Supreme Court ruled that discrimination against a woman because she failed to conform to societal stereotypes of femininity constituted discrimination based on "sex."[151]

The Court's acceptance of sex stereotyping as a form of impermissible sex discrimination reflects a more sophisticated understanding of the harms of sex-based discriminatory conduct. Based on the *Price Waterhouse* decision, individuals who are treated differently because they fail to conform to sex-related stereotypes have been able to prove that they were subjected to impermissible sex discrimination if they appropriately frame their claims as gender nonconformity or sex stereotyping discrimination. A number of courts have embraced the concept that gender role performance, sexual orientation, and gender identity are part of a person's "sex." These courts have prohibited discrimination against people whose gender roles, gender behaviors, and gender identities fail to conform to societal norms.

The Equal Protection Clause Protects Transgender People Subjected to Discriminatory Treatment Based on Sex and Gender Stereotyping

Before the decision in *Price Waterhouse*, transgender plaintiffs consistently lost their cases when they tried to state a claim for sex discrimination. Early courts ruled that discrimination against people whose gender identity did not conform to the sex assigned to them at birth was not prohibited under statutes barring sex discrimination.[152] Since *Price Waterhouse*, however, courts in the first, sixth, ninth, and eleventh circuits have held that discrimination against transgender people because their gender identity fails to conform to their natal sex constitutes impermissible sex stereotyping discrimination.[153]

For example, in *Smith v. City of Salem*,[154] firefighting lieutenant, Jimmie Smith, had worked for seven years in the Salem Fire Department without any negative incidents. After Lieutenant Smith began transitioning to becoming a woman, coworkers began asking questions about Lieutenant Smith's appearance and commenting that the lieutenant's looks and mannerisms were not "masculine enough."[155] Smith decided to notify her supervisor about her transition and informed the supervisor that she would eventually undergo a complete physical transformation and present as a woman. After this disclosure, Smith's employer instituted a plan to fire her.[156] The court held that the fire department discriminated against Smith based on the *Price Waterhouse* sex stereotyping theory because the treatment was based on Smith's failure to conform to gender norms of how men should look and behave. The Sixth Circuit ruled that the earlier cases that had denied the ability of transgender people to recover for sex discrimination were "eviscerated" by the 1989 holding in *Price Waterhouse*.[157] The Sixth Circuit reinforced this approach one year later in *Barnes v. Cincinnati*.[158]

150 *Id.*

151 *Id.* at 258.

152 *See supra* note 146.

153 *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (transgender employee can state a § 1983 Equal Protection sex discrimination claim); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (transsexuals are a protected class under Equal Protection and Title VII); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (plaintiff stated a § 1983 Equal Protection claim when he suffered discrimination because of his gender nonconforming behavior); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (transgender female could state a cause of action for sex discrimination under the Equal Credit Opportunity Act); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (mistreatment of a male-to-female transsexual prisoner constitutes impermissible gender discrimination under the Gender Motivated Violence Act). This theory was also upheld in Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (withdrawal of job offer after the Library of Congress learned that the plaintiff was a male-to-female transsexual constitutes unlawful sex stereotyping discrimination under Title VII). The sex stereotyping theory has not been universally accepted in all cases involving transgender plaintiffs. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).

154 378 F.3d 566 (6th Cir. 2004).

155 *Id.* at 568.

156 *Id.*

157 *Id.* at 573.

158 401 F.3d 729 (6th Cir. 2005).

In 2011, the Eleventh Circuit agreed with the Sixth Circuit's approach. In *Glenn v. Brumby*,[159] the appellate court affirmed the trial court's grant of summary judgment in favor of a transgender plaintiff who brought an equal protection sex discrimination claim. Vandiver Glenn sued for sex discrimination when the Georgia General Assembly's Office of Legislative Counsel fired her from her editorial position after she notified her supervisor that she identified as a woman and was beginning her transition to living and presenting as a female. Her employer, Sewell Brumby, stated that her appearance was inappropriate, and he found it "unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," and "that a male in women's clothing is 'unnatural.'"[160] When he fired her, he stated that her "intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable."[161] The Eleventh Circuit ruled that when the employer fired the transgender employee, the employer's actions violated the Equal Protection Clause's prohibition against sex-based discrimination because it was based on the employee's failure to conform to gender stereotypes.[162]

A number of other circuit courts have reached similar conclusions under other statutes prohibiting sex discrimination. For example, in *Schwenk v. Hartford*,[163] the Ninth Circuit ruled that discrimination against a transgender plaintiff because she failed to act like a man constituted impermissible sex discrimination under the Gender Motivated Violence Act. The First Circuit adopted a similar approach when it determined that refusing a loan to a transgender plaintiff because she failed to dress in accordance with prescribed gender roles violated the prohibition against sex discrimination in the Equal Credit Opportunity Act.[164] A number of district courts also have concluded that transgender plaintiffs who suffer differential treatment because of their failure to comply with stereotypical gender norms have been subjected to impermissible sex discrimination.[165]

The Equal Protection Clause Protects Transgender Plaintiffs Subjected to Discriminatory Treatment Because of Sex

As discussed in the previous section, many courts have allowed transgender plaintiffs to state a cause of action for sex discrimination if they properly allege that they have suffered discrimination because of their failure to conform to sex and gender stereotypes. One court has ruled that discrimination against transgender people also constitutes straightforward sex discrimination and transgender plaintiffs do not have to rely on a stereotyping theory.

In 2008, a federal district court ruled in *Schroer v. Billington*[166] that a male-to-female transgender person who had been discriminated against because of her transgender status had been subjected to impermissible sex discrimination. Diane Schroer applied for a position with the research division of the Library of Congress as a terrorism specialist providing expert policy analysis to Congress. When she applied for the job, she had not yet transitioned from male to female so she used her legal male name, David, on the application and she attended the interview in male clothing. She received the highest score of the 18 candidates and she was

159 663 F.3d 1312 (11th Cir. 2011).

160 *Id.* at 1314.

161 *Id.*

162 *Id.* at 1320.

163 204 F.3d 1187 (9th Cir. 2000).

164 Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 216 (1st Cir. 2000).

165 *See, e.g.*, Kaeo-Tomaselli v. Pi'ikoi Recovery House for Women 2011 WL 5572603 (D. Hawaii 2011) (natal male who self-identified as a female who was denied housing as a female stated a cause of action for violation of her right to equal protection); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 659–61 (S.D. Tex. 2008) (transgender job applicant whose job offer was rescinded after the prospective employer learned of the applicant's transgender status stated a claim under Title VII); Mitchell v. Axcan Scandipharm, 2006 WL 986971 (W.D. Pa. 2006) (transgender employee who was terminated from her job when she announced her intent to transition stated a claim under Title VII); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 2004 WL 2008954 (D. Ariz. 2004), *aff'd*, 325 F. App'x. 492 (9th Cir. 2009)(transgender employee who was discharged after she refused to use the men's restroom stated a prima facie sex discrimination case based on sex stereotyping); Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03–CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. 2003) (male-to-female transsexual stated a valid cause of action for sex discrimination).

166 577 F. Supp. 2d 293 (D.D.C. 2008).

offered the job. Diane accepted the position, but before she began work, she notified the person in charge of hiring that she would begin work as a female. The job offer was revoked and Diane sued.

The court found that the Library of Congress had engaged in unlawful sex discrimination for two reasons. First, the court found that Diane was denied the job based on the sex stereotyping theory developed in *Price Waterhouse*. The court concluded that different comments by the employer indicated that Diane was viewed as "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."[167] The court stated: "[T]he Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination 'because of … sex.'"[168]

More important, the court found that, in addition to stating a sex stereotyping discrimination claim, Schroer could recover under a straightforward sex discrimination theory and did not need to rely on the stereotyping approach. The court ruled that people who "change" their sex and suffer discrimination because of the transition have suffered sex discrimination. The court continued:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.[169]

Therefore, under the reasoning of the court in *Schroer*, any government discrimination directed at transgender people based on their transgender status should be considered impermissible sex discrimination under the Equal Protection Clause.

Plaintiffs with an Intersex Condition should be able to Recover under the Equal Protection Clause Under Either a Sex or a Sex Stereotyping Discrimination Theory

Discrimination against people with an intersex condition is not as prevalent as discrimination against transgender people for two reasons. First, most people with an intersex condition self-identify as the sex assigned to them at birth and are gender conforming.[170] Second, because of fear of stigma and rejection, many people with an intersex condition are not "out"; they do not share information about their intersex condition with people in the workplace or even friends and relatives. Therefore, people with an intersex condition frequently do not suffer discrimination because their condition is not known.[171]

People with an intersex condition, who are gender nonconforming or who want to live as the sex opposite the sex assigned to them at birth, may be subjected to the same type of discrimination endured by transgender people. If so, they should be able to recover under the same sex-stereotyping theory that protects transgender

167 *Id.* at 305.

168 *Id.* at 306.

169 *Id.* at 306–07. The Equal Employment Opportunity Commission approved this approach in Macy v. Holder, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012).

170 Some women with one type of intersex condition have a higher likelihood of being bisexual or lesbian and are gender nonconforming in that they often display behavior that is stereotypically associated with males. Heino Meyer-Bahlburg, *What Causes Low Rates of Childbearing in Congenital Adrenal Hyperplasia?*, 84 J. Clinical Endocrinology & Metabolism 1844, 1845–46 (1999), *available at* http://jcem.endojournals.org/content/84/6/1844. In addition, between 5–25 percent of people with an intersex condition will ultimately reject the gender assigned to them at birth and will thus share the same concerns as the transgender community about their right to transition from one gender to the other. Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 Pediatrics e488, e491–92 (2006).

171 People with an intersex condition do suffer from sex stereotyping in the provision of health care. *See* Greenberg, *Health Care Issues*, *supra*, note 17.

people. In addition, gender conforming people with an intersex condition should be able to recover under the straightforward sex discrimination theory adopted by the court in *Schroer*.

Thus far, only one plaintiff with an intersex condition has brought a claim alleging that she had been subjected to discrimination because of her intersex condition. In *Wood v. C.G. Studios, Inc.*,[172] an employer terminated one of its employees after learning that the employee "had undergone surgery to correct her hermaphroditic condition."[173] The federal district court refused to treat the employer's actions as unlawful sex discrimination. The court reasoned that sex discrimination prohibitions were designed to provide equal employment opportunities to women. Consequently, the court determined that the statute was not intended to remedy discrimination against individuals because they had undergone gender-corrective surgery.[174] The court limited the meaning of the word "sex" in the statute to what it considered to be the word's "plain meaning," and held that sex discrimination prohibitions do not encompass discrimination against "hermaphrodites" because of their intersex status.[175]

The holding in *Wood* is consistent with the understanding of the scope of sex discrimination prohibitions during the 1980s.[176] All the cases at that time narrowly construed the reach of statutes prohibiting sex discrimination. The holding of the *Schroer* court calls into serious question the continuing validity of this single employment discrimination case involving an employee with an intersex condition.

Just as *Price Waterhouse* eviscerated the holdings in earlier sex discrimination cases brought by gay, lesbian, transgender, and other gender nonconforming people, it should be interpreted to eviscerate the holding in *Wood*. Discrimination against people with an intersex condition should be treated similarly to the treatment of transgender people in the *Schroer* decision. If discrimination against transgender people who have transitioned from one sex to the other constitutes impermissible sex discrimination, people who have been discriminated against based on their intersex condition also have been subjected to unlawful sex discrimination.

Conclusion

Laws permitting differential treatment of men and women because of their status as males and females have almost vanished during the last 40 years. Although *de facto* gender discrimination and economic disparity still exist, outside of marriage prohibitions and jobs in which a person's sex is considered a *bona fide* occupational qualification, *de jure* sex discrimination against men and women is no longer permitted under the Equal Protection Clause.

The same is not true for sex and gender nonconformists—people with an intersex condition and transgender people. People who challenge the sex and gender binary system are still subjected to differential treatment by the government. Most of the recent cases involving sex classification have imposed arbitrary sex tests that rely on chromosomes, reproductive capacity, and sex or gender stereotypes rather than scientific developments about gender identity formation. Such sex classification systems fail the intermediate scrutiny test imposed under the Equal Protection Clause because the government's sex tests are not substantially related to an important government interest. They also likely fail the lowest level rational basis test. In addition, the government violates the Equal Protection Clause when it treats transgender people or people with an intersex condition differently from the way it treats men and women who are not transgender or intersex. Such differential treatment violates equal protection mandates prohibiting sex discrimination. People with an intersex condition and transgender people should have their right to live and work in their self-identified gender role and any infringements on this right should be considered unconstitutional under the Equal Protection Clause.

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172 660 F. Supp. 176, 178 (E.D. Pa. 1987).

173 *Id.* At the time of this decision, people with an intersex condition were often referred to as hermaphrodites. That term "hermaphrodite" is considered pejorative and people with an intersex condition prefer the terms intersex condition or DSD.

174 *Id.*

175 *Id.* at 176–78.

176 *See* notes 143–46 *infra* and accompanying text.