NOTE

Losing Your Children: The Failure to Extend Civil Rights Protections to Transgender Parents

*Charles Cohen**

ABSTRACT

No widely accepted legal rule governs how courts adjudicate claims made by transgender parents for custody of, and visitation with, their children. The result is a patchwork of rules, none of which guarantees these parents nondiscriminatory consideration of their claims for custody and visitation. To correct this inequitable treatment, courts should apply the intermediate scrutiny test of the Equal Protection Clause to prevent discrimination when making such decisions.

This Note first explores the current per se and nexus approaches used by courts to adjudicate custody and visitation claims by transgender parents. Next, this Note surveys the current legal status of transgender persons under the law. Finally, the recent legal recognition of the group's minority status and numerous parallels to laws protecting persons on the basis of sex, are applied to the case of custody and visitation decisions. This Note demonstrates that the intermediate scrutiny test of the Equal Protection Clause is the most appropriate standard for appellate courts to use when considering the relevance of a parent's gender identity in such cases.

---

* J.D. expected, 2017, The George Washington University Law School. Thank you to Darek Lawlor, who guided me through the writing process, and *The George Washington Law Review* editors, who helped me navigate the publication process. A special thank you to my parents who have always supported me.

Table of Contents

INTRODUCTION

After agreeing upon visitation following a divorce, Joni Christian's former spouse successfully sued to bar Joni from seeing her two children.[1] The court found that "[c]ommon sense dictates" that the very presence of Joni in her children's lives would cause them harm.[2] Joni's only sin, for which she was denied parental rights, was that she was born a man. Before her divorce and subsequent name change, Joni married a woman and started a family.[3] Eventually, Joni divorced, came out as transgender, and underwent sex reassignment surgery.[4] The result of this process was a court ruling cutting her off from her family in which the judge opined, "Was his [Joni's] sex change simply an indulgence of some fantasy?"[5]

Even in our changing modern times, the vast majority of Americans still marry at some point in their lives.[6] A strong majority of those who marry also add at least one child to their family.[7] Transgender Americans also partake in these lifecycle events. A study conducted by the National Center for Transgender Equality found that thirty-eight percent of the sampled transgender adults were parents.[8] Unfortunately, a significant percentage of Americans also go through the next milestone of divorce.[9] When children are involved, the process of legally separating the family is fraught with emotion and discord. When one partner of the couple is transgender, an additional level of difficulty and uncertainty exists.

Transgender Americans, in particular, suffer from uncertainty that their parental rights may be restricted or eliminated by family

---

1 *In re* Marriage of Cisek, No. 80 C.A. 113, 1982 Ohio App. LEXIS 13335, at *1–2, *4–5 (Ohio Ct. App. July 20, 1982).

2 *See id.* at *4.

3 *See id.* at *1.

4 *Id.*

5 *Id.* at *3–4.

6 *See Marriage and Divorce*, AM. PSYCHOLOGICAL ASS'N, http://www.apa.org/topics/divorce/ (last visited Jan. 27, 2017) ("[M]ore than 90 percent of people marry by age 50" in Western countries).

7 U.S. Census Bureau, Fertility of Women in the United States: 2014 Table 1 (2014), http://www.census.gov/hhes/fertility/data/cps/2014.html (follow "Table 1. Women's Number of Children Ever Born by Age and Marital Status: June 2014" hyperlink) (showing that only about 16% of women between the ages of 15 and 50 who married during their lifetime never had a child (data for Table 1 released Apr. 7, 2015)).

8 JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 88 (2011).

9 *Marriage and Divorce*, *supra* note 6 (stating that "40 to 50 percent of married couples in the United States divorce").

court judges for no other reason than their gender identity.[10] In cases where transgender individuals were in "a relationship that ended," twenty-nine percent reported that their former partners limited or prevented access to the children because of their transgender status.[11] Additionally, thirteen percent of transgender individuals reported that judges limited or prevented them from seeing their children because of their gender identity.[12]

The recent *Obergefell v. Hodges*[13] decision represents a major step forward in lesbian, gay, bisexual, and transgender ("LGBT") rights through its recognition of a constitutional right to same-sex marriage.[14] Inequality, however, still persists in our country for many LGBT persons who wish to start a family and protect their legal rights to their children. LGBT persons may now marry the partner of their choosing in all fifty states, but their parental rights upon divorce are far from protected.[15]

This Note proposes that courts extend current law barring discrimination on the basis of sex under the Equal Protection Clause of the Fourteenth Amendment[16] to encompass gender identity when adjudicating child custody and visitation cases. Specifically, trial court judges, when adjudicating child custody cases, should not consider the gender identity of a parent. If a trial judge considers gender identity a factor in a custody ruling, an appellate court should apply the intermediate scrutiny test of the Equal Protection Clause to determine that a parent's gender identity should not be considered when making custody and visitation decisions. This standard will provide clear protection to transgender parents who are fighting for custody of—and visitation with—their children in court.

Part I of this Note provides an overview of transgender related terms and concepts that courts must understand and evaluate. This Part continues by identifying the two main approaches courts have taken when adjudicating custody claims involving transgender parents

---

10 *See* LESLIE COOPER, ACLU AND NAT'L CTR. FOR TRANSGENDER EQUAL., PROTECTING THE RIGHTS OF TRANSGENDER PARENTS AND THEIR CHILDREN 6 (2013) ("[M]ost states have no reported cases" addressing transgender parents and "treatment of transgender parents varies dramatically from case to case.").

11 GRANT ET AL., *supra* note 8, at 98.

12 *Id.*

13 135 S. Ct. 2584 (2015).

14 *See id.* at 2604–05.

15 *See supra* notes 11–12 and accompanying text.

16 U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

and by describing the current absence of consistent rules applied by courts.

Part II details past proposals in scholarly works and outlines the inadequacy of the proposed solutions to date. Part III examines developments in court attitudes towards transgender persons as a class in general. New federal administrative rulings suggest that federal sex antidiscrimination laws as currently written apply to and protect transgender Americans.[17] These rulings will provide a logical basis from which to apply a similar construction of sex antidiscrimination protections for custody decisions in family courts. Moreover, these developments will serve as the basis for extending equal protection to transgender parents in custody decisions. Finally, Part IV applies the intermediate scrutiny test of the Equal Protection Clause to provide a clear and just rule in custody determinations that eliminates discrimination in the courts.

I. Current Approaches of Courts Towards Transgender Parents

Little precedent exists on the subject of transgender parental rights in custody cases. Currently, all U.S. courts apply a form of the best interests of the child standard when making custody determinations.[18] Due to this dearth of case law, court applications of this standard to transgender parents "var[y] . . . from case to case."[19] No pattern in how courts consider the transgender status of parents in making custody determinations is easily discernable across states or over time. Court decisions, however, may be categorized into two main approaches: the per se and nexus approaches.[20] Before delving

17 *See infra* notes 95–97 and accompanying text.

18 The application of this best interest of the child standard varies from state to state. *See* Child Welfare Info. Gateway, Determining the Best Interests of the Child 1–3 (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

19 Cooper, *supra* note 10, at 6.

20 *See* Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 Ind. L.J. 623, 633–34 (1996) (identifying per se and nexus approaches in the context of gay and lesbian parent custody decisions); *see also* Helen Y. Chang, *My Father Is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 Santa Clara L. Rev. 649, 685–93 (2003) (identifying per se, nexus, and negative nexus approaches to custody decisions involving transgender parents). Helen Chang's paper distinguishes decisions that required transgender parents to hide their gender identity and expression from their children as a condition of visitation. *See id.* at 689. These decisions are philosophically similar to other nexus approach cases and their separation into a separate category unnecessary.

into these approaches, the following Section will review background definitions on terms and issues facing transgender Americans.

A. Background—Sex, Gender, and Gender Identity

To adequately grasp the issues facing transgender Americans and examine the situations family courts must understand and grapple with when dealing with transgender parents, one must have a working understanding of gender identity. The American Psychological Association defines sex as "one's biological status as either male or female" and gender as "the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women."[21] Gender identity relates to "a person's internal sense of being male, female or something else," and gender expression describes how "a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics."[22]

Transgender persons, therefore, are individuals "whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth."[23] A person's transgender status is not necessarily related to their sexual orientation, and transgender persons "may be straight, lesbian, gay, bisexual, or asexual."[24]

Most importantly, the American Psychological Association states that "identifying as transgender does not constitute a mental disorder."[25] Additionally, multiple social science studies have found that a parent's transgender status does not negatively affect a child's development, and that the removal of a transgender parent from a child's life "may result" in "negative outcomes" for the child.[26] Courts, however, have not always adopted these findings when ruling on custody determinations.

---

21 *Answers to Your Questions about Transgender People, Gender Identity and Gender Expression*, AM. PSYCHOL. ASS'N, http://www.apa.org/topics/lgbt/transgender.aspx (last visited Jan. 27, 2017).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* ("Many other obstacles may lead to distress, including a lack of acceptance within society, direct or indirect experiences with discrimination, or assault.").

26 REBECCA L. STOTZER ET AL., TRANSGENDER PARENTING: A REVIEW OF EXISTING RESEARCH 11 (2014) (collecting studies).

B. The Per Se Rule

Some courts have applied a simple, but harsh, per se rule when adjudicating custody cases involving transgender parents. The per se approach in a child custody context refers to a categorical exclusion of a specific group.[27] Courts historically applied this rule mainly to gay and lesbian parents to deny them custody, but some courts also apply the per se rule to transgender parents.[28] Judges apply this approach in the following way: first, a judge determines that the gender nonconforming parent is unfit; second, the judge grants the other parent custody; and third, the transgender parent is either restricted or barred from seeing the child.

The most extreme line of cases that apply the per se rule not only deny custody to transgender parents, but also revoke all visitation and parental rights. In one example, an Illinois court annulled a transgender father's[29] parental rights, finding that laws protecting a father's parental rights in the case of artificial insemination and granting a legal presumption of parental rights to a husband in a marriage do not apply to transgender males.[30] Furthermore, the court dismissed as legally irrelevant the father's longstanding and good relationship with his child.[31] Following this ruling, the father had no greater legal claim to see or interact with his child than a stranger on the street.

Another line of cases uses the per se approach to limit the visitation rights of the gender nonconforming parent. In one case, a father in New York was denied overnight visitation rights with his child.[32] The mother objected to expanded visitation rights on the grounds that the father "was not an appropriate role model for the young child."[33] The objection was rooted in the father's "history of cross-dressing," and both the trial court and the appellate court affirmed the mother's concern and limited the father's visitation rights.[34] The parent-child

---

27 *See* Shapiro, *supra* note 20, at 633.

28 Chang, *supra* note 20, at 685–88.

29 Few courts designate in the record or provide any information on the preferred gender pronouns of a transgender parent. The pronouns used by courts almost universally align with the biological sex of the parent at birth and may not reflect the parent's preferred form of address. For clarity, when referring to the record, and to avoid presumptions the Author may make on others' behalf given the diversity of opinions on preferred gender pronouns, this Note will use the pronouns and nomenclature used by the court writing the opinion.

30 *In re* Marriage of Simmons, 825 N.E.2d 303, 311–12 (Ill. App. Ct. 2005).

31 *See id.* at 312–15.

32 *In re* Marriage of B., 585 N.Y.S.2d 65, 66 (App. Div. 1992).

33 *Id.*

34 *Id.*

relationship was significantly restricted under the per se rule here, but not entirely terminated.

The per se rule represents the most blatant form of discrimination against transgender parents. Courts under this approach severely restrict or terminate a parent's relationship with his or her child solely because of the gender identity of that parent, without looking at other factors. Many other judges employ the nexus approach, which considers how a parent's gender identity may affect the child.

C. The Nexus Approach

Many courts evaluate the fitness of a transgender person to be a parent through the nexus approach. Under this approach, courts apply the universal best interests of the child standard through a case-by-case evaluation of whether a parent's characteristic, such as transgender status, "has an adverse impact on the child."[35] Advocates of this approach argue that with greater understanding of transgender issues, courts will be less likely to allow the gender identity of a parent to negatively affect custody decisions and will decline to discriminate against transgender parents.[36] However, this expected result of the nexus approach has not been universal, and other courts have used the nexus approach to justify restricting custodial rights.

1. Equal Treatment of Transgender Parents Under the Nexus Approach

The seminal case under this approach hails from 1973, when a Colorado court held that a mother's transition to a man "did not justify" revocation of her custodial rights.[37] Using the nexus approach, the court held that it "shall not consider conduct of a proposed custodian that does not affect his relationship with the child."[38] This ruling suggests that, under this approach, a parent's gender transition was only relevant in custody determinations to the extent that the transition impacted the children, if at all.

Several subsequent cases led some transgender advocates to believe that the nexus approach would prevent unjust custody rulings. In *Pierre v. Pierre*,[39] for example, a Louisiana court found that a parent's

---

35 Shapiro, *supra* note 20, at 633.

36 *See, e.g.*, GRANT ET AL., *supra* note 8, at 104; Shapiro, *supra* note 20, at 667–68; Kari J. Carter, Note, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209, 235–36 (2006).

37 Christian v. Randall, 516 P.2d 132, 132 (Colo. App. 1973).

38 *Id.* at 134 (quoting COLO. REV. STAT. § 46-1-24(2) (1963)).

39 898 So. 2d 419 (La. Ct. App. 2004).

sex reassignment surgery was not an issue relevant to the question of visitation rights.[40] An Ohio court found that a parent's gender expression, or "cross-dressing," was not relevant to the issue of custody because it would not affect a parent's ability to be "fit, loving and capable."[41] The Montana Supreme Court also firmly rejected the implication that the gender identity of a father could negatively affect his child in *In re the Marriage of D.F.D.*[42] As a result, the court held that the father was entitled to joint custody and unsupervised visitation with his child.[43] However, the nexus approach has not always been used to the benefit of the transgender parent.

2. *Discriminatory Treatment Under the Nexus Approach*

All of the above nexus approach cases determined that a parent's gender identity was irrelevant to custody or visitation considerations because this factor did not adversely affect the child. Other courts, however, use the nexus approach to find that transgender parents are unfit because of their gender nonconformity. Some judges reaching such a conclusion rely upon expert testimony admitted into evidence.[44] Other judges allow their own personal beliefs on the possible effects a transgender parent may have on a child to color their decisions.[45] These judges, using the nexus approach, determined that the parent's gender identity or gender expression would negatively affect the child and thus restricted custodial or visitation rights of the parent.

The Missouri case of *J.L.S. v. D.K.S.*[46] showcases an example where an appellate court judge overturned a trial court finding for joint custody on personal concerns of how a transgender parent may harm a child.[47] The court expanded the definition of best interests of the child to allow "consideration of what conduct a parent may inspire by example" and not just what conduct has been shown to "detrimentally affect[ ] the children."[48]

---

40 *See id.* at 426.

41 *In re* Marriage of Mayfield, No. 96AP030032, 1996 WL 489043, at *1–2 (Ohio Ct. App. Aug. 14, 1996).

42 862 P.2d 368, 375–77 (Mont. 1993) (finding no basis to believe that a child's mental health would be affected by the father's gender identity).

43 *Id.* at 376–77.

44 *See, e.g.*, M.B. v. D.W., 236 S.W.3d 31, 35 (Ky. Ct. App. 2007).

45 *See, e.g.*, J.L.S. v. D.K.S., 943 S.W.2d 766, 775 (Mo. Ct. App. 1997).

46 943 S.W.2d 766 (Mo. Ct. App. 1997).

47 *See id.* at 775.

48 *Id.*

The court reinstated a ban on the father's visitation with the child and made any subsequent reinstatement of visitation or custodial rights contingent on the father not cohabitating with other transgender persons.[49] Furthermore, the *J.L.S.* court accepted concerns about the fitness of the transgender father and rejected the father's request for custody and visitation rights by opining that he did not submit any evidence to show he was not dangerous to the child.[50] This ruling overturned the lower court's findings—the court instead applied its own values and reasoning to deny a parent custody of his child without a factual basis to support the decision.

In a 2007 Kentucky case, a father's gender identity and expression were also deemed grounds for terminating his parental rights.[51] The Kentucky court declined to apply the per se rule, finding that the best interests of the child justified the termination of the father's parental rights.[52] The youngest daughter reported emotional distress and confusion regarding her father's gender transition, but the court declined to apply any less dramatic remedies to improve the situation.[53] Instead, the court endorsed the mother's decision to keep her daughter from seeing the father and the extreme request of terminating the father's parental rights.[54]

Thus, while the nexus approach is a positive step towards equality, the approach falls far short of its goal of protecting the rights of transgender parents. The nexus approach provides transgender parents little protection from individual judges who substitute their moral judgment for expert testimony, as in *J.L.S.*, or deem a gender transition to cause emotional injury so severe as to justify the revocation of parental rights, as in *M.B.*[55] Rulings under this approach inject uncertainty into the custody process, one that is difficult and heart wrenching even under the best of circumstances.

---

49 *Id.* ("[T]he court cannot ignore the effect which the conduct of a parent may have on a child's moral development.").

50 *See id.* at 774–75.

51 *See* M.B. v. D.W., 236 S.W.3d 31, 38 (Ky. Ct. App. 2007).

52 *See id.* at 36 (finding the father's gender reassignment on its own did not justify revocation of parental rights, but that the gender change caused emotional injury to the daughter and justified the revocation).

53 *See id.* at 38 (recognizing an "implied finding" of the trial court that the daughter's emotional "need to have a father figure in her life" required termination of the father's parental rights).

54 *See id.* at 38.

55 236 S.W.3d 31 (Ky. Ct. App. 2007).

II. Past Approaches to Equal Treatment and Their Shortcomings

Several commentators have provided a valuable service in highlighting the unfair and discriminatory treatment transgender Americans face when trying to exercise and protect their parental rights. The current body of scholarly work was written before the landmark *Obergefell* marriage ruling. These works use legal concepts recognized at the time, including equitable remedies, to recommend approaches to mitigate discriminatory effects felt by transgender parents. Other works call for extra-legal solutions, such as political intervention by legislators and increased social science research to educate judges, to prevent discrimination. None of these proposals, however, recommend a bright-line legal rule that would uniformly prohibit discrimination in custody cases involving transgender parents.

The recent *Obergefell* marriage equality ruling, however, has opened the door to equal protection claims by the LGBT community.[56] The Supreme Court's acknowledgement that LGBT Americans have some kind of class protection allows for the application of currently existing sex antidiscrimination rules to the transgender community. Pre-existing literature outlines a real and heartbreaking problem for these persons in the family context.[57] The application of the Equal Protection Clause to custody determinations involving transgender parents would eliminate adverse treatment of gender nonconforming parents by the courts in this area of law.

Several advocacy groups and writers in academic journals have documented the discrimination against transgender parents and the need for action. A 2011 report by the National Center for Transgender Equality (the "Center") detailed the scope of the problem.[58] In 2013, the American Civil Liberties Union (the "ACLU") joined forces with

---

56 Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) ("[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . same-sex couples may exercise the fundamental right to marry.").

57 *See generally* Cooper, *supra* note 10, at 5 (outlining discriminatory treatment transgender parents face in U.S. courts); Grant et al., *supra* note 8 (reviewing discrimination against transgender Americans in family life); Stotzer et al., *supra* note 26, at 16 (detailing discrimination against transgender persons in the family context); Shannon Shafron Perez, Comment, *Is It a Boy or a Girl? Not the Baby, the Parent: Transgender Parties in Custody Battles and the Benefit of Promoting a Truer Understanding of Gender*, 9 Whittier J. Child & Fam. Advoc. 367 (2010) (outlining treatment of transgender parents by courts, challenges transgender parents face, and issuing an emotional plea for compassion).

58 *See* Grant et al., *supra* note 8, at 88, 98 ("[Thirty-eight percent] of the sample were parents" and "13% reported that a court or judge stopped or limited their relationships with children because of their transgender identity").

the Center to publish a paper outlining differing kinds of treatment transgender parents face in American courts.[59] This paper even offered a few legal strategies transgender parents could use in court to protect their legal rights to custody and visitation with their children, such as employing arguments claiming estoppel and de facto parental rights.[60]

Both the estoppel and de facto parent arguments offered by the ACLU have provided valid legal strategies to advocates for transgender parents, but both are fact specific arguments that have limited precedential value for others in similar situations.[61] In the case of estoppel, the transgender parent argues that the other parent is barred from asserting that gender identity may impact the familial relationship if the gender nonconformity of the spouse was previously known.[62] This common law standard rooted in unconscionability is both difficult to meet and is fact intensive, limiting its applicability to future custody cases.

The de facto parent doctrine advocated by the ACLU can be applied if one parent argues the transgender parent has no legal parental rights because the child is not related to the transgender parent "by blood or adoption."[63] This doctrine grants full or limited parental rights to an unrelated adult who has "fully functioned" as a parent for the minor in question.[64] The de facto parent doctrine is not universally recognized and requires the application of difficult to prove, fact-intensive equitable principles.[65] Thus, although the ACLU's arguments are a great resource to transgender parents in danger of losing their children, no general recommendations are made to ensure equal treatment on a broader scale.

Several writers have proposed alternate ideas that inadequately address the uncertainty and inequality that transgender parents face. Mark Strasser appeals broadly to legislators to recognize the rights of

---

59 This paper distinguishes cases based on the impact the ruling has on the transgender parent's visitation and custody rights, rather than a legal approach, as outlined in this Note. *See* COOPER, *supra* note 10, at 21–23 (suggesting that attorneys argue estoppel and assert de facto parental rights). Arguments to preserve parental rights despite the invalidation of a marriage, while offered in this paper, *see id.* at 21, are significantly less relevant following the *Obergefell* marriage equality ruling and are not discussed here.

60 *Id.* at 22–23.

61 *See supra* note 59.

62 *See* COOPER, *supra* note 10, at 22.

63 *Id.*

64 *Id.*

65 *See id.*

transgender parents through the political arena.[66] Strasser's article discusses transgender parents and the hell some face attempting to build and protect their families.[67] Among other issues, Strasser discusses custody and visitation issues for transgender parents, noting that "[t]he current system imposes unjustifiable burdens on the transgendered and their families."[68] The article includes a call to action, demanding that "Congress or the states must act" to address the multitude of issues transgender Americans face.[69] Neither Congress nor the states have been particularly receptive to these calls, and limited nondiscrimination initiatives have been met with mixed support at best.[70] Furthermore, none of these limited antidiscrimination initiatives proposed addressed the parental rights of transgender Americans.[71]

Another writer suggests that the solution to protecting the rights of transgender parents lies outside the legal realm. Kari Carter opines in her note that "reliable scientific data is the key to changing the court system's outlook" and that courts should "individually consider the facts of each case."[72] Essentially, Carter is arguing two parallel solutions: judges should receive more information so they understand transgender persons better, and courts should apply the nexus approach in evaluating custody decisions.[73]

Scholarly studies examining transgender families already exist; however, Rebecca L. Stotzer and her coauthors produced an article cataloging numerous social science research studies on various aspects of families in which at least one parent is transgender.[74] These studies, conducted between 1972 and 2014, answer concerns about the fitness of transgender parents and the ability of children to understand and

66 *See generally* Mark Strasser, *Defining Sex: On Marriage, Family, and Good Public Policy*, 17 MICH. J. GENDER & L. 57 (2010).

67 *Id.*

68 *Id.* at 82.

69 *Id.*

70 *See, e.g.*, Manny Fernandez & Mitch Smith, *Houston Voters Reject Broad Anti-Discrimination Ordinance*, N.Y. TIMES, (Nov. 3, 2015), http://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html (ordinance rejected because of its inclusion of protections for gender identity).

71 Eighteen states and over 200 cities have nondiscrimination laws protecting transgender persons. *Know Your Rights: Transgender People and the Law*, ACLU, https://www.aclu.org/know-your-rights/transgender-people-and-law (last visited Jan. 27, 2017). These laws have not been understood to apply to transgender parental rights. *See id.*

72 Carter, *supra* note 36, at 235–36.

73 *Id.* at 232–36.

74 *See* STOTZER ET AL., *supra* note 26, at 5–7, 11.

love their transgender parents.[75] Despite the availability of such information and experts who are willing to testify to their validity, some courts choose to set aside this evidence and apply personal biases to custody decisions.[76] As a result, while continued scholarly research into transgender families is welcome and encouraged, it appears unlikely that such research will end discriminatory treatment.

Carter's second proposal is similar to that which Helen Chang suggested in her article. Chang's approach includes the universal adoption of the nexus approach in custody decisions.[77] Use of the nexus approach is a legal solution that may be implemented and applied without need for legislative action, which makes it much more practical than Strasser's call for a legislative solution. However, as shown in this Note's Section I.B, the application of the nexus approach will not end transgender discrimination. Under the nexus approach, some judges continue to rule that the best interests of the child dictate limited or no contact with a parent because of that parent's gender identity. Thus, although the adoption of this approach is a great step forward for transgender rights, it continues to deny transgender parents the peace of mind that their children will not be taken away from them.

III. Developments in Legal Protections for Transgender Americans

This Note's assertion that the Equal Protection Clause should be extended to protect the parental rights of transgender Americans rests on recent developments in the law. Gender identity is increasingly seen as a class worthy of protection, and inroads are being made in several areas, including healthcare, education, and employment, to specifically address issues facing transgender Americans in these areas.[78] Additionally, the reverberations of the recent *Obergefell* same-sex marriage case will likely impact transgender individuals in addition to those who identify as lesbian, gay, or bisexual. This evolving societal understanding forms the basis of the argument to extend antidiscrimination protections to transgender parents in the context of custody decisions. To frame the discussion on why intermediate scru-

---

75 *Id.* at 5, 15–16.

76 *E.g.*, *In re* Marriage of Magnuson, 170 P.3d 65, 67 (Wash. Ct. App. 2007) (rejecting a guardian ad litem's recommendation and finding that "[t]he impact of [a parent's gender reassignment] surgery on the children is unknown").

77 Chang, *supra* note 20, at 697 (arguing that "a parent's gender status should be merely one of many factors to be balanced–not the ultimate determinant").

78 *See infra* Sections III.A, III.B.

tiny should apply to custody cases involving transgender individuals, this Section provides an analysis of the application of sex antidiscrimination laws to gender identity and the impact of *Obergefell* on the LGBT movement.

A. Application of Sex Antidiscrimination Laws to Include Gender Identity

Gender identity is increasingly being recognized as a protected class both under the Constitution, similar to sexual orientation and gender, and through expanded understanding of sex antidiscrimination laws. With this understanding that gender identity is a protected class, family courts should then apply the analogous case of *Palmore v. Sidoti*,[79] which bars discrimination in custody determinations on the basis of race,[80] to similarly prohibit courts from considering the gender identity of parents in custody decisions.

Two examples of existing sex antidiscrimination laws that have been expanded to include protection for gender identity are Title IX of the Education Amendments Act[81] and Title VII of the Civil Rights Act.[82] The U.S. Department of Education ("DoED") believes that existing law protects transgender students. DoED recently found that Title IX protections prevent schools from discriminating against transgender students in bathrooms.[83] In this situation, an Illinois school refused to let a transgender student "who identifies as a girl and participates on a girls' sports team to change and shower in the girls' locker room without restrictions."[84] The complaint was subsequently resolved when the school district agreed to construct private changing areas in the women's locker room and allow all students to change behind privacy curtains.[85] In a similar case, the Fourth Circuit deferred to DoED's interpretation of Title IX and affirmed a transgender student's right to use the bathroom of his choice.[86]

---

79 466 U.S. 429 (1984).

80 *Id.* at 433–34 (holding that courts may not consider the race of parents or their partners when making custody determinations). This case is discussed in-depth *infra* Section IV.A.

81 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

82 Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e–2000e-17 (2012).

83 Mitch Smith & Monica Davey, *Illinois District Violated Transgender Student's Rights, U.S. Says*, N.Y. Times (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/us/illinois-district-violated-transgender-students-rights-us-says.html.

84 *Id.*

85 Agreement to Resolve Between Township High School District 211 and the U.S. Department of Education, OCR Case #05-14-1055 (Dec. 2, 2015), http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf.

86 G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016) (Title

A recent U.S. Health and Human Services ("HHS") regulation also bars discrimination on the basis of gender identity. Section 1557 of the Patient Protection and Affordable Care Act,[87] among other things, extended Title IX's sex antidiscrimination law to the healthcare context.[88] Consistent with the DoED's interpretation of Title IX discussed *supra*, HHS ruled that this sex antidiscrimination law covers gender identity in addition to biological sex and issued regulations to this effect.[89] HHS's strong stance on protecting transgender Americans from discrimination in the healthcare context demonstrates that existing law already recognizes gender identity as a protected subset of sex.

Employment law is another area where gender identity is increasingly being considered part of sex antidiscrimination laws. The Supreme Court opined in a plurality opinion that Title VII bars gender stereotyping, the expectation that members of a sex should or should not act in particular ways.[90] This ruling clarified that discrimination based upon gender and what is deemed gender appropriate behavior is barred under federal law.[91] If discriminating against a person on the basis of gender is barred, then one could argue that Title VII similarly protects against discrimination on the basis of gender identity.

Several circuits have addressed this issue with mixed results.[92] The Eleventh Circuit found that Title VII protections against gender stereotyping apply equally to those who identify as transgender as to those who do not identify as such.[93] However, not all circuits have

---

IX's sex antidiscrimination rule may be interpreted by DoED to protect transgender students), *cert. granted in part*, 137 S. Ct. 369 (2016).

87 Patient Protection and Affordable Care Act § 1557, 42 U.S.C. § 18116 (2012).

88 *Id.* § 18116(a).

89 Equal Program Access on the Basis of Sex, 45 C.F.R. § 92.206 (2016) ("A covered entity shall provide individuals equal access to its health programs or activities without discrimination on the basis of sex; and a covered entity shall treat individuals consistent with their gender identity . . . ."); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,387–88 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (proposing that "discrimination on the basis of sex further includes discrimination on the basis of gender identity").

90 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion). Title VII bars employers, employment agencies, labor organizations, and training programs from discriminating on the basis of sex and other enumerated protected classes. 42 U.S.C. § 2000e-2(a)–(d) (2012).

91 *Price Waterhouse*, 490 U.S. at 251.

92 *See infra* notes 93–94 and accompanying text.

93 *See* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination . . . .").

agreed to extend Title VII sex discrimination provisions to cover transgender workers.[94]

More recently, a 2012 Equal Employment Opportunity Commission ("EEOC") administrative ruling held that discrimination against an employee on the basis of gender identity is barred under Title VII.[95] The EEOC reaffirmed this position in 2015, finding that "Title VII prohibits discrimination based on sex" including the motivation "to accommodate other people's prejudices or discomfort."[96] Both these cases involved government employers, but the rulings were not specifically limited to the government.[97]

Thus, not only are Title VII sex antidiscrimination protections extended to cover transgender persons in the workforce, but the EEOC also firmly rejects private bias as justification to discriminate. This logic is similar to that expressed in *Palmore v. Sidoti*,[98] where consideration of private bias was barred in connection to race in child custody cases.[99] These two holdings can be synthesized to create a *Palmore*-style bright-line rule prohibiting trial court judges from considering the gender identity of parents in child custody hearings.[100]

While several circuits have resisted this extension of Title VII antidiscrimination protections, the most recent circuit court decision and

---

94 *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086–87 (7th Cir. 1984).

95 Macy v. Holder, E.E.O.C. DOC 0120120821, 2012 WL 1435995, at *4, *6 (Apr. 20, 2012) ("Title VII[ ] . . . proscribes gender discrimination, and not just discrimination on the basis of biological sex . . . .").

96 Lusardi v. McHugh, E.E.O.C. DOC 0120133395, 2015 WL 1607756, at *7, *9 (Apr. 1, 2015).

97 *See id.* at *1, *12 (holding that a transgender employee's discriminatory treatment in the workplace was illegal under Title VII); *Macy*, 2012 WL 1435995, at *1, *10 (finding that discrimination on the basis of gender identity is another way "of describing sex discrimination" barred under Title VII); *Employment Law—Title VII—EEOC Affirms Protections for Transgender Employees*—Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012)*, 126 HARV. L. REV. 1731, 1732, 1738 (2013) (commenting that the EEOC ruling in *Macy* "affirmed protections for transgender employees" under Title VII).

98 466 U.S. 429 (1984).

99 *Id.* at 433–34.

100 *Palmore* addresses the discrimination on the basis of race, which is examined under the strict scrutiny standard. *Id.* at 432; *see also, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326, 343 (2003) (upholding holistic affirmative action policies after examination under the strict scrutiny standard); Loving v. Virginia, 388 U.S. 1, 11 (1967) (finding that laws classifying people on the basis of race should be subject to the strictest level of judicial scrutiny). Gender identity does not qualify for race-based strict scrutiny review by courts, *see* Glenn v. Brumby, 663 F.3d 1312, 1315 n.4 (11th Cir. 2011), but this Note argues that the logic underlying the *Palmore* holding also applies in the case of discrimination against transgender parents. The appropriate standard of review for gender identity is discussed *infra* in Part IV.

administrative rulings from various federal government agencies in recent years find that such an extension is warranted.[101] The sudden number of rulings supporting the inclusion of gender identity in sex antidiscrimination measures in the past few years suggests that the country is reexamining its treatment of this minority group.[102]

B. Obergefell *and the Movement Toward Class Protection for All LGBT Americans*

Alternatively, gender identity could be evaluated under the same standard by which the Supreme Court evaluated the *Obergefell* same-sex marriage case. The watershed *Obergefell* case represents a fundamental change in how the United States views the LGBT community. Justice Kennedy, writing for the Court, held that marriage is a fundamental right.[103] As such, the Equal Protection Clause protects the rights of gays and lesbians to marry.[104] If the Court now holds that the government cannot discriminate in the creation of families through marriage, it stands to reason that the government would not be able to discriminate against individuals in the dissolution of families.

The Court's application of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to gays and lesbians in this case opened new possibilities for evolving standards of equality in our society. Previously, the nexus approach to LGBT families was considered the progressive approach to these individuals because its application sometimes resulted in favorable outcomes.[105] With *Obergefell*, however, LGBT persons are now recognized as a minority group entitled to equal protection under the law.

Scholars are still debating exactly under which test of the Equal Protection Clause the Court applied in finding a legal right to same-sex marriage. Differences in the burden of proof required under each standard of scrutiny will affect the legal arguments transgender par-

---

101 *See supra* notes 93–95.

102 This Note provides only a brief survey of recent developments in Title VII jurisprudence as it relates to transgender persons. For an in-depth examination on the application of Title VII to transgender persons in the workplace and the development of this area of law over time, see generally Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423 (2012).

103 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

104 *Id.* at 2603 ("[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

105 *See* Shapiro, *supra* note 20, at 633–34 (identifying per se and nexus approaches as the two approaches courts may take in the context of gay and lesbian parent custody decisions); *see also* Chang, *supra* note 20, at 685–93 (applying per se and nexus approaches to custody decisions involving transgender parents); *supra* Section I.C.

ents must plead to avoid discriminatory treatment. Richard Lempert of the Brookings Institution believes that the Court rejected the intermediate scrutiny test, and defines Kennedy's opinion as endorsing the lower rational basis test.[106] Ilya Somin expressed his belief that some combination of the Equal Protection and Due Process Clauses "somehow" results in the illegality of laws banning same-sex marriage.[107]

Another scholar, Peter Nicolas, lamented Kennedy's emphasis on marriage as a fundamental right protected by the Due Process and Equal Protection Clauses, as opposed to emphasizing class-based protection for LGBT individuals.[108] Overturning same-sex marriage bans on class grounds would have resulted in some form of heightened scrutiny that could be readily applied to numerous areas of law.[109] Nicolas concedes that "the Court has historically proceeded incrementally before declaring a classification suspect or quasi-suspect, often first applying a more aggressive form of rational basis scrutiny to strike down a law."[110]

Kennedy's ambiguous opinion does not provide any clear answers to the status of LGBT individuals as a class.[111] Because the Court has historically been cautious[112] in adopting heightened scrutiny standards, a possibility still exists that the Court will explicitly adopt one for LGBT persons in the foreseeable future. While much is still undecided in this field, some courts are slowly moving toward class recognition for LGBT Americans.[113]

---

106 Richard Lempert, Obergefell v. Hodges*: Same Sex Marriage & Cultural Jousting at the Supreme Court*, BROOKINGS INST. (June 29, 2015, 9:45 AM), http://www.brookings.edu/blogs/fixgov/posts/2015/06/29-obergefell-same-sex-marriage-lempert.

107 Ilya Somin, *A Great Decision on Same-Sex Marriage—but Based on Dubious Reasoning*, WASH. POST: THE VOLOKH CONSPIRACY (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/.

108 Peter Nicolas, Obergefell*'s Squandered Potential*, 6 CAL. L. REV. CIR. 137, 139–40 (2015).

109 *Id.*

110 *Id.* at 140.

111 *See supra* note 107.

112 *See supra* notes 106–08 and accompanying text.

113 *See generally* Wolf v. Walker, 986 F. Supp. 2d. 982, 1014 (W.D. Wis. 2014) (finding that heightened scrutiny should be applied to sexual orientation discrimination); *In re* Marriage Cases, 183 P.3d 384, 441–42 (Cal. 2008) (finding that sexual orientation should be considered a suspect class under the state constitution).

IV. Application of the Equal Protection Clause to Child Custody Decisions

Adoption of a bright-line rule dictating the role gender identity may play in custody determinations will most effectively serve justice and remove the fear of bias against transgender parents. Extending Equal Protection Clause protections to gender nonconforming parents in the context of custody decisions would fulfill this need for such a bright line. Additionally, past court and administrative rulings on similar subjects show that this extension of antidiscrimination protections would merely be a moderate change in the protection afforded to an increasingly recognized minority group.[114]

Public policy interests highly favor a bright-line rule that can be easily applied and understood by all parties involved. The dissolution of a marriage with children is an emotionally shocking and challenging situation for everyone involved. The nexus approach's individualized inquiry considering how gender identity of a parent affects the best interests of the child requires intensive fact-based analysis or expert testimony, and thereby fails to provide transgender parents the categorical relief a bright-line rule would provide.[115] For example, the father in *In re the Marriage of D.F.D.* underwent psychological "evaluations" due to his gender expression and brought an expert witness to testify on the matter before an appellate court ruled that supervised visitation was not necessary.[116] In *J.L.S. v. D.K.S.*, the court relied upon the testimony of three experts and the deposition of a fourth before ruling that exposing the children to their father's gender nonconformity would not be in their best interests.[117] This process requires both time and money to adjudicate properly—resources that families may not have in abundance. As such, this approach is costly and does not guarantee a nondiscriminatory outcome.

Moreover, the majority standard of review for custody rulings is high, generally abuse of discretion.[118] Preventing unending appeals in child custody cases is a legitimate public policy motive, but this policy means that courts must correctly decide the case the first time around. Thus, individualized fact-based approaches such as the one advanced

---

114 *See* Equal Program Access on the Basis of Sex, 45 C.F.R. § 92.206 (2016); Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

115 *See* Shapiro, *supra* note 20, at 633.

116 *In re* the Marriage of D.F.D., 862 P.2d 368, 369, 371 (Mont. 1993).

117 J.L.S. v. D.K.S., 943 S.W.2d 766, 770, 775 (Mo. Ct. App. 1997).

118 *See, e.g.*, M.B. v. D.W., 236 S.W.3d 31, 38 (Ky. Ct. App. 2007); Mayfield v. Mayfield, No. 96AP030032, 1996 WL 489043, at *1 (Ohio Ct. App. Aug. 14, 1996); *In re* Marriage of Magnuson, 170 P.3d 65, 67 (Wash. Ct. App. 2007).

by Carter,[119] embodied in the nexus approach, neither resolve issues of discrimination nor do they further public policy interests for a clear and simple rule. Instead, courts should simply decline to consider gender identity on its own as a factor in determining which parent should obtain custody. Extending the Equal Protection Clause to cover gender identity in the child custody context would achieve this end.

A. Equal Protection Clause in the Context of Child Custody Decisions

The Equal Protection Clause has been invoked in the past to protect against discrimination on the basis of race and sexual orientation in child custody decisions.[120] As a result, expanding current precedent to include gender identity would be a logical extension of current law.

The Supreme Court used the Equal Protection Clause to bar consideration of race in child custody decisions in *Palmore v. Sidoti*.[121] The Court held that the Equal Protection Clause bars consideration of private racial bias by judges in determining child custody decisions.[122] Florida state courts had found that the child in *Palmore* should be shielded from private discrimination and stigma as a result of the mother's subsequent relationship with a man of a different race.[123] This reason alone was sufficient to justify denying her custody of her child.[124] The Court, however, found that "racial prejudice, however real, cannot justify . . . removing an infant child from the custody of its natural mother."[125] Thus, while adjudicating the case in the best interests of the minor is a "substantial governmental interest," the Court found it impermissible to consider the private discriminatory views of others in the community in custody determinations.[126]

Palmore assumes that race alone does not affect a parent's ability to raise a child, and does not rely upon any specific evidence to reach

---

119 Carter argued that judges should be given more information on gender identity in order to render fair custody decisions under the nexus approach. Carter, *supra* note 36, at 235–36. Carter's note is discussed in detail in Part II, *supra*.

120 *See infra* notes 125–29, 133–36 and accompanying text.

121 466 U.S. 429, 433–34 (1984).

122 *See id.* at 434.

123 *Id.* at 431–32.

124 *Id.* at 432, 434.

125 *Id.* at 434.

126 *Id.* at 433 ("Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." (quoting Palmer v. Thompson, 403 U.S. 217, 260–61 (1971) (White, J., dissenting))).

this conclusion.[127] In contrast, while social science research strongly refutes concerns that a parent's gender identity may negatively affect a child, judges have not uniformly accepted this position.[128] The *Palmore* rule, however, can and should be applied in the context of gender identity to prevent judges from considering social bias in determinations of custody.[129] The result would be a clear and uniform rule easily understood by all parties in a custody proceeding.

The *Palmore* anti-bias rule has been applied in at least one jurisdiction in the context of sexual orientation. A Kentucky court drew an explicit parallel between race and sexual orientation considerations in custody cases in *Maxwell v. Maxwell*.[130] The court held that refusal to grant custody to a parent "because of a threat of private discrimination violates the due process and equal protection clauses of the federal and state constitutions."[131] Not all groups are granted the suspect classification race enjoys, but *Maxwell* demonstrates that the *Palmore* ruling is not to be considered in a vacuum. *Palmore*'s principle of equal protection in the context of custody determinations has been applied to sexual orientation and should be further applied to cover gender nonconforming parents.

A transgender parent argued, in *In re Marriage of Tipsword*,[132] that consideration of a parent's gender identity in child custody determinations violates the Equal Protection Clause.[133] The court cited the *Palmore* decision to justify the position that membership in a minority group should not be considered by the court when making a custody determination.[134] However, the court held that the transgender father in this case suffered from emotional issues that made him emotionally absent and less fit to be a parent.[135] Under the facts of the case, the court felt that the biological mother was in the best position to take custody of the children and did not rule on the issue of gender identity.[136] Although the equal protection discussion is only dicta, consid-

127 *Palmore*, 466 U.S. at 433–34.

128 *See* STOTZER ET AL., *supra* note 26, at 11, 14.

129 *Cf. Palmore*, 466 U.S. at 433 (noting "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

130 382 S.W.3d 892, 898–99 (Ky. Ct. App. 2012).

131 *Id.* at 898.

132 No. 1 CA-CV 12-0066, 2013 WL 1320444 (Ariz. Ct. App. Apr. 2, 2013).

133 *Id.* at *6 (summarizing the argument that "societal prejudice" does not justify consideration of a parent's transgender status).

134 *See id.* at *6–7.

135 *See id.* at *3, *11 (recounting the biological mother's testimony that the children returned from their father's care "hungry, tired, unhappy, and with diaper rash").

136 *See id.* at *8.

eration of the argument by a state appellate court provides some strength to the position that equal protection is not limited to race in the context of custody decisions.

When evaluating a claim alleging a violation of the Equal Protection Clause, courts will use one of three tests: strict scrutiny, intermediate scrutiny, or rational basis. Claims alleging discrimination on the basis of race are evaluated under the strict scrutiny standard,[137] laws alleged to discriminate on the basis of sex are examined under the intermediate scrutiny test,[138] and any other claims seeking relief for discrimination under the Equal Protection Clause are evaluated under the rational basis standard.[139]

B. Using the Rational Basis Standard of Review Is an Ineffective Means of Extending Equal Protection to Transgender Parents in Child Custody Decisions

Obergefell's dramatic ruling that same-sex couples have a legal right to marry provides the window through which the Equal Protection Clause can apply in other areas of family law. The Court's application of some form of the rational basis test when evaluating the petitioner's equal protection arguments provides a constitutional basis for arguing that other family rights, such as custody, similarly enjoy equal protection.[140] Under rational basis, a plaintiff must demonstrate that a law classifies a group of people differently from the general population, and the plaintiff bears the burden of showing that such classification is discriminatory and violates the Equal Protection Clause.[141] To prevail, the government need not provide any justification or reasoning for the classification.[142]

Direct application of the *Obergefell* standard to gender identity, however, is less appropriate than applying sex antidiscrimination precedent. While *Obergefell*'s holding applies to all members of the LGBT community, the central focus of the case was sexual orientation.[143] Lesbians, gays, and bisexuals who wished to marry a person of

---

137 *See supra* note 100.

138 *E.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994) (explaining that a history of discrimination "warrants the heightened scrutiny we afford all gender-based classifications today").

139 *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, 53 n.109 (1973).

140 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

141 *See* Nguyen v. INS, 533 U.S. 53, 75 (2001) (citing Heller v. Doe, 509 U.S. 312, 320–21 (1993)).

142 *Id.*

143 *See generally* Chris Johnson, *After Marriage, What's Next for LGBT Movement?*, WASH. BLADE (June 11, 2015, 10:36 AM) http://www.washingtonblade.com/2015/06/11/after-marriage-

the same sex could not get married under the laws of many states before this ruling.[144]

Transgender persons benefited from this ruling only if their partner was the same sex as their own *legally recognized* sex.[145] Because gender identity is a concept distinct from sexual orientation, logic would dictate that application of laws relating to gender and sex are the preferred means of protecting this historically disadvantaged group. Sex and gender equal protection arguments have traditionally been evaluated under the intermediate scrutiny test.[146]

C. *Applying the Intermediate Scrutiny Standard of Review to Extend Equal Protection to Transgender Parents in Child Custody Decisions Safeguards Against Discrimination*

As mentioned above, courts increasingly find that current sex antidiscrimination laws protect against discrimination on the basis of gender identity.[147] As a result, judges should use the intermediate scrutiny test under the Equal Protection Clause to find it unlawful to consider a parent's gender identity when making custody decisions because, for the purposes of the law, gender identity is a logical extension of sex.

The gender identity of a parent should not be raised as an issue for a court to consider in custody determinations. If gender identity is raised, courts should apply the two-prong intermediate scrutiny test used in sex discrimination cases to adjudicate the claim of discrimination against transgender parents in custody determinations. In the case of transgender parents denied custody and visitation rights because of their gender identity, the "best interests of the child" standard would be the law under scrutiny by the appellate court. The Equal Protection Clause's intermediate scrutiny test sets a burden on

---

whats-next-for-lgbt-movement/ (recognizing that, although same-sex marriage is a great win for the LGBT community, there is still room to increase protection for transgender individuals).

144 Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html (discussing that thirteen states maintained bans on same-sex marriage on the eve of the *Obergefell* ruling).

145 *See generally* J. Courtney Sullivan, *What Marriage Equality Means for Transgender Rights*, N.Y. TIMES (July 16, 2015), http://www.nytimes.com/2015/07/16/opinion/what-marriage-equality-means-for-transgender-rights.html (recognizing the difficulty involved in resolving issues related to gender identity through adjudication even prior to the *Obergefell* ruling).

146 *See e.g.*, Craig v. Boren, 429 U.S. 190, 204, 208–09 (1976).

147 *See supra* Sections IV.A, IV.B.

the government to justify a law that has a discriminatory effect.[148] A law shown by the plaintiff to discriminate on the basis of sex must (1) serve "important governmental objectives" and (2) the means employed by the government must be "substantially related to the achievement of those objectives."[149] Therefore, use of the intermediate scrutiny test would both be a logical extension of currently existing law and save parents from the difficulties of meeting the higher standard required under the rational basis test.

1. Important Government Objectives Prong

If a government action has a discriminatory impact on the basis of sex, in this case a child custody standard that discriminates against transgender parents, the government must first defend the law by showing that the rule "serves 'important governmental objectives.'"[150] This prong does not include objective criteria to identify important government objectives, but the Court has previously identified several examples that meet this standard.

New York State met the important government objectives standard in *Lehr v. Robertson*,[151] when it limited the parental rights of an absent father who met certain criteria set by the state legislature.[152] A father who met these criteria and did not submit a postcard to the state putative father registry would not be notified of any adoption hearings involving his child.[153] In contrast, state courts were required to notify the mother, if known, of an adoption hearing for her child regardless of how active she was in the child's life.[154] The Supreme Court upheld the sex-based distinction as furthering important government objectives like finality in adoption decrees and protecting the privacy of unwed mothers.[155]

Similarly, the Court upheld another distinction between mothers and fathers based upon perceived inherent differences in the relationship between a father and his child versus a mother and her child. An

148 *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

149 *Id.* at 524 (quoting *Miss. Univ. for Women*, 458 U.S. at 724); *Miss. Univ. for Women*, 458 U.S. at 724; Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980); Craig v. Boren, 429 U.S. 190, 197 (1976).

150 *E.g.*, Nguyen v. INS, 533 U.S. 53, 60 (2001) (quoting United States v. Virginia, 518 U.S. at 533).

151 463 U.S. 248 (1983).

152 *Id.* at 265.

153 *Id.* at 263–64.

154 *See id.* at 251–52, 266.

155 *Id.* at 264, 267–68.

immigration statute, scrutinized in *Nguyen v. INS*,[156] granted the children of U.S.-citizen mothers citizenship without preconditions, but required that U.S.-citizen fathers take affirmative action in order to pass citizenship onto their children.[157] The Court found that this sex-based distinction furthered important government objectives such as ensuring a biological and sincere emotional relationship with the child.[158]

A court applying intermediate scrutiny's first prong to cases of gender identity would likely find ensuring custody decisions are made in the best interest of the child a legitimate government interest because all U.S. jurisdictions use a form of the best interests of the child test to determine custody.[159] Courts must therefore ask whether the best interests of the child test advances important government objectives. The Supreme Court has previously ruled that "[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[160] Thus, custody decisions based upon this standard clearly serve an important government interest and meet this prong of the test.

2. Substantial Relation to Achievement of the Objectives Prong

If the government successfully demonstrates that the law in question serves an important government interest, it must then show an "exceedingly persuasive justification" for the sex-based discrimination.[161] This standard may be met if the "'discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[162] A law that meets the substantially related prong, in addition to the first prong, survives intermediate scrutiny and is upheld by the court.[163] The application of intermediate scrutiny to discrimination on the basis of gender identity would prevent discriminatory outcomes because reliance on (1) overgeneralizations and gender stereotypes and (2) physical differences fail to advance the

156 533 U.S. 53 (2001).

157 *Id.* at 60.

158 *Id.* at 62–65.

159 *See* CHILD WELFARE INFO. GATEWAY, *supra* note 18, at 1.

160 Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

161 United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

162 *Id.* at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724).

163 *See e.g.*, *Nguyen*, 533 U.S. at 60–61; United States v. Virginia, 518 U.S. at 533; *Miss. Univ. for Women*, 458 U.S. at 724–26; Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980); Craig v. Boren, 429 U.S. 190, 197 (1976).

government interest in making custody decisions in the best interest of the child.

a. Overgeneralizations and Gender Stereotypes

One branch of sex discrimination cases focuses on the role gender stereotypes play in rationalizing laws.[164] If a court finds that a law relies "on overbroad generalizations about the different talents, capacities, or preferences of males and females," then the law violates the Equal Protection Clause and will be overturned.[165] Additionally, courts will evaluate the "genuine" rationale for laws classifying individuals on the basis of sex, and will not rely upon "hypothesized or invented" justifications submitted by the government "in response to litigation."[166]

The substantial relation standard was not met in *United States v. Virginia*,[167] where the Court rejected state arguments that a male-only educational institution contributed to diversity in educational opportunities.[168] The Court additionally rejected the state's argument that the admission of women would result in negative consequences in the learning environment, thus justifying their "categorical exclusion" from the Virginia Military Institute ("VMI").[169]

The Court reserves the right to examine the stated intent of a law to ensure the reason provided is genuine.[170] Courts have been highly skeptical when examining laws that make "archaic and overbroad" generalizations on the basis of sex.[171] The overarching goal of VMI was to produce "citizen-soldiers" using an "adversative model" of ed-

164 *See, e.g.*, United States v. Virginia, 518 U.S. at 533.

165 *See id.*

166 *Id.*

167 518 U.S. 515, 539 (1996).

168 *Id.* at 540 ("However 'liberally' this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not "*equal* protection.").

169 *Id.* at 515, 545–46 (noting that the justifications for excluding women espoused by VMI are not "exceedingly persuasive").

170 Weinberger v. Wiesenfeld, 420 U.S. 636, 647–48 n.16 (1975) (finding that a Social Security rule granting widows a larger pension than widowers is not substantially related to the important government objective stated).

171 *See* Craig v. Boren, 429 U.S. 190, 198 (1976) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003) (holding that employees may sue if fired for taking leave under the Family Medical Leave Act's "family-care leave provision," regardless of gender); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (holding that gender stereotyping is barred as sex discrimination under Title VII); *Weinberger*, 420 U.S. at 651–53 (holding that a gender-based distinction should not be made when applying section 402 of the Social Security Act).

ucation that was not available at any other institution in the state.[172] The establishment of a women's-only university with a similar curriculum was found to be an insufficient remedy because this new institution lacked the history, prestige, and connections that come with a degree from VMI.[173] Exclusion of women from VMI was found to not be substantially related to the achievement of the educational objectives of VMI, and the Court ordered the school integrated.[174]

The Court rejected an argument raised in *Craig v. Boren*[175] that sex served as an "accurate proxy" for identifying risky drinking behaviors.[176] While reduction in traffic deaths associated with drunk driving is an important government objective, the Oklahoma law restricting the sale of alcohol to young men was not found to substantially relate to the achievement of this objective.[177] As such, the Court struck down the Oklahoma law discriminating between men and women in the purchase of alcohol.[178]

In the realm of child custody specifically, the Court overturned a state law in New York limiting the parental rights of all unwed fathers because it was an "example of 'over-broad generalizations'" on the basis of sex.[179] Advancement of desirable ends, such as encouraging new spouses to adopt the children of their partner from a previous relationship, was not enough to save this law.[180] If the state, however, distinguished unwed fathers involved in their children's lives from those fathers who are not, as was the case in *Lehr v. Robertson*, then the law targeting these absent fathers specifically would be upheld by the Court.[181] In these cases, the abandonment of the father was the basis for triggering the restriction of rights, not the sex of the parent on its own.

---

172 United States v. Virginia, 518 U.S. at 522–23 (citing United States v. Commonwealth, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

173 *Id.* at 551.

174 *Id.* at 558.

175 429 U.S. 190 (1976).

176 *Id.* at 204.

177 *Id.* at 199.

178 *Id.* at 210.

179 Caban v. Mohammed, 441 U.S. 380, 394 (1979) (quoting Califano v. Goldfarb, 430 U.S. 199, 211 (1977)).

180 *Id.* at 391.

181 Lehr v. Robertson, 463 U.S. 248, 267–68 (1983) (upholding a law only restricting the parental rights of certain absent fathers). This case is also discussed in Section IV.C.1, *supra*. *See also* Parham v. Hughes, 441 U.S. 347, 355–56 (1979) (affirming a Georgia law distinguishing between fathers who "legitimated" their children and those who did not, even when no comparable distinction was made for mothers).

Courts should extend the precedent barring use of gender stereotypes to include differential treatment based upon gender identity of parents. Gender nonconforming parents should not be disadvantaged because of who they are, especially in an area as sensitive as parental rights. Consideration of gender identity in custody determinations, therefore, fails this prong of the intermediate scrutiny test. Failure of any prong of the intermediate scrutiny test results in the government action being considered a breach of the Equal Protection Clause.[182] As a result, courts would therefore be barred from considering the gender identity of a parent when evaluating custody decisions.

b. Inherent Physical Differences

Another branch of cases examined by the Court involves laws that discriminate between the sexes based upon inherent physical differences. The government met the substantially related standard in *Nguyen v. INS*, where the Court upheld a law differentiating among foreign-born children in the naturalization process based upon which parent held U.S. citizenship.[183] Here, the Court held that "ensuring some opportunity for a tie between citizen father and foreign born child" is reasonably analogous to the act of a mother giving birth to the child.[184] The differential standard was supported by the inherent "[p]hysical differences between men and women" which required this differential treatment.[185] Thus, the Court upheld the state's differing standard in *Nguyen* under intermediate scrutiny because the state's basis for maintaining dual standards for men and women was not based on generalizations or sex-based stereotypes.[186]

Consideration of a parent's gender identity cannot reasonably be understood to further the government objective of protecting a child's best interests. The narrowly defined "physical differences" exception allowing for differential treatment based on inherent physical differences between the sexes is inapplicable in the case of custody determinations. The best interests of the child standard fails to consider the sex of the parent. As such, this exception in *Nguyen* would not apply in the custody context.[187] Application of the best interests of the child

182 *E.g.*, Nguyen v. INS, 533 U.S. 53, 60 (2001).

183 *Id.* at 66–68.

184 *Id.* at 66.

185 *Id.* at 68 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

186 *Id.* at 68, 73; *see also* United States v. Virginia, 518 U.S. at 533.

187 *See Nguyen*, 533 U.S. at 68.

standard to include consideration of a parent's gender identity would therefore be illegal under this legal rubric.[188]

Conclusion

Transgender parents face unique concerns and hurdles when petitioning courts for custody of their children. These concerns are compounded by a complete lack of a clearly defined standard, and uncertainty about what standard will be used. Furthermore, whatever currently existing approach the court decides upon will consider the gender identity of the parent in making its custody determination.

This inequity can be resolved by applying a broad rule, rooted in the Equal Protection Clause, which would bar consideration of gender identity in custody decisions. A growing basis in law exists for extending currently existing sex antidiscrimination provisions to include gender identity. Transgender parents should benefit from this developing understanding that antidiscrimination laws protecting people from discrimination on the basis of sex are similarly applicable to discrimination on the basis of gender identity. Trial court judges should not consider the gender identity of parents when making custody determinations. If a trial judge does so, an appellate court should apply the intermediate scrutiny test used in sex discrimination cases to determine that such consideration of a parent's gender identity violates the Equal Protection Clause.

188 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198–99 (1976).