Anti-Transgender Constitutional Law

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Over the course of the last three decades, gender identity anti-discrimination protections and other transgender-supportive government policies have increased, as government entities have sought to protect and support the transgender community. But constitutional litigation by opponents of transgender equality has also proliferated, seeking to limit or eliminate such trans-protective measures. Such litigation has attacked as unconstitutional everything from laws prohibiting anti-transgender employment discrimination to the efforts of individual public school teachers to support transgender teens.

This Article provides the first systematic account of the phenomenon of anti-transgender constitutional litigation. As described herein, such litigation is surprisingly novel: while trans-protective measures date back much further, anti-transgender constitutional litigation was virtually nonexistent prior to 2016. Moreover, as late as 2018, the few victories in such cases were almost always either temporary or predicated on arguments with only limited application. In contrast, the most recent wave of anti-transgender constitutional litigation has seen increasing success in invalidating or limiting transgender equality measures, based on increasingly broad and potentially impactful rationales.

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These findings raise significant questions, both for the transgender community and for those who care about broader anti-discrimination law. They suggest that even at a time when the transgender community is achieving important gains, the constitutional claims of transgender equality opponents are simultaneously eroding these gains. Moreover, the reasoning in some of the recent rulings in anti-transgender constitutional cases ought to be of substantial concern to all groups protected by anti-discrimination law.

Indeed, the rulings in some anti-transgender constitutional law cases provide a troubling vision of what the future of speech- and religion-based claims could portend. Emboldened by the recent victories, litigants have become increasingly aggressive—and lower courts increasingly creative—in arguing for the constitutional limitation of equality rights. While such arguments have been adopted by only a limited number of courts to date, they could—if adopted more widely—form the basis for the constitutional limitation or invalidation of broad swaths of modern anti-discrimination law.

INTRODUCTION

Recent years have seen an explosion of transgender equality measures, as both government and private entities have increasingly sought to affirm and protect the transgender community.[1] School districts in states from Wyoming to Massachusetts have adopted policies seeking to support and protect transgender students.[2] States and localities have adopted anti-discrimination measures explicitly protecting against gender identity discrimination.[3] Courts, including most notably the Supreme Court in *Bostock v. Clayton County*, have held that transgender people are protected by federal, state, and local sex discrimination laws.[4] And numerous lower courts have, over the last ten years, found that measures targeting the transgender community warrant heightened scrutiny under the Equal Protection Clause.[5]

But at the same time, opponents of transgender equality have not been quiescent. Opposition to transgender rights has become a central issue on the conservative right, arguably overtaking traditional conservative concerns such as cutting taxes and limiting the federal government.[6] States around the country—including even some that have trans-inclusive anti-discrimination laws—have increasingly proposed and enacted legislation that explicitly targets the transgender community, especially transgender youth.[7] And, as relevant to this project, litigation has proliferated, seeking to use the Constitution (and

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1. I describe what I mean by transgender equality measures more fully in Part II, *infra*. In brief, such measures include any measures intended to prevent discrimination against the transgender community and/or to promote full inclusion and recognition of the transgender community.

2. *See, e.g.*, Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., No. 23-CV-069, 2023 WL 4297186, at *3 (D. Wyo. June 30, 2023) (policy requiring school personnel to use students' preferred pronouns); Foote v. Town of Ludlow, No. 22-30041, 2022 WL 18356421, at *2 (D. Mass. Dec. 14, 2022) (policy prohibiting school personnel from sharing information relating to a student's expressed gender identity without the student's consent).

3. *See infra* Section I.A (discussing transgender-inclusive state and local anti-discrimination laws).

4. *See* Bostock v. Clayton County, 590 U.S. 644, 682–83 (2020).

5. *See* Eyer, *Transgender Constitutional Law*, *supra* note *, at 1425 ("[I]n every one of the twenty-four cases during the study period that addressed the issue of whether the transgender community should receive heightened scrutiny, the court ruled in favor of transgender litigants."). *But cf.* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 486–87 (6th Cir. 2023) (post-study case declining to recognize the transgender community as a "suspect class").

6. *See, e.g.*, Jesús Rodríguez, *She Was a GOP Congresswoman. Her Son is a Transgender Activist.*, WASH. POST, https://www.washingtonpost.com/lifestyle/2023/07/24/republicans-and-transgender-issues/ (last updated Aug. 1, 2023, 6:33 PM) [https://perma.cc/K7XM-XPBX] (" 'I'm talking about cutting taxes, people go like that,' Donald Trump said at a Republican event in June [2023], mimicking polite applause. 'Talk about transgender, everyone goes crazy.' ").

7. *See, e.g.*, *2024 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/ (last visited Apr. 22, 2024) [https://perma.cc/E8KM-9UF5] (tracking state legislation targeting transgender community).

related statutes such as the Religious Freedom Restoration Act ("RFRA")) to limit or overturn transgender equality measures.[8]

This Article is the first to comprehensively address this important phenomenon.[9] Drawing on a survey of the last ten years of anti-transgender constitutional law claims (January 2013–June 2023), this Article provides the first comprehensive descriptive account of the burgeoning field of anti-transgender constitutional law.[10] As that account demonstrates, litigators have increasingly sought to deploy constitutional law to limit, defend against, or eliminate entirely transgender-protective policies.[11] The areas in which such constitutional arguments are being raised are as diverse as the arenas in which law, policy, and individual efforts have sought to protect and affirm the transgender community—ranging from individual efforts to support and protect transgender youth, to transgender-protective employer workplace policies, to federal anti-discrimination law.[12]

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8. *See infra* Parts II–III (discussing constitutional arguments revolving around free speech, Free Exercise, substantive due process, equal protection, procedural due process, and freedom of association).

9. Numerous articles have touched on discrete aspects of the litigation discussed herein, as well as the more general issue of speech and religion claims of exemption to anti-discrimination law. However, none has undertaken to comprehensively study the legal landscape of anti-transgender constitutional litigation or its implications more broadly. For a selection of other literature addressing some components of the litigation described herein, see, for example, Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341 (2021); Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615 (2022); Marcia L. McCormick & Sachin S. Pandya, *The* Braidwood *Exploit: On the RFRA Declaratory-Judgment Class-Action and Title VII Employer Liability*, 58 U. RICH. L. REV. 411 (2024); Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227 (2021); Brian Soucek, Speech First*, Equality Last*, 55 ARIZ. ST. L.J. 681 (2023); and Brian Soucek & Ryan Chen, *Misunderstanding* Meriwether, 92 FORDHAM L. REV. 57 (2023). For examples of other important work in the area of speech and religion-based challenges to anti-discrimination law, see, for example, CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY (2017); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129 (2015); and Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328 (Susanna Mancini & Michel Rosenfeld eds., 2018).

10. See Katie R. Eyer, *Data and Methodological Appendices for Anti-Transgender Constitutional Law* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4542760 [https://perma.cc/YY7U-TZE4] [hereinafter Appendix A or Appendix B], for a discussion of the study criteria and methodology. I use the term "anti-transgender" or "AT" herein as descriptive shorthand for constitutional litigation seeking to oppose or limit transgender rights measures. I should be clear at the outset that this term does not necessarily connote hostility towards transgender *people*. While some of the litigation described herein appears founded on such hostility, that is certainly not true of all of the diverse cases described herein.

11. *See infra* Parts II–III.

12. *See infra* Parts II–III.

The mere fact of such litigation is of course concerning for transgender rights, as it embroils supportive government entities, employers, and individuals in expensive and complex litigation, often for years at a time. Thus, even where proponents of transgender rights succeed in defeating such litigation—as they often still do—they may spend years defending against legal challenges seeking to invalidate or otherwise legally penalize their efforts.[13] On the other hand, it is important to note that the arguments being raised by litigants in anti-transgender constitutional rights cases do still typically fail: from 2013–2023, the majority (60.0%) of study cases that resulted in final outcomes were total losses for anti-transgender litigants.[14]

Nonetheless, a more granular assessment of anti-transgender constitutional law cases shows numerous reasons for proponents of transgender equality—and equality law more generally—to be concerned. While anti-transgender constitutional litigation was virtually nonexistent a decade ago, such claims have proliferated today, with twenty rulings in the first half of 2023 alone.[15] Moreover, as the number of such cases has increased, so too has the number of rulings in favor of anti-transgender constitutional principles—both in terms of the absolute number of rulings favorable to opponents of transgender equality as well as in the proportion of cases resolved favorably to anti-transgender constitutional law litigants.[16]

As importantly, a close examination of the arguments that are prevailing in such litigation reveals that the victories that anti-transgender constitutional litigators are experiencing in the lower and state courts—while still inconsistent—rely on reasoning that has the potential to profoundly affect *all* of anti-discrimination law. Thus, recent victories for anti-transgender constitutional litigators have included, for example, rulings that for-profit employers are

13. *See, e.g.*, Parents for Priv. v. Barr, 949 F.3d 1210, 1217–18 (9th Cir.) (upholding school bathroom policy against Fourteenth Amendment and Title IX challenges), *cert. denied*, 141 S. Ct. 894 (2020) (case filed initially in 2017, resolved only in 2020).

14. *See* Appendix B, *supra* note 10. Cases were deemed "successful" if they resulted in any litigated or settlement-based relief, including even nominal monetary relief, though most successful resolved cases did achieve some form of nonmonetary relief, which was included as a more meaningful metric of success. Note that the study does not include cases which were resolved sufficiently early that they resulted in no merits opinions at any stage, something that might result in some especially strong legal claims being omitted—although given the relative novelty of the legal claims being raised by AT litigants and the strong incentives toward continued litigation that often exist on both sides of these disputes, it would be surprising if such early settlements were common. *Cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 45 (1984) (predicting that in conditions of substantial uncertainty regarding the outcome of particular cases, this will lead to "high rates of litigation").

15. *See* Appendix B, *supra* note 10.

16. *See id.* (showing 71.4% AT-favorable resolution rate for the seven cases resolved in the first half of 2023).

prospectively immune under RFRA from hiring workers of whom they disapprove for religious reasons;[17] that published statements of intent to discriminate are protected speech;[18] that anti-discrimination laws are not "neutral and generally applicable" for Free Exercise purposes;[19] and more.[20] Notably, all of these rulings predated the Supreme Court's most recent ruling in *303 Creative LLC v. Elenis*—recognizing a constitutional right of a website designer not to design websites for same-sex weddings.[21]

While such arguments, to date, have been adopted only by a minority of circuit, district, and state courts, they nonetheless hold reason for substantial concern. Indeed, more widely adopted, such arguments could profoundly limit the reach of anti-discrimination law—for all protected classes, from race to disability to age to sex. Recent rulings in the anti-transgender constitutional law context thus can and should serve as the "canary in the coal mine" for those who care about anti-discrimination law: they suggest the potential of a very dark future, to the extent a stable settlement of the current conflicts between speech and religion and equality cannot be achieved.[22]

A few caveats are in order before proceeding to the substance of the analysis. First, it is important to clarify that this Article proceeds from a positional perspective: that transgender equality is an important value, and efforts to roll back or limit transgender equality measures are problematic. I recognize that this perspective will not be shared by all readers, some of whom may not value transgender equality and others of whom may place greater value on countervailing constitutional entitlements (such as an expressive or religious right to be exempt from anti-discrimination law). I hope that even for such readers, the discussion (in particular in Part III) of the truly radical implications of some of the recent anti-transgender constitutional law

17. *See, e.g.*, Braidwood Mgmt. v. EEOC, 70 F.4th 914, 937 (5th Cir. 2023) (holding that for-profit employer was prospectively immune from having to employ LGBTQ workers under RFRA).

18. *See, e.g.*, Bethel Ministries, Inc. v. Salmon, No. SAG-19-01853, 2019 WL 6034988, at *1, 4 (D. Md. Nov. 14, 2019) (treating a handbook statement explicitly stating that student conduct was " 'expected to align with th[e] view' " that " 'God immutably bestows gender upon each person at birth as male or female to reflect his image' " as protected speech, rather than evidence of prohibited discrimination (internal quotation marks omitted)).

19. *See, e.g.*, Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 612–13 (N.D. Tex. 2021) ("Because Title VII is not a generally applicable statute due to the existence of individualized exemptions, the Court finds that strict scrutiny applies."), *aff'd in part, vacated in part, rev'd in part sub nom. Braidwood*, 70 F.4th 914.

20. *See infra* Part III (discussing these and other rulings).

21. 600 U.S. 570, 602–03 (2023).

22. For this reason, *all* groups protected by anti-discrimination law ought to have an interest in taking steps to address the increasing scope of speech- and religion-based limitations on anti-discrimination law. *Cf.* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (developing the theory of interest convergence).

cases—which could imperil all of anti-discrimination law—may be of interest, and of concern.

Second, it is important to acknowledge at the outset that many of the most important rulings discussed herein can and should be the subject of broader study with respect to other protected statuses (such as race, sexual orientation, cisgender sex claims, disability, national origin, religion, and age).[23] While I discuss the backdrop of Supreme Court law from non-transgender contexts, and at times draw on lower court rulings with respect to other protected classes as well (including some of the study cases, which at times spanned multiple protected classes), because of the origins of the study, the instant Article is necessarily incomplete in this respect. I nonetheless hope that the example of current rulings in anti-transgender constitutional law—rulings which have the potential to extend to *all* of anti-discrimination law—will provide a valuable window on the potential problems created by existing speech and religion doctrine in the lower courts.

Third, by focusing herein on constitutional attacks on transgender equality (as well as on constitutional-adjacent arguments, such as RFRA-based arguments), I do not mean to suggest that such constitutional attacks are the only, or even the most important form of, contemporary legal efforts to restrict transgender equality. Indeed, as I have written elsewhere, state legislation targeted at the transgender community represents a prolific and deeply concerning source of contemporary legal restrictions on transgender rights.[24] This Article

23. There are also significant connections that could be made between the cases under study herein, contemporary litigation over conscience-based healthcare exemptions (including with respect to reproductive healthcare), and conservative social movement strategy more generally. *See, e.g.*, Kate Redburn, *The Equal Right to Exclude: Compelled Expressive Commercial Conduct and the Road to* 303 Creative v. Elenis, 112 CALIF. L. REV. (forthcoming 2024) (providing a legal history of the religious conservative legal movements' arguments for speech rights that culminated in *303 Creative*); Elizabeth Sepper, *Healthcare Exemptions and the Future of Corporate Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 305 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) (analyzing and discussing religious exemption claims in the healthcare sphere). Indeed, some of the same cases discussed herein for their salience to transgender rights also involved claims of exemption, e.g., from covering or performing certain reproductive healthcare procedures. *See, e.g.*, Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1135, 1149 (D.N.D. 2021) ("The Plaintiffs contend that HHS's current interpretation of Section 1557 will cause imminent injury by forcing them to choose between performing and providing insurance coverage for gender transitions and abortions or risking the loss of federal funding and other penalties."), *aff'd on nonmerits grounds sub nom.* Religious Sisters of Mercy v. Becerra, 55 F.4th 583 (8th Cir. 2022); Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361, 378 (N.D. Tex. 2021) (enjoining enforcement of rule requiring medical providers to perform and insure abortions and gender-affirming care), *aff'd on nonmerits grounds*, 47 F.4th 368 (5th Cir. 2022). I thus recognize that my discussion herein is in some respects artificially narrow, and that there is surely more for scholars to say about many of these cases.

24. *See* Eyer, *Transgender Constitutional Law*, *supra* note *, at 1409 (noting in 2023 that "successfully enacted anti-transgender laws and executive policies have already begun to profoundly affect transgender communities across the United States").

thus should be understood as just one part of broader work, by both myself and others, to map the legal landscape of contemporary attacks on transgender rights.[25]

Finally, it is worth observing that this Article has a fundamentally different orientation than other recent work that has primarily focused on critiquing the Supreme Court's jurisprudence in this area. As described herein, the lower courts have already gone far beyond where the Supreme Court has in explicitly endorsing broad speech- and religion-based rights to discriminate. Thus, my account herein focuses far more on the limiting principles that remain available under the Supreme Court's jurisprudence—principles that could permit a settlement of contemporary disputes short of the radical positions many of the lower courts have already embraced. In doing so, I do not mean to suggest an overly optimistic account of where the Court itself may be headed but rather to point out that (contra the accounts of some other scholars) I do not believe the Court has yet gone as far as to endorse a generally available constitutional right to discriminate.

The remainder of this Article proceeds as follows. Part I, by way of background, provides a brief history of the emergence of the transgender-protective equality measures that are the object of attack in recent anti-transgender constitutional litigation. Part II takes up the study cases and provides an overview of the descriptive characteristics of such cases, including their increasing prevalence and success rates over time, as well as their contexts and claims. Part III turns to key rulings of concern in recent anti-transgender constitutional law litigation, their implications, and the ways in which they both arise from—but also have extended—the Supreme Court's existing recognition of religion- and speech-based rights to discriminate. Part IV turns to a discussion of strategies for achieving a stable settlement between speech and religion rights and anti-discrimination law. A brief conclusion follows.

I. THE BACKDROP OF TRANSGENDER EQUALITY PROTECTIONS

In order to understand both the implications and the impetus for anti-transgender constitutional law claims, it is important to

25. For other work of my own discussing this legal landscape, see sources cited *supra* note *. For work by other scholars, see generally sources cited *supra* note 9; Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507 (2016); Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065 (2023); Jennifer L. Levi & Kevin M. Barry, Essay, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL'Y REV. 589 (2019); Shannon Price Minter, *"Déjà vu All Over Again": The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161 (2017); and Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024).

understand the backdrop of transgender equality protections. As described at greater length below, the first of such measures emerged at the local level a half-century ago—long before the anti-transgender constitutional law movement described herein. In the most recent era, such equality measures have emerged from virtually every corner, ranging from federal anti-discrimination law, to supportive school board policies, to the efforts of individual teachers, family court judges, and others to support transgender youth. The proliferation of such measures—while in many respects a measure of the striking success of the transgender rights movement—has also provided an array of targets for opponents of transgender rights who are seeking to raise anti-transgender constitutional claims.

A. Transgender-Inclusive State and Local Anti-Discrimination Laws

The first laws explicitly protecting transgender rights emerged at the local level in the 1970s, with Minneapolis in 1975 becoming the first jurisdiction to explicitly protect against anti-transgender discrimination.[26] By 2013, the start of the study period here, seventeen states and the District of Columbia had enacted such protections, as well as many more localities, both large and small.[27] Today, twenty-three states, the District of Columbia, and the U.S. Virgin Islands—as well as innumerable cities, counties, and towns—have laws explicitly prohibiting a variety of forms of anti-transgender discrimination.[28] Both before and after the Supreme Court's decision in *Bostock v. Clayton County*, a number of additional states have also construed their state prohibitions on sex discrimination to reach anti-transgender conduct.[29]

State and local human relations commissions also played an early and important role in clarifying the implications of gender identity discrimination protections. For example, while courts were initially reluctant to extend even explicit gender identity protections to

26. *See* Emma Margolin, *How Minneapolis Became First U.S. City to Pass Trans Protections*, NBC NEWS (June 3, 2016, 9:28 AM), https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291 [https://perma.cc/K7ER-VPYF].

27. *State Nondiscrimination Laws in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE, https://perma.cc/LLQ9-U72V (last updated June 21, 2013).

28. *See Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last updated Feb. 22, 2024) [https://perma.cc/Q2AY-RCTA] (providing numbers for housing laws—other areas of protection may vary slightly).

29. *See id.* (reporting that five states construe the sex discrimination provisions of their public accommodations laws to prohibit discrimination based on gender identity and seven states construe their housing laws in the same manner); *see also infra* Section I.B (discussing development of sex-discrimination law and its application to transgender litigants).

sex-segregated spaces such as restrooms,[30] local human relations commissions in San Francisco, New York, and Philadelphia, among others, issued early guidance documents making clear that anti-discrimination protections extended to gender identity–appropriate facility access.[31] So too state and local human relations commissions were among the first to address issues such as purposeful misgendering[32] or deadnaming[33] as a form of discrimination.[34]

Despite their role as the earliest source of protections for the transgender community—and despite their frequent invocation in public discourse—only a relatively small number of the claims in the study arose in the context of state or local measures affording protections for transgender rights.[35] An even smaller number arose in the context of an entity defending against a claim by an aggrieved transgender litigant—only seven in the study over the entire ten-year period, across the entire United States.[36] Thus, while popular discourse often paints the likelihood of clashes between (in particular) small, religious entities and state and local transgender rights measures, this was not borne out by the study cases.[37] In fact, such conflicts appear to

30. *See, e.g.*, Goins v. W. Grp., 635 N.W.2d 717, 723 (Minn. 2001) ("[A]bsent more express guidance from the legislature, we conclude that an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination . . . .").

31. *See, e.g.*, *Compliance Guidelines to Prohibit Gender Identity Discrimination*, S.F. HUM. RTS. COMM'N (Dec. 10, 2003), https://wayback.archive-it.org/19238/20230114000856/https:/sf-hrc.org/compliance-guidelines-prohibit-gender-identity-discrimination [https://perma.cc/XM53-BGE6] (providing explanation and examples of unlawful gender identity discrimination); *Understanding Discrimination Based on Gender Identity and Expression: A Guide for Philadelphia Employers and Human Resources Professionals*, PHILA. COMM'N ON HUM. RELS. (2006), https://perma.cc/5RX3-6AX6 (same).

32. Misgendering is the practice of "identify[ing] the gender of [ ]a person, such as a nonbinary or transgender person[,] incorrectly (as by using an incorrect label or pronoun)." *Misgender*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/misgender (last visited Apr. 22, 2024) [https://perma.cc/7BDZ-L5T7].

33. Deadnaming is the practice of "speak[ing] of or address[ing] (someone) by their deadname," i.e., "the name that a transgender person was given at birth and no longer uses upon transitioning." *Deadname*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/dead%20name#dictionary-entry-1 (last visited Apr. 22, 2024) [https://perma.cc/9VG5-SHND].

34. *See, e.g.*, *NYC Commission on Human Rights Announces Strong Protections for City's Transgender and Gender Non-Conforming Communities in Housing, Employment and Public Spaces*, NYC (Dec. 21, 2015), https://www.nyc.gov/office-of-the-mayor/news/961-15/nyc-commission-human-rights-strong-protections-city-s-transgender-gender [https://perma.cc/T4FV-ZPSK].

35. *See* Appendix B, *supra* note 10.

36. *Id.* One additional case, *L.K.*, arose under a state anti-harassment law, but in a context where it is not clear that the transgender individual played any role in prosecuting the matter. *See* L.K. *ex rel.* A.K. v. Bd. of Educ., No. A-4290-18T1, 2020 WL 6389939 (N.J. App. Div. Nov. 2, 2020) (per curiam).

37. *See* Appendix B, *supra* note 10. Of course, just like other types of claims, it is surely the case that the world of published opinions underrepresents the actual incidence of such conflicts. Some entities may simply choose to behave in a nondiscriminatory fashion, even if they might have

have arisen only rarely and sporadically, even in jurisdictions that have long had trans-inclusive anti-discrimination laws.

B. Sex Discrimination Law

In addition to explicit gender identity–inclusive laws, many of the transgender community's most important protections today derive from federal (and state and local) sex discrimination law.[38] Efforts to obtain rulings interpreting sex discrimination law to include gender identity discrimination date back to the 1970s, with the earliest favorable rulings for transgender litigants being handed down during that era.[39] Nevertheless, efforts to secure protections for the transgender community under sex discrimination law largely stalled until the early 2000s, when the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*[40] caused the courts to begin to reevaluate prior precedents rejecting the argument that anti-transgender discrimination is sex discrimination.[41]

By the early 2010s, there was a consistent trend in circuit case law holding that anti-transgender discrimination is sex discrimination under a variety of federal statutes (Title VII of the Civil Rights Act of 1964, the Equal Credit Opportunity Act, the Gender Motivated Violence Act).[42] This laid the groundwork for the Equal Employment Opportunity Commission ("EEOC") to hold in the 2012 federal sector case of *Macy v. Holder* that anti-transgender discrimination is

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a viable constitutional argument for noncompliance. Conversely, published opinions may miss very early stage settlements, though as described in note 14, *supra*, the context of contemporary AT litigation provides reasons to believe that such very early settlements will be comparatively rare.

38. Disability discrimination laws have sometimes provided additional important protections for the transgender community. *See, e.g.*, Williams v. Kincaid, 45 F.4th 759, 766–74 (4th Cir. 2022) (holding that the gender dysphoria is not categorically excluded from protection under the Americans with Disabilities Act ("ADA") and can form a basis for an ADA claim in some circumstances); *see also* KATIE EYER, AM. CONST. SOC'Y FOR L. & POL'Y, PROTECTING LESBIAN GAY BISEXUAL AND TRANSGENDER (LGBT) WORKERS 10–12 (2006) (describing the early role of disability precedents in providing protections for transgender rights). Because no study cases arose in the context of disability discrimination laws, discussion of such arguments is omitted herein, though it should be noted that many of the arguments raised in the study cases would extend equally to that context.

39. *See, e.g.*, Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 272–73 (N.Y. Sup. Ct. 1977) ("When an individual such as plaintiff . . . finds it necessary . . . to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.").

40. 490 U.S. 228, 235, 250–52 (1989) (holding that gender stereotyping is a form of sex discrimination under Title VII, and that woman who was told to "walk more femininely, talk more femininely, dress more femininely, [and] wear make-up" had been subjected to sex discrimination).

41. *See* EYER, *supra* note 38, at 4–7 (discussing post-*Price Waterhouse* cases).

42. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (Title VII); Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (Gender Motivated Violence Act).

categorically sex discrimination and would be treated as such by the Agency.[43] This increasing consensus also prompted the Obama Administration's Department of Health and Human Services ("HHS") to adopt the regulatory position with respect to Section 1557 of the Affordable Care Act that anti-transgender discrimination (including categorical bans on gender-affirming care) is unlawful sex discrimination.[44]

But it was the Supreme Court's 2020 decision in *Bostock* that has had the most profound impact on the recognition of protections for the transgender community under federal (and state and local) sex discrimination laws.[45] In *Bostock*, the Supreme Court, drawing on prior textualist precedents, recognized that Title VII's proscription on discrimination "because of . . . sex" connotes but-for causation, and thus has been violated where an individual would have been treated differently "but for" their sex.[46] Because this is true in each and every instance of anti-transgender discrimination—even if sex is narrowly defined as sex assigned at birth—the Court recognized that anti-transgender discrimination is categorically sex discrimination.[47]

While the Trump Administration showed little interest in enforcing *Bostock*, or incorporating its interpretation of Title VII into administrative law, one of the Biden Administration's earliest executive actions was to issue an "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."[48] Under this Executive Order, the heads of each executive agency were ordered to "review all existing orders, regulations, guidance documents, policies, programs, or other agency actions" enacted pursuant to Title VII or other sex discrimination prohibitions for compliance with *Bostock*.[49] This led to the issuance of a number of Notices of Proposed Rulemaking ("NPRMs"), guidance documents, and in some instances final rules, which explicitly prohibited anti-transgender discrimination across a host of contexts from the administration of the Supplemental Nutrition Assistance Program to healthcare to education.[50]

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43. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *11 (Equal Emp. Opportunity Comm'n Apr. 20, 2012).

44. *See* HHS Nondiscrimination in Health Programs and Activities Rule, 81 Fed. Reg. 31375 (2016) (to be codified at 45 C.F.R. pt. 92).

45. 590 U.S. 644 (2020).

46. *Id.* at 655–58.

47. *Id.* at 659–62.

48. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

49. *Id.*

50. *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34

As in the case of state and local anti-discrimination protections, only a small number of the cases in the study (three over the ten-year period) involved an entity that actually had been sued or subjected to any other enforcement action under federal sex discrimination law.[51] However, the Biden Administration's administrative actions interpreting *Bostock* (as well as earlier LGBTQ administrative guidance and regulations issued by the Obama Administration) have also attracted affirmative litigation.[52] These cases—often filed in strategic districts and divisions—have seen a generally high level of success, resulting in the injunction of substantial portions of the administrative architecture for enforcing LGBTQ sex discrimination protections under federal law (though it is important to note that such injunctions generally do not preclude other courts from adopting the same substantive legal position as the agency in lawsuits brought by private parties).[53]

Of course there is nothing wrong with affirmative pre-enforcement litigation efforts, and indeed litigators bringing affirmative transgender rights claims often engage in such proactive litigation themselves.[54] But the paucity of cases in the study involving an actual conflict between the alleged rights of a regulated entity and a transgender employee, client, or student does suggest a different image than that often portrayed regarding such litigation: of an unavoidable conflict between one's own convictions and another's right to equality.[55] Moreover, the lack of an actual concrete context has led, for example, to the decisively odd spectacle of courts adjudicating whether a religious entity had experienced a "substantial[ ] burden"—and whether the federal government had a compelling interest in enforcing the law—as applied "to the person," in entirely speculative contexts, divorced from any real-world harms.[56]

C.F.R. pt. 106); FNS Doc. No. CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing (U.S.D.A. 2022); U.S. EQUAL EMP. OPPORTUNITY COMM'N, NVTA-2021-1, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (June 15, 2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender [https://perma.cc/2C6F-KSRW] [hereinafter EEOC, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION].

51. *See* Appendix B, *supra* note 10.

52. *Id.*

53. *Id.*

54. *See generally* Eyer, *Transgender Constitutional Law*, *supra* note * (describing affirmative constitutional litigation on behalf of transgender rights).

55. *See* Redburn, *supra* note 23 (manuscript at 26 n.123) (describing the historical emergence of minoritizing claims on behalf of the New Christian Right).

56. 42 U.S.C. § 2000bb-1 (specifying that government must justify a substantial burden on a person's religious exercise by demonstrating that the application of the burden "to the person" satisfies strict scrutiny); *see also, e.g.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 939–40 (5th

C. Fourteenth Amendment Equal Protection Doctrine

Constitutional protections for the transgender community have not been the explicit target of anti-transgender constitutional litigation, likely because such arguments (e.g., arguments that First Amendment or RFRA rights should "trump" a right to equal protection) would be unlikely to succeed.[57] Nevertheless, they are an important part of the legal backdrop of contemporary transgender rights—and arguably *should* be an important part of judges' consideration of the merits of at least some anti-transgender cases.[58] As set out below, however, discussion of the affirmative constitutional rights of the transgender community was remarkably absent from most study cases.[59]

While the Supreme Court has yet to take up the constitutional rights of the transgender community under the Equal Protection Clause, a growing array of lower and state courts have.[60] And since 2017, such courts have largely (though not universally) concluded that the discrimination against the transgender community warrants heightened scrutiny—either because gender identity itself is a quasi-suspect classification or because anti-transgender discrimination is sex discrimination (which already receives intermediate scrutiny).[61] While two recent circuit cases have rejected arguments for heightened

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Cir. 2023) (stating that government must "show a compelling interest in denying Braidwood, individually, an exemption" and concluding that the government had not done so, but in a pre-enforcement case where there was no individualized factual context as to the potential harms of nonenforcement). For more on why this seems problematic given the nature of the courts' individualized approach to strict scrutiny, see Section IV.B, *infra*.

57. Some of the conflicts at issue in the study litigation between the equality policies of state and local governments and, for example, the desire of their employees to discriminate, *should* be framed in terms of a conflict between equal protection and the right being raised by the plaintiffs. However, as described *infra*, Section IV.D, even in such cases, courts rarely mentioned the Equal Protection Clause, much less considered how it ought to figure in such rights contests.

58. *See infra* Section IV.D.

59. *See* Appendix B, *supra* note 10. In the religion context, there may be independent constitutional arguments under the Religion Clauses themselves that third-party harms of the kind at issue in the study cases are largely impermissible. *See, e.g.*, Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 798–805 (2018) (arguing that the Establishment Clause places limits on the ability of the government to permit accommodation in contexts where it results in meaningful third-party harms).

60. *See, e.g.*, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1050–52 (7th Cir. 2017) (employing a sex discrimination rationale); Karnoski v. Trump, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (holding that transgender people as a class should receive heightened scrutiny); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610–13 (4th Cir. 2020) (holding that transgender people should be deemed a quasi-suspect class and that discrimination against them is sex discrimination); Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 669–70 (8th Cir. 2022) (sex discrimination rationale). *See generally* Eyer, *Transgender Constitutional Law*, *supra* note *, at 1420–40 (comprehensively surveying the case law as of early 2023).

61. *See* sources cited *supra* note 60.

scrutiny (at least in the particular context under review),[62] the weight of the equal protection case law thus favors heightened scrutiny for the transgender community.[63]

This case law reflects two important features of contemporary equal protection doctrine, and of contemporary transgender rights litigation. First, taking seriously the criteria for suspect or quasi-suspect class status—as many of the lower courts still do—it is genuinely hard to avoid the conclusion that discrimination against transgender people should be deemed quasi-suspect. As courts have observed, transgender people have been subject to a long and virulent history of discrimination, which persists to the present day.[64] Being transgender is a "distinguishing" or "immutable" characteristic, which "invites discrimination when it is manifest."[65] The transgender community is small and comparatively lacking in political power, as evidenced by its inability to forestall the current wave of anti-transgender legislation in the states.[66] And, as numerous courts have recognized, "transgender status bears no relation to ability to contribute to society."[67]

Alternatively, as many courts have also recognized, the sex discrimination argument for heightened scrutiny is also compelling in

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62. Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1227–29 (11th Cir. 2023) (relying on *Dobbs* and *Geduldig* to conclude that statute did not classify based on sex or transgender status); L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 419–21 (6th Cir. 2023) (rejecting the argument that transgender people should be deemed a quasi-suspect class). Interestingly, both the Sixth Circuit and the Eleventh Circuit have preexisting case law applying heightened scrutiny to anti-transgender discrimination on sex discrimination grounds, and the more recent cases did not purport to overrule this case law, though it may well limit its applicability. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (concluding that discrimination against a transgender employee was sex discrimination and applying heightened scrutiny on that grounds); Smith v. City of Salem, 378 F.3d 566, 577–78 (6th Cir. 2004) (same).

63. *See* sources cited *supra* note 60; *cf.* Adams *ex rel.* Kasper v. Sch. Bd., 57 F.4th 791, 803 & n.5 (11th Cir. 2022) (en banc) (finding intermediate scrutiny applied but had been satisfied by the defendant school).

64. *See, e.g.*, *Grimm*, 972 F.3d at 611–12; Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018).

65. Windsor v. United States, 699 F.3d 169, 181, 184–85 (2d Cir. 2012) (holding that gays and lesbians are a quasi-suspect class), *aff'd on other grounds*, 570 U.S. 744 (2013); *see also, e.g.*, M.A.B. v. Bd. of Educ., 286 F. Supp. 3d 704, 721 (D. Md. 2018) (addressing the application of this criteria in the transgender context); *Grimm*, 972 F.3d at 612–13 (same).

66. *See, e.g.*, Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020) ("[T]ransgender people constitute a minority lacking in political power."); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) ("[Transgender people] are a minority with relatively little political power."); *M.A.B.*, 286 F. Supp. 3d at 721 ("[Transgender people]are both a minority and politically powerless.").

67. *M.A.B.*, 286 F. Supp. 3d at 720; *see also Ray*, 507 F. Supp. 3d at 937 ("[T]ransgender people are no less capable of contributing value to society than other people."); *Grimm*, 972 F.3d at 612 ("Seventeen of our foremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.' ").

transgender equal protection cases.[68] Many circumstances where the transgender community is seeking to enforce its equal protection rights facially involve differential treatment based on sex, such as restroom access, athletics, and prison placement.[69] Moreover, as the courts have recognized, both the but-for argument of *Bostock* and longstanding gender stereotyping arguments (from both the equal protection and statutory contexts) mean that anti-transgender discrimination is logically and doctrinally sex discrimination.[70]

Nonetheless, as alluded to above, there was a surprising absence of discussion of the equal protection stature of the transgender community in the vast majority of the study cases.[71] Even in cases where the government's efforts to avoid *its own* discrimination prompted its actions, there was often little or no discussion of the equal protection backdrop.[72] So too, cases addressing whether the government possessed a "compelling" interest in seeking transgender equality goals almost never engaged with the equal protection backdrop.[73] As I discuss below in Section IV.D, there is an argument that, in at least the former context, equal protection doctrine should be relevant.

D. Trans-Supportive School District Policies

While transgender youth have long sought to use civil rights law to challenge discrimination in schools, affirmative school policies seeking to support transgender students are of more recent vintage. Indeed, GLSEN, which has tracked the educational experience of LGBTQ students systematically since 2001, did not even ask about schools' trans-supportive policies until 2015.[74] And although such

68. *See* Eyer, *Transgender Constitutional Law*, *supra* note *, at 1432–45.

69. *See id.* at 1432–39.

70. *See id.* at 1439–45.

71. *See* Appendix B, *supra* note 10.

72. *Id.*

73. *Id.*

74. *Compare* JOSEPH G. KOSCIW, EMILY A. GREYTAK, NEAL A. PALMER & MEDELYN J. BOESEN, GLSEN, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS (2013), https://www.glsen.org/sites/default/files/2020-03/GLSEN-2013-National-School-Climate-Survey-Full-Report.pdf [https://perma.cc/KJ7M-X4QW] (not asking about trans-supportive policies, presumably because they were infrequent enough not to be worth including), *with* JOSEPH G. KOSCIW, EMILY A. GREYTAK, NOREEN M. GIGA, CHRISTIAN VILLENAS & DAVID J. DANISCHEWSKI, GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 60 (2015), https://www.glsen.org/sites/default/files/2020-01/GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf [https://perma.cc/VSS8-7CNY] (for the first time surveying about trans-affirming policies, but showing only a small

policies have proliferated in the last decade, they are by no means universal. Even in the most trans-supportive states, such as California, only a small minority of students report attending schools that have policies or guidelines designed to ensure a welcoming environment for transgender and nonbinary students.[75] While such policies have thus increased exponentially, they remain a minority phenomenon—and, as the study cases show, are often subject to litigation where they are adopted.

The nature of trans-supportive school policies can be varied and multifaceted, but a number of specific issues are often addressed. Most commonly, such policies include some measure for permitting the use of chosen names and/or pronouns by students and requiring teachers and staff (and sometimes other school community members) to respect chosen names and pronouns.[76] Other common issues that school policies address include access to gender identity–appropriate restrooms, access to a gender-neutral restroom (if preferred), the ability to participate in sports and other extracurriculars on a gender identity–appropriate basis, and other issues, such as gender identity–appropriate housing on field trips.[77]

Multiple factors have played a role in the increase in trans-supportive school district policies, including the increased visibility of transgender youth and the desire of local school boards to support them.[78] However, it also appears that law—and specifically federal administrative action—has played a role in the proliferation of school district policies supporting transgender youth. In 2016, under the Obama Administration, the Department of Education ("DOE") issued a

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percentage of LGBTQ+ students—6.3 percent—who were aware of the existence of such a policy at their school).

75. *See* GLSEN, SCHOOL CLIMATE FOR LGBTQ+ STUDENTS IN CALIFORNIA 3–4 (2021), https://maps.glsen.org/wp-content/uploads/2023/02/GLSEN_2021_NSCS_State_Snapshots_CA.pdf [https://perma.cc/Z7M6-GQYR] (showing that only eleven percent of California students reported being covered by a supportive policy for trans/nonbinary students in 2021).

76. *See, e.g.*, JOSEPH G. KOSCIW, CAITLIN M. CLARK, NHAN L. TRUONG & ADRIAN D. ZONGRONE, GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 66 (2019), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf [https://perma.cc/4G7E-VE3A] (finding that policies regarding use of chosen name and pronouns were the most commonly reported policies).

77. *Id.* A more controversial set of provisions that has been common in the most recent wave of policies are confidentiality provisions prohibiting disclosure of a student's transgender status even to parents or caregivers without student consent. As described *infra* note 190 and accompanying text, the strongest versions of such confidentiality provisions are likely to be the most legally vulnerable aspect of contemporary trans-affirming school policies.

78. *See, e.g.*, Laura Meckler, *Some Va. Districts Seem Ready to Fight Youngkin Plan for Trans Students*, WASH. POST (Sept. 20, 2022, 5:48 PM), https://www.washingtonpost.com/education/2022/09/20/trans-school-virginia-youngkin-districts/ [https://perma.cc/KW3S-94MM].

"Dear Colleague" letter that specified that transgender students were protected against discrimination under Title IX, and generally must be treated consistently with their gender identity.[79] While this Dear Colleague letter was promptly rescinded by the incoming Trump Administration,[80] the Biden DOE has reasserted its commitment to interpreting Title IX as protecting trans youth.[81]

Trans-supportive school district policies were one of the most prolific sources of litigation in the study, with a full quarter of the cases implicating such policies.[82] As in other subject areas, a significant number of these challenges arose in the context of prospective challenges, sometimes in situations where the litigant had had no apparent actual real-world contact with the policy.[83] However, more so than in other contexts, many of the schools' policies challenges did involve a direct real-world conflict: for example, a teacher who had refused to use gender identity–appropriate pronouns,[84] or parents who objected to an actual (not hypothesized) use of gender identity–appropriate restrooms or locker rooms by a transgender student.[85] Because of the increasing number of transgender and gender nonconforming youth, and because schools represent one of the most common points of interaction with the government for many individuals, it seems likely that this area of litigation will only continue to increase.

E. Other State and Local LGBTQ-Protective Laws

In addition to classic anti-discrimination laws, a number of states and localities have also enacted other forms of LGBTQ-protective laws, several of which were the subject of litigation in the study cases. For example, an increasing number of states and localities have enacted

79. *See* Letter from Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for C.R., U.S. Dep't of Just., Dear Colleague Letter on Transgender Students (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/QUN9-FJ8M].

80. *See* Letter from Sandra Battle, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ, & T.E. Wheeler, II, Acting Assistant Att'y Gen. for C.R., U.S. Dep't of Just., Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/NF56-6RS9] (withdrawing May 13, 2016 Dear Colleague letter).

81. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (final rule, interpreting Title IX in a manner protective of transgender youth).

82. *See* Appendix B, *supra* note 10.

83. *Id.*

84. *See, e.g.*, Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., No. 23-CV-069, 2023 WL 4297186, at *3–4 (D. Wyo. June 30, 2023).

85. *See, e.g.*, Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 521 (3d Cir. 2018).

laws banning conversion therapy (i.e., efforts directed at changing sexual orientation or gender identity) when performed on LGBTQ youth.[86] While early constitutional challenges to such laws often focused exclusively on their application in the sexual orientation context, more recent challenges typically have included specific attacks on the inability to engage in gender identity–change efforts.[87]

Other examples of additional types of pro-LGBTQ laws challenged in the study included, for example, a California law criminalizing repeated and willful misgendering of transgender elders in congregate care settings, and also requiring that trans elders be roomed according with their gender identity (in the absence of resident assent to a contrary arrangement).[88] Like most other areas of study cases, these challenges were typically affirmative, meaning they typically arose pre-enforcement, and outside of the context of a specific transgender individual seeking remedies.[89]

F. Other Localized Trans-Supportive Policies and Actions

Finally, the above formal legal contexts are only some of the ways in which public actors and entities have sought to provide support for—and enforce anti-discrimination norms with respect to—the transgender community in recent years. Many public employers have some form of formal or informal anti-discrimination policies protective of transgender workers (and may penalize or terminate workers who fail to comply).[90] Some colleges and universities have anti-discrimination policies that govern student (and sometimes faculty) conduct that are transgender inclusive.[91] Some individual judges have construed "the best interest of the child" in child custody or child welfare laws to require gender identity–supportive rulings in particular

86. *See* Appendix B, *supra* note 10 (listing conversion therapy cases).

87. *Compare* Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013) (exclusively focusing on sexual orientation), *with* Doyle v. Hogan, 411 F. Supp. 3d 337 (D. Md. 2019) (showing the plaintiff specifically challenging inability to engage in gender identity–change efforts), *vacated on other grounds*, 1 F.4th 249 (4th Cir. 2021).

88. *See* Taking Offense v. State, 281 Cal. Rptr. 3d 298, 306 (Cal. Ct. App.), *petition for rev. granted*, 498 P.3d 90 (Cal. 2021) (mem).

89. *See* sources cited *supra* notes 86–88.

90. This is reflected in the study cases, some of which were brought when public workers objected to such policies. *See, e.g.*, Norgren v. Minn. Dep't of Hum. Servs., No. CV 22-2009, 2023 WL 35904, at *1 (D. Minn. Jan. 4, 2023); Haskins v. Bio Blood Components, No. 1:22-CV-586, 2023 WL 2071483, at *1 (W.D. Mich. Feb. 17, 2023).

91. This also is reflected in the study cases, some of which arose as a result of general anti-discrimination policies and/or specifically trans-affirming policies. *See, e.g.*, Speech First, Inc. v. Sands, 69 F.4th 184, 188–90 (4th Cir. 2023) (general anti-discrimination); Meriwether v. Hartop, 992 F.3d 492, 500–01 (6th Cir. 2021) (trans specific).

cases.[92] And individual teachers, counselors and other public personnel have sought to support transgender youth who come to them in the course of their duties.[93]

As the study cases reveal, all of these contexts have generated litigation in recent years. Public employees who object to having to undergo anti-discrimination training or to using gender identity–appropriate pronouns for a student or co-worker have challenged policies requiring them to do so.[94] So too, students seeking to use anti-transgender language, or wear anti-transgender attire to school, have raised claims.[95] Individual parents who felt that the actions of individual teachers, or even school volunteers, in supporting their transgender child infringed upon their parental rights were also common litigants.[96] Many, though not all of these lawsuits, involved a direct conflict with the actions of the public entity, in the sense that the public actor's efforts to prevent discrimination or support an individual member of the transgender community were directly in opposition to the desire of an employee, student, or parent to decline to affirm transgender identity.[97]

* * *

First emerging in the 1970s, the legal landscape of trans-protective measures has shifted rapidly over the last twenty years. Today a wide array of measures—from federal sex discrimination law, to state and local laws, to the individual policies of local school districts and employers—protect members of the transgender community from discrimination. As described at greater length in Part II, below, such trans-protective measures in all of their forms have increasingly been the subject of litigation by those seeking to oppose transgender equality. While such litigation has, to date, only had moderate success, it holds the potential to impose serious retrenchments on the progress that has been made with respect to transgender equality to date.[98]

Moreover, it is important to stress that although the subject of the description above is, in light of the study subject, focused on

92. *See, e.g.*, *In re* K.L., 258 A.3d 932, 957 (Md. Ct. Spec. App. 2021).

93. *See, e.g.*, Leontiev v. Corbett Sch. Dist., 333 F. Supp. 3d 1054, 1059–61 (D. Or. 2018) (involving school volunteers and teachers who supported transgender student).

94. *See, e.g.*, *Meriwether*, 992 F.3d at 501–02 (involving suit by college professor who was reprimanded for failing to follow school's pronoun policy).

95. *See, e.g.*, L.M. v. Town of Middleborough, No. 23-cv-11111, 2023 WL 4053023, at *2 (D. Mass. June 16, 2023).

96. *See, e.g.*, *Leontiev*, 333 F. Supp. 3d at 1062.

97. *See supra* notes 94–96 and accompanying text.

98. *See infra* Parts II–III.

transgender-*protective* measures, anti-transgender laws, policies, and individual actions continue to proliferate.[99] An ever-increasing number of states have enacted measures affirmatively targeting the transgender community, especially transgender youth, in areas such as healthcare, athletics participation, drag performances, and more.[100] At the school level, it remains the case that transgender students are far more likely to experience anti-LGBTQ policies or practices than to experience trans-affirming ones.[101] Many transgender prisoners, employees, and foster youth continue to face outright discrimination in their respective institutional settings.[102]

Thus, the progress that has been made with respect to transgender equality is both new and incomplete. Despite important legal developments, transgender individuals are still highly likely to face discrimination in their day-to-day lives, including discrimination in their interactions with public entities. Thus, it is important to recall that the litigation described in the following parts is *not* being decided against a backdrop of widespread and longstanding acceptance of transgender equality but rather against a backdrop in which anti-transgender discrimination remains the norm in many contexts (including many government contexts).

II. ANTI-TRANSGENDER CONSTITUTIONAL LAW CASES, 2013–2023

Drawing on a comprehensive survey of federal and state cases from 2013–2023, this Part provides a descriptive account of the case characteristics of anti-transgender ("AT") constitutional law litigation. The primary criterion for study inclusion was the existence of at least one opinion addressing the merits of a constitutional claim or defense seeking to restrict, limit, oppose, or invalidate transgender rights.[103]

99. *See, e.g.*, *2024 Anti-Trans Bills Tracker*, *supra* note 7 (listing over five hundred anti-trans bills that have been introduced in the first four months of 2024); Skinner-Thompson, *supra* note 25 (discussing this proliferation of anti-transgender legislation).

100. *See supra* note 99.

101. *See* JOSEPH G. KOSCIW, CAITLIN M. CLARK & LEESH MENARD, GLSEN, THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LGBTQ+ YOUTH IN OUR NATION'S SCHOOLS 32–33 (2022), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf [https://perma.cc/E8RC-UFZJ] (58.9% of LGBTQ students reported discriminatory policies or practices at school).

102. *See generally* SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/VLC9-38QJ] (describing high levels of continuing discrimination against the transgender community across multiple settings, including by government entities).

103. See Appendix A, *supra* note 10, for this and other information regarding the study design.

RFRA claims and defenses were also included as constitutional-adjacent.[104] In total, the study was comprised of 116 merits opinions spread across seventy-two different cases.[105]

As set out below, one of the most striking findings of the study is that AT constitutional litigation was virtually nonexistent prior to the mid-2010s, first emerging as a significant phenomenon around 2016.[106] Since that time, it has continued to grow in success and prevalence.[107] Today, it reaches virtually every context in which equality measures or even informal supports are provided to the transgender community—and relies on a host of different constitutional arguments from speech to Free Exercise to equal protection.[108] As described below and in Part III, these constitutional arguments have had differing levels of success, with speech and religion claims faring better than substantive due process and equal protection claims.

A. Trends in Growth of AT Constitutional Law and Success Rates

One of the most striking aspects of AT constitutional litigation is its recent growth. AT litigation was virtually nonexistent prior to 2016, and where it existed was almost always a response to actual conflicts with laws or policies prohibiting gender identity discrimination—for example, an affirmative defense to an employment discrimination claim by a terminated transgender employee.[109] In contrast, from 2016 onward the number of cases filed each year raising AT constitutional claims dramatically increased.[110]

104. *Id.*

105. *Id.* For study data, see Appendix B, *supra* note 10.

106. *Infra*, Figure A.

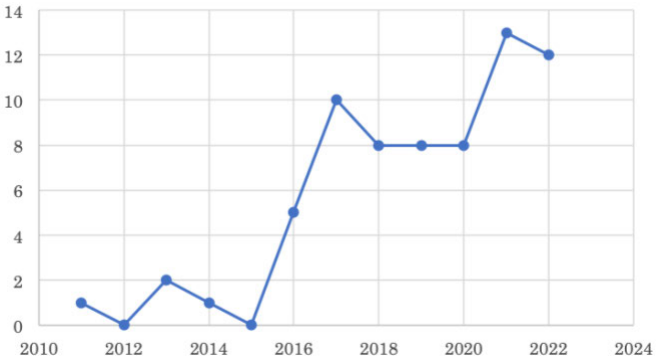
107. *See infra* Section II.A.

108. *See infra* Sections II.B–C.

109. *See* Appendix B, *supra* note 10; *see also infra* Figure A (showing cases in study by year of filing).

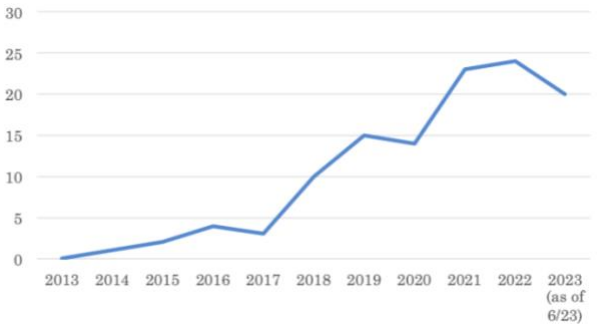
110. *See infra* Figure A.

FIGURE A: CASES IN STUDY SAMPLE BY FILING YEAR[111]



Unsurprisingly, this increased number of cases is also reflected in an increased number of merits rulings. While there were no merits rulings at all in 2013, and only one in 2014, that number had increased to twenty-four by 2022.[112]

FIGURE B: NUMBER OF MERITS OPINIONS BY STUDY YEAR[113]



In addition to an increasing *number* of AT constitutional law cases, an increasing proportion of those cases were resolved (by settlement or by litigation) in a manner that resulted in at least some

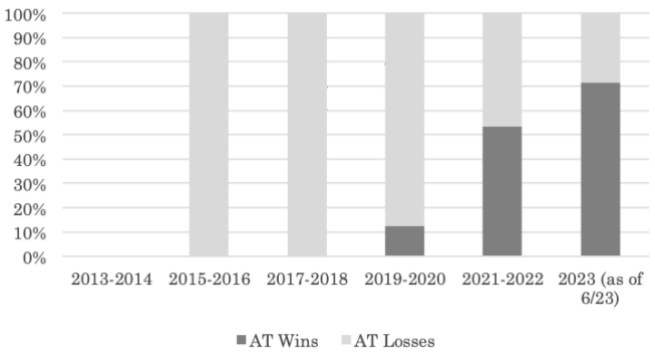
111. *See* Appendix B, *supra* note 10. A data point for 2023 was omitted because the data was incomplete as of the time the study formally concluded. Note also that there likely are cases that were filed in 2022 or earlier that have yet to result in a merits ruling and thus were not included in the study.

112. *See id.*

113. *Id.* Note that 2023 data is incomplete since opinions were only included through the end of June 2023. If the rates for the second half of 2023 are comparable to the first half of 2023, this year would mark by far the highest number of merits rulings in any year to date, with forty merits rulings.

relief to the AT party over the course of the study period.[114] While no cases were resolved in favor of an AT party from 2015–2018 (and, reflecting the newness of AT constitutional law cases, no cases were resolved at all from 2013–2014), 12.5% were resolved in favor of the AT party during 2019–2020, and a full 53.3% were resolved in favor of the AT party during 2021–2022.[115] While the numbers evidently remain incomplete for the 2023–2024 time frame, current numbers suggest an even higher (71.4%) AT-favorable resolution rate for the seven cases resolved through June 2023.[116] (Note, however, that cases were coded as "successfully" resolved if they resulted in any relief, including even de minimis monetary relief, for the AT litigant).

FIGURE C: PERCENTAGE OF AT WINS (RESOLVED CASES) OVER TIME[117]



It is worth noting, however, that the overall case resolution success rates for AT parties in the study sample (40.0%) remain considerably lower than the success rates for transgender litigants bringing affirmative constitutional litigation from 2017–2021 (78.4%).[118] Limiting the relevant data to only identical time frames (2017–2021) reaches an even more divergent result, with a 15.8% success rate for AT litigants, versus a 78.4% success rate for transgender litigants from 2017–2021.[119] Thus, while AT constitutional law cases are increasingly resulting in favorable outcomes for AT

114. *See infra* Figure C; Appendix B, *supra* note 10.

115. *See infra* Figure C; Appendix B, *supra* note 10.

116. *See infra* Figure C; Appendix B, *supra* note 10.

117. *See* Appendix B, *supra* note 10. Data was combined over a two-year period to reduce noise. Reflecting the newness of anti-transgender constitutional litigation, no cases went to final resolution in the 2013–2014 time period.

118. *See infra* Figure D (illustrating 2017–2021 outcomes for both groups); Appendix B, *supra* note 10.

119. *See infra* Figure D.

litigants, during most of the study period these cases had not yet reached the level of success that is generally reflected in affirmative transgender constitutional litigation.

FIGURE D: OUTCOMES OF RESOLVED CASES, 2017–2021[120]

In addition to overall case outcomes, merits rulings at all litigation stages—from § 1915A screenings and motions to dismiss, to summary judgment rulings and awards of final injunctive relief—were also assessed separately. Unlike final resolutions, these intermediate merits rulings did not show a consistent trend in the rates of success for AT litigants (perhaps unsurprisingly, given the widely varying standards for differing procedural stages).[121] Nevertheless, because the absolute number of merits rulings per year increased considerably over time (from a maximum of two in the first three years of the study to twenty in the first half of 2023 alone), the body of rulings favorable to AT constitutional arguments has grown considerably in the more recent years of the study.[122]

Why have AT constitutional law claims increased so dramatically in the last decade, both in prevalence and in apparent success? It is impossible to know for sure, but a number of factors seem likely to have played a role. The increasing visibility and positive portrayal of the transgender community in some sectors of society seems likely to have increased its salience, helping to spur a strongly

120. *See* Appendix B, *supra* note 10; *see also* Eyer, *Transgender Constitutional Law*, *supra* note *, at 1417 (trans litigation outcomes 2017–2021).

121. *See* Appendix B, *supra* note 10.

122. *Id.*

motivated counter-movement.[123] AT sentiment has, moreover, become tightly linked to political commitments, forming one of the central fault lines of contemporary politics.[124] As such, it is unsurprising that we have seen AT constitutional litigation emerging (and then undergoing dramatic growth) at the same time that we have *also* seen a dramatic increase in political action targeting the transgender community.[125]

Other, more practical considerations such as organizational resources seem likely also to have played a role, especially in the very large bump we see in filings around 2016. Until 2015, most of the organizations that ultimately became involved in AT constitutional cases (such as the Alliance Defending Freedom ("ADF") and the Becket Fund) were heavily involved in efforts to oppose same-sex marriage.[126] After *Obergefell v. Hodges* (2015),[127] a number of those organizations redeployed significant resources to litigating AT constitutional claims (and more generally to litigating similar speech and religion claims in opposition to the application of anti-discrimination law).[128] Other developments in the 2010s—such as the Supreme Court's decisions in cases like *Burwell v. Hobby Lobby Stores, Inc.* (2014)[129] and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018)[130]—as well as the changing composition of the Court may also have encouraged

123. *See, e.g.*, Kate Redburn, *The Visibility Trap*, 89 U. CHI. L. REV. 1515, 1541–47 (2022) (observing that "[t]rans people are caught in a visibility trap," and describing the increasing activities of conservative legal actors in the transgender rights space).

124. *See, e.g.*, Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RSCH. CTR. (Nov. 8, 2017), https://www.pewresearch.org/short-reads/2017/11/08/transgender-issues-divide-republicans-and-democrats/ [https://perma.cc/V6EN-5J6R].

125. Indeed, the rise of AT study case filings tracks a very similar time frame as the rise in AT legislation, though the most dramatic rise in legislation appears to have come later than the initial spike in litigation. *See Tracking the Rise of Anti-Trans Bills in the U.S.*, TRANS LEGIS. TRACKER, https://translegislation.com/learn (last visited Apr. 22, 2024) [https://perma.cc/W5FR-JAY2] (showing spike in legislation occurring in the early 2020s, significantly after the major rise in litigation).

126. *See* Appendix B, *supra* note 10; *see also* Joanna Wuest & Briana Last, *Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy, and the Administrative State*, J.L. MED. & ETHICS (forthcoming 2024) (manuscript at 5, 19–20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306283 [https://perma.cc/DG56-BY8S] (describing overlaps in the attorneys involved in litigating against same-sex marriage and against transgender rights).

127. 576 U.S. 644, 681 (2015) (striking down bans on same-sex marriage).

128. *See supra* note 126. To be clear: some of the organizations that devoted *greater* resources to this issue after *Obergefell* were already quite involved in making similar arguments (albeit not in the transgender rights context) long before *Obergefell*. *See generally* Redburn, *supra* note 23 (tracing the involvement of ADF in raising and testing First Amendment speech arguments as a means of litigating on behalf of religious entities).

129. 573 U.S. 682, 724–25 (2014).

130. 584 U.S. 617, 617–19 (2018).

litigants to believe that they could win claims that may not have previously seemed plausible.[131]

Finally, while the existence of *some* legal protections for the transgender community long predates the advent of AT constitutional law litigation, it does seem likely that shifts in the *nature* of such protections have in some instances spurred greater opportunities for active conflict, and thus litigation. For example, trans-protective school policies were exceedingly rare before 2016 but became increasingly common around 2016 (in part because of DOE administrative action).[132] As described above in Section I.D, such policies are especially likely to result in direct (or perceived) conflicts between school constituents and transgender equality. As such, while the advent and increase in AT constitutional cases cannot be fully explained by the existence of transgender protections (which date back many decades prior to such litigation), it seems likely that the shifting *nature* of such protections played a role in spurring increased litigation.

B. Contexts and Claimants

Where and how are AT constitutional law claims being brought, and by whom? As described above in Part I, virtually every type of transgender-supportive action by the government—from sweeping legal protections, to individualized support of a particular transgender youth—has been the subject of AT constitutional litigation.[133] These claims have been brought by a wide variety of actors and individuals—from nonprofits, to parents (of both transgender and non-transgender children), to government employees, to government entities themselves.[134] Often such litigants have been represented by conservative public interest organizations, such as the ADF, Liberty Counsel, and others.[135]

While subject areas may overlap in some cases (for example, an AT employee may oppose a trans-supportive school district policy),

131. *See, e.g.*, Emily Birnbaum, *Conservative Groups Scored Big Supreme Court Wins. Now They're Trying to Do It Again*, BLOOMBERG (Oct. 3, 2023), https://www.bnnbloomberg.ca/conservative-groups-scored-big-supreme-court-wins-now-they-re-trying-to-do-it-again-1.1979662 [https://perma.cc/PUN8-3QSZ].

132. *See supra* Section I.D.

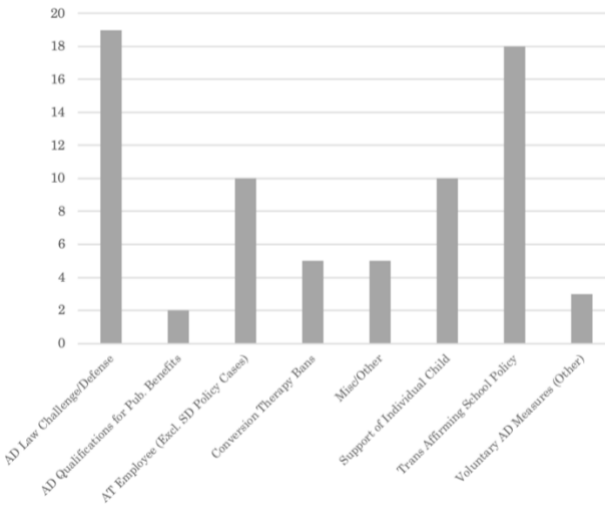
133. *See also* Appendix B, *supra* note 10.

134. *See, e.g.*, Speech First, Inc. v. Sands, 69 F.4th 184, 188 (4th Cir. 2023) (nonprofit); Anderson v. Nebraska, No. 17-CV-3073, 2018 WL 4599832, at *1 (D. Neb. Sept. 25, 2018) (parents of transgender child); Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 521 (3d Cir. 2018) (parents of non-transgender children); Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 832 (S.D. Ind. 2020) (public employee); Tennessee v. U.S. Dep't of Agric., No. 22-CV-257, 2023 WL 3048342, at *5 (E.D. Tenn. Mar. 29, 2023) (states).

135. *See* Appendix B, *supra* note 10.

making absolute subject matter categorization difficult, a general snapshot of the contexts in which AT constitutional claims are arising is provided below.

FIGURE E: STUDY CASES BY SUBJECT AREA[136]



As Figure E makes clear, AT legal arguments are arising across a wide array of contexts. Consistent with the focus in popular media, AT constitutional law claims most commonly arose in the context of challenges to traditional anti-discrimination protections, in both the federal and state/local context (nineteen of seventy-two cases, or 26.4% of cases).[137] As observed above in Part I, however, many of these, especially in the federal context, were affirmative challenges rather than defenses to actual claims by transgender litigants.[138] Thus, for example, only three of nine AT constitutional law arguments made in relation to federal anti-discrimination law were defenses to actual claims by transgender litigants.[139] Rather, such claims often arose in the context of challenges to administrative interpretations issued by the Obama or Biden Administration.[140]

Strikingly, the second most common category of cases—accounting for a full eighteen of seventy-two (or 25.0%) of the study cases—were cases involving a constitutional challenge to trans-

136. *See* Appendix B, *supra* note 10.
137. *See supra* Figure E; Appendix B, *supra* note 10.
138. *See* Appendix B, *supra* note 10.
139. *Id.*
140. *Id.*

affirming school policies.[141] These cases involved both claims by employees (teachers and counselors) and claims by other school constituencies, such as parents.[142] It was also common to see claims in these cases raised by nonprofit associations apparently created specifically for the purposes of litigation, often titled some variation of "Students and Parents for Privacy."[143] These claims involved attacks on a wide variety of aspects of trans-affirming school policies, including provisions protecting the use of preferred names and pronouns, policies permitting gender identity–appropriate restroom and locker-room access, and, in recent years, challenges to policy provisions related to the confidentiality of information regarding students' transgender status.[144]

The next most common categories, with ten cases (or 13.9% of the total) each, were cases involving AT employee conduct (outside of the context of trans-affirming school policies) and cases involving the support or welfare of an individual transgender child.[145] Employee cases arose in a variety of contexts but included employee refusals to engage in anti-discrimination law training on transgender issues, direct employee confrontations with transgender coworkers, the posting of AT memes on private social media, and other issues.[146] Cases arising in the context of the support or welfare of an individual transgender child also arose in a variety of contexts but often centered on claims that trans-supportive school personnel had violated a parent's constitutional rights of care and control of their child, or that trans-supportive judicial rulings in the family or dependency context impermissibly infringed on such parental rights.[147]

Other subject areas that were less well represented in the study included constitutional attacks on conversion therapy bans involving

141. *See supra* Figure E; Appendix B, *supra* note 10.

142. *See* Appendix B, *supra* note 10.

143. *Id.*; *see also, e.g.*, Complaint ¶ 11, Parents for Priv. v. Dall. Sch. Dist. No. 2, 326 F. Supp. 3d 1075 (D. Or. 2018) (No. 17-CV-01813) (describing "Parents for Privacy" as "a voluntary unincorporated association of current and former students, as well as their parents and other concerned members of the District community").

144. *See, e.g.*, Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 521 (3d Cir. 2018) (bathroom and locker room policy); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., No. 23-CV-069, 2023 WL 4297186 (D. Wyo. June 30, 2023) (confidentiality about pronouns and names).

145. *See supra* Figure E; Appendix B, *supra* note 10.

146. *See, e.g.*, Norgren v. Minn. Dep't of Hum. Servs., No. CV 22-2009, 2023 WL 35904, at *1–2 (D. Minn. Jan. 4, 2023) (refusal to engage in training); Haskins v. Bio Blood Components, No. 22-CV-586, 2023 WL 2071483, at *1 (W.D. Mich. Feb. 17, 2023) (direct employee confrontation with transgender coworker); Fenico v. City of Philadelphia, 582 F. Supp. 3d 229, 233–40 (E.D. Pa. 2022) (posting of anti-transgender memes), *rev'd*, 70 F.4th 151 (3d Cir. 2023).

147. *See, e.g.*, Leontiev v. Corbett Sch. Dist., 333 F. Supp. 3d 1054, 1062 (D. Or. 2018) (trans-supportive school personnel and volunteers); *In re* K.L., 258 A.3d 932, 950–52 (Md. Ct. Spec. App. 2021) (trans-supportive judicial ruling).

sexual orientation and gender identity ("SOGI") change efforts (five cases), voluntary bias reporting and anti-discrimination measures (three cases), anti-discrimination qualifications for receipt of public benefits (two cases), and miscellaneous/other (five cases).[148] Many of these categories involved policies that extended beyond the context of transgender rights to sexual orientation, or sometimes all protected classes—though in order to be included in the study, the AT party had to invoke a specific desire to avoid or invalidate the measure at issue at least in part because of a desire to engage in AT conduct.[149]

Small numbers make it impossible to draw any meaningful conclusions about the ultimate success of claims in each of these substantive categories, especially because many cases in the study sample remain ongoing. Thus, I restrict my discussion of the success of claims in particular study areas to a qualitative discussion of trends in the doctrine, in Section II.C and Part III, below.

C. Types of Legal Arguments

A wide variety of constitutional arguments also existed in the study.[150] Perhaps unsurprisingly, many of such arguments revolved around free speech (forty-one of seventy-two cases) or Free Exercise (thirty-two cases) or RFRA/Religious Land Use and Institutionalized Persons Act (eleven cases).[151] But substantive due process arguments (thirty-one cases) were also well-represented (primarily alleging a violation of parental rights and/or privacy rights).[152] A smaller number of study cases also included equal protection arguments (fifteen cases), procedural due process arguments (ten cases), and/or freedom of association arguments (five cases).[153] Note that both state and federal constitutional claims are included in the tallies below, and state RFRA equivalents are included under the RFRA tally.[154]

148. *See supra* Figure E; Appendix B, *supra* note 10.

149. *See* Appendix B, *supra* note 10 (study data); Appendix A, *supra* note 10 (study design).

150. *See infra* Figure F. A few uncommonly raised claims were excluded from the study, including state sovereign immunity and Spending Clause arguments. *See* Appendix A, *supra* note 10.

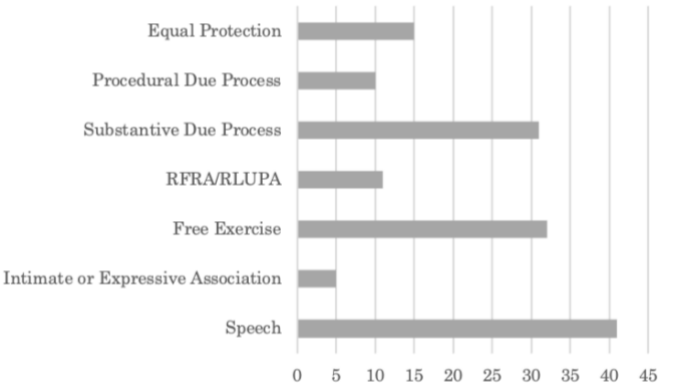
151. *See infra* Figure F.

152. *See infra* Figure F.

153. *See infra* Figure F.

154. *See* Appendix A, *supra* note 10.

FIGURE F: FREQUENCY OF CLAIMS IN STUDY CASES[155]



With the exception of RFRA, which is discussed at greater length in Part III below, none of the study legal arguments showed consistent success, at least when considered in the aggregate.[156] Nonetheless, there are some broad-brush insights that can be drawn from the case law, mostly regarding where AT claims are currently *not* succeeding. Such insights are fleshed out immediately below. The following Part (Part III) takes up more fully the contexts where such claims *are* at times succeeding (predominantly certain types of speech and religion claims), and the reasons why even some of the inconsistent rulings for AT parties should be reason for concern for those who care about anti-discrimination law.

1. Misgendering and Deadnaming by Public Employees

The high profile study case of *Meriwether v. Hartop* raised significant concerns of a possible right for public employees to misgender and/or deadname in the context of public employment.[157] In *Meriwether*, the U. S. Court of Appeals for the Sixth Circuit reversed a grant of a motion to dismiss in the case of a professor at a public college who objected to the use of gender identity–appropriate pronouns in the classroom.[158] Finding that university professors were protected by the First Amendment in the context of their teaching and scholarship, and that misgendering fell within that protected sphere, the court concluded

155. Appendix B, *supra* note 10.

156. *See* Appendix B, *supra* note 10.

157. 992 F.3d 492 (6th Cir. 2021); *cf.* Taking Offense v. State, 281 Cal. Rptr. 3d 298, 319–20 (Cal. Ct. App. 2021) (striking down criminal proscription on repeated and willful misgendering in the elder care context), *petition for rev. granted*, 498 P.3d 90 (Cal. 2021) (mem.).

158. *Meriwether*, 992 F.3d at 498–502.

that—while the university might still prevail on *Pickering* balancing (which weighs the employee's speech right against the employer's interests)—it had not conclusively done so at this early stage.[159]

By way of background, the case of *Pickering v. Board of Education* held that the First Amendment protects public employee speech, but that public employers also have interests that must be weighed in the balance.[160] Where those interests outweigh the employee's interests in free speech, the employer is entitled to prohibit or sanction employee speech, despite First Amendment constraints. The subsequent case of *Garcetti v. Ceballos* further constrained the scope of *Pickering* protections for public employees by holding that speech must generally be "as a private citizen" (rather than as an employee) in order to be constitutionally protected.[161] *Meriwether* recognized an exception to the usual *Garcetti* rule for university professors' teaching and research, concluding that such activities remain protected by the First Amendment (even though they are within the scope of employment)—and relied on that exception to conclude that Meriwether had at least a potential right to misgender (subject to *Pickering* balancing).[162]

Scholars have rightly criticized the *Meriwether* decision for its apparent dismissiveness of the harms of misgendering and for its apparent disregard of the usual rule (discussed more fully in Parts III and IV below) that discriminatory conduct and incidental speech are simply constitutionally unprotected.[163] Nevertheless, as study cases make clear, *Meriwether* alone does not establish a general First Amendment right for public employees to misgender or deadname within the context of employment.[164] Indeed, aside from *Meriwether* itself—and one other recent case arising under the Virginia Constitution's First Amendment equivalent[165]—arguments for a First Amendment right for public employees to misgender or deadname have been strikingly unsuccessful.[166]

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159. *Id.* at 504–12.

160. 391 U.S. 563, 574–75 (1968).

161. 547 U.S. 410, 419–22 (2006).

162. *Meriwether*, 992 F.3d at 504–12.

163. Many law review articles have addressed the *Meriwether* case. For a number of important contributions, see, for example, Soucek & Chen, *supra* note 9; Boso, *supra* note 9; McNamarah, *supra* note 9; and Inara Scott, Elizabeth Brown & Eric Yordy, *First Do No Harm: Revisiting* Meriwhether v. Hartop *and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977 (2022).

164. *See infra* notes 168–177 and accompanying text; *see also* Soucek & Chen, *supra* note 9, at 97–101 (making a similar observation based on the procedural posture of *Meriwether*, which makes clear that, contra to common understanding, the Court could not have decisively ruled against the school on *Pickering* balancing).

165. Vlaming v. West Point Sch. Bd., 895 S.E.2d 705, 737–43 (Va. 2023).

166. *See infra* notes 168–177 and accompanying text.

This is largely because of the limitations imposed by *Garcetti*, which, as described above, holds that in order to qualify for First Amendment protections, public employee speech must generally be "as a private citizen" (rather than as an employee).[167] As courts have observed, deadnaming or misgendering within the scope of employment is not speech "as a private citizen" and thus does not satisfy this requirement.[168] (Recall that in *Meriwether* itself, the Court held for the employee only by carving out an exception to *Garcetti* for teaching and scholarship in the public university context—an exception that will not apply to most public workplaces.[169])

Moreover, study cases also make clear that—even where AT employee speech *is* presumptively protected (either because it is made as a private citizen or under the *Meriwether* exception)—*Pickering* balancing will often favor the public employer, rather than the employee.[170] Especially where public employees indicated their

167. Garcetti v. Ceballos, 547 U.S. 410, 419–22 (2006).

168. *See* Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 838–39 (S.D. Ind. 2020) (holding a teacher's refusal to address students by their listed names and genders was not protected speech because he spoke in his capacity as a schoolteacher); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., No. 23-CV-069, 2023 WL 4297186, at *16, 22–23 (D. Wyo. June 30, 2023) (holding that compliance with a school's "Preferred Names Policy" compelled a teacher to speak only "pursuant to her official duties as a teacher"); *see also* Bloch v. Bouchey, No. 2:23-cv-00209, 2023 WL 9058377, at *23 (D. Vt. Dec. 28, 2023) (in post-study case, finding that high school coach who had made disparaging remarks about a trans athlete on the opposing team had not demonstrated a likelihood of success on the merits because the "[p]laintiff has not established that he spoke purely as a citizen rather than as an employee"); Corbin, *supra* note 9, at 631–41 (explaining why *Garcetti* can and does apply to misgendering by public school teachers); *cf.* Wade v. Stigdon, 506 F. Supp. 3d 582, 594–96 (S.D. Ind. 2020) (dismissing First Amendment employee claim under *Garcetti* in a non-teacher case involving refusal to serve family with a transgender child); Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 23-CV-01595, 2023 WL 4848509 (S.D. Ohio July 28, 2023) (post-study case rejecting a First Amendment challenge to a policy treating intentional misgendering by students as discriminatory and harassing speech, inter alia, because the regulated speech fell within *Tinker*'s provisions permitting regulation of disruptive speech, or speech that invades the rights of others).

169. Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021).

170. These cases typically did not involve the university context, but instead ordinarily involved nonworkplace speech by primary and secondary school teachers. Nonetheless, they demonstrate that courts often find in favor of the government on *Pickering* balancing where the conduct of AT parties in fact causes substantial harm or disruption. *See, e.g.*, Darlingh v. Maddaleni, No. 22-CV-1355, 2023 WL 2697754, at *8–10 (E.D. Wis. Mar. 13, 2023) (holding that a school district could reasonably interpret a teacher's anti-transgender statements at a rally as indicating she would not follow school district policy and terminate her employment); Damiano v. Grants Pass Sch. Dist. No. 7, No. 21-CV-00859, 2023 WL 2687259, at *5–8 (D. Or. Mar. 29, 2023) (holding that the district's legitimate interests outweighed teachers' First Amendment rights when teachers were terminated for posting disruptive YouTube videos contradicting the school's guidance regarding transgender students); *Wade*, 506 F. Supp. 3d at 596 (holding that state agency could terminate counselor who stated he was unable to effectively counsel transgender individuals based on his personal views); *see also* Labriola v. Miami-Dade County, No. CV-23196, 2023 WL 6456525, at *3–4 (S.D. Fla. Sept. 21, 2023) (concluding in context of public employee terminated inter alia for anti-transgender speech that government's interests outweighed employee's speech interest on *Pickering* balancing, especially because employee used crude and hateful speech);

unwillingness to comply with their own employers' trans-affirming policies (for example, in public remarks) and/or where their AT conduct generated significant public complaint, courts generally found that *Pickering* balancing favored public employers, and thus that discipline or even termination was permissible.[171]

Although beyond the scope of the official study, it is worth noting that similar trans-favorable results were obtained in the few instances during the study period where employees alleged a right to deadname or misgender students and other employees as a matter of Title VII religious accommodation law.[172] In those circumstances, claims typically failed based on a finding that it would impose an undue hardship on the employer to permit discriminatory practices.[173] It is of course possible that these decisions may be subject to reevaluation following the Supreme Court's recent decision in *Groff v. DeJoy*—which held that the "undue hardship" standard in Title VII connotes more

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MacRae v. Mattos, No. 21-CV-11917, 2023 WL 6218158, at *11–12 (D. Mass. Sept. 25, 2023) (same); *cf. Bloch*, 2023 WL 9058377, at *24 (stating that "Plaintiff has not yet sustained his burden of establishing his termination 'was for the speech itself, rather than for any resulting disruption' " where he was terminated for comments disparaging trans athlete on the opposing team (quoting Melzer v. Bd. of Educ., 333 F.3d 185, 193 (2d Cir. 2003))). *But cf.* Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at *5–9 (Va. Aug. 30, 2021) (at a preliminary stage, reaching the opposite conclusion on *Pickering* balancing with respect to the public comments of a teacher in opposition to trans-affirming school district policy). *See generally* Soucek & Chen, *supra* note 9 (raising a similar argument).

171. *See, e.g.*, *Darlingh*, 2023 WL 2697754, at *10 (holding that a school could terminate a teacher for anti-transgender statements made at a rally); *Damiano*, 2023 WL 2687259, at *6–7 (holding that a school could terminate a teacher for posting YouTube videos contradicting the school's guidance regarding transgender students); *Wade*, 506 F. Supp. 3d at 596 (holding that a counseling service could terminate a counselor who expressed concerns about his ability to counsel transgender clients). *But cf. Loudoun Cnty. Sch. Bd.*, 2021 WL 9276274, at *5–9 (holding that a school board violated a teacher's First Amendment rights by placing him on administrative leave following his comments on the county's transgender-student policy at a school board meeting); Fenico v. City of Philadelphia, 70 F.4th 151, 168 (3d Cir. 2023) (holding that there was insufficient factual development in case involving biased Facebook posts, including anti-transgender posts, by multiple police officers to address *Pickering* balancing across all posts).

172. *See, e.g.*, Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861, 899 (7th Cir. 2023) (holding that school corporation's termination of teacher for refusing to address students by chosen names and pronouns was not a violation of Title VII), *vacated on denial of reh'g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023) (vacating the district court's decision in light of *Groff v. DeJoy*, 600 U.S. 447 (2023)), *on remand* No. 1:19-cv-02462-JMS-KMB, 2024 WL 1885848, *16-21 (S.D. Ind. 2024) (concluding that accommodation would impose undue hardship even under *Groff*, due to harm to students and potential for liability); *cf.* Zdunski v. Erie 2-Chautauqua-Cattaraugus Boces, No. 19-CV-940, 2022 WL 816010, at *11–12 (W.D.N.Y. Feb. 16, 2022) (undue hardship to exempt employee from LGBTQ diversity training), *aff'd*, No. 22-547-CV, 2023 WL 2469827 (2d Cir. Mar. 13, 2023); Haskins v. Bio Blood Components, No. 22-CV-586, 2023 WL 2071483, at *2–3 (W.D. Mich. Feb. 17, 2023) (finding at the motion to dismiss stage it would be an undue hardship to permit discrimination against fellow employee, but that another accommodation such as a transfer might have been possible).

173. *See supra* note 172.

than a "de minimis" burden.[174] But it is important to note that allowing employees to discriminate—against fellow employees much less students—is hardly "de minimis" and likely should meet even *Groff*'s elevated undue hardship standard.[175]

Thus, public employer policies requiring the use of gender identity–appropriate names and pronouns should generally be enforceable as to public employees, despite the First Amendment.[176] In most instances, deadnaming and misgendering are not protected in the first instance, because they are not speech "as a private citizen." Even in the limited contexts like *Meriwether* where the courts have carved out an exception to *Garcetti*, it remains the case that employers can rely on *Pickering* balancing—and often do successfully, where AT employee speech causes harm.[177]

There is, however, one important caveat to this general account of the legal landscape with respect to this issue: state courts are free to construe their state constitutions more expansively than the First Amendment. And in fact, in a post-study ruling in the case of *Vlaming v. West Point School Board*, the Virginia Supreme Court did just that, concluding that the Virginia state constitution likely protected a high school teacher's right to refuse to use gender identity–appropriate pronouns.[178] Thus, while most federal courts, applying the Federal Constitution, are currently rejecting claims of a right to misgender, state courts, applying state constitutions, may prove more receptive to such claims.

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174. 600 U.S. at 468.

175. *See supra* note 172; *see also* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606–08 (9th Cir. 2004) (addressing this issue in the context of sexual orientation discrimination); Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552 (7th Cir. 2011) (same).

176. *See supra* notes 164–175 and accompanying text. *But cf.* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 528–31 (2022) (concluding that coach's religious expression was as a private citizen, rather than as an employee under *Garcetti*). Note that the rationale behind *Kennedy* seems unlikely to apply to most of the contexts in which misgendering conflicts have arisen, as such conflicts have typically arisen in relation to public employees' core duties, as opposed to in the context of actions that arguably could be considered speech as a private party. Nonetheless, *Kennedy* does demonstrate that the lines around what is speech as a private party versus as an employee can at times be fuzzy, and that the current Court appears predisposed to interpret the facts in ways that support the rights of religious speakers.

177. *See supra* note 171.

178. 895 S.E.2d 705, 737–43 (Va. 2023) (finding that Vlaming had stated a claim under the Virginia state constitution, and rejecting arguments based on *Garcetti*). Note that *Vlaming* was, like *Meriwether*, decided at a motion to dismiss phase. Thus, the school could prevail at later stages of the proceedings. It may be notable that Vlaming's allegations were that he was willing to use the student's preferred name and simply avoided use of pronouns altogether.

2. Substantive Due Process Rights of Parental Care and Control in Relation to Trans-Affirming School Policies and Curriculum

As noted above, one of the most common issues arising in the study was parental challenges to trans-affirming public school policies (such as policies requiring respect for preferred pronouns and names, or allowing gender identity–appropriate facility access) and/or curriculum.[179] The central claim of such challenges was typically that the substantive due process right to parental care and control of one's child—or related rights, such as the right to control medical care or familial privacy—was violated by the school's trans-affirming policies.[180] But study cases show that such arguments almost always failed.[181]

The reasons for this failure varied but most commonly reflected one of two doctrinal principles. First, many circuits have held (outside of the context of transgender rights) that parents do not have a right to control public school policies or curriculum (though they do have the right of exit)—which means that no fundamental right is implicated at all where schools adopt trans-affirming policies.[182] Many courts treated

179. *See supra* Section I.D.

180. *See* Appendix B, *supra* note 10.

181. *Id.*; *see also infra* notes 182–188 and accompanying text.

182. For circuit cases holding that parents, *in general*, lack a fundamental right to control public school policies or curricula, see, for example, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) ("The constitution does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise."); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005) ("While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child."); Herndon *ex rel.* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 177–79 (4th Cir. 1996) (holding that a school's community service requirement did not violate parents' fundamental right to direct their children's education); Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (holding that parents' right to direct child's education was not violated by school district's refusal to allow student to attend classes part-time). For study cases applying this circuit precedent, see, for example, Parents for Priv. v. Barr, 949 F.3d 1210, 1232–33 (9th Cir. 2020) (holding parents challenging a policy allowing transgender students to use restrooms matching their gender identities did not have a fundamental right to determine the restroom policies of public schools); Jones v. Boulder Valley Sch. Dist. RE-2, No. 20-CV-03399, 2021 WL 5264188, at *15–17 (D. Colo. Oct. 4, 2021) (finding parents had no fundamental right to demand their children not be exposed to transgender tolerance programming at school); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 128–30 (D. Md. 2022) (finding that parents did not have a fundamental right to be promptly informed when their child's gender identity differed from the child's sex assigned at birth or to control gender-affirming aspects of school district's curriculum and counseling), *vacated on other grounds*, 78 F.4th 622 (4th Cir. 2023); Students & Parents for Priv. v. Sch. Dirs. of Twp. High Sch. Dist. 211, 377 F. Supp. 3d 891, 903–04 (N.D. Ill. 2019) (finding that parents had no fundamental right to determine whether their children would share bathrooms and locker rooms with transgender students); Regino v. Staley, No. 23-cv-00032, 2023 WL 2432920, at *3, 6 (E.D. Cal. Mar. 9, 2023) (denying motion for preliminary injunction, finding the parent plaintiff lacked a fundamental right to control her child's gender identification at school

this alone as conclusive, while others applied rational basis review.[183] Those courts that applied further review typically concluded that trans-affirming policies are at least rational (and indeed may even be compelling).[184]

Alternatively, some courts also held that a showing of "conscience shocking" behavior was required *in addition* to a showing of an infringement of a fundamental right for the plaintiff to prevail on their due process claim.[185] Because trans-affirming policies and practices were generally found not to be "conscience shocking" (but

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or to control the school's supportive response to that gender identification); and Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., No. 23-CV-069, 2023 WL 4297186, at *13 (D. Wyo. June 30, 2023) (finding that a school's policy of using students' preferred names and respecting students' privacy regarding chosen names did not violate parents' fundamental rights). *But cf.* Tatel v. Mt. Lebanon Sch. Dist., 637 F. Supp. 3d 295, 326–28 (W.D. Pa. 2022) (finding allegations of indoctrination by teacher of young children stated a claim). Post-study case law has also largely, though not entirely, rejected such parental rights arguments. *See* Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 23-CV-01595, 2023 WL 4848509, at *19 (S.D. Ohio July 28, 2023) (finding that school policy prohibiting students from intentionally misgendering others did not violate parents' fundamental rights); Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ., No. 22-CV-337, 2023 WL 5018511, at *7 (S.D. Ohio Aug. 7, 2023) (finding that parents do not have a constitutional right to contest a school's policy permitting gender identity–appropriate restroom usage by trans student); Mahmoud v. McKnight, No. CV DLB-23-1380, 2023 WL 5487218, at *26–27 (D. Md. Aug. 24, 2023) (finding that a school policy that did not allow parents to opt their children out of discussions of books with LGBTQ+ characters did not violate parents' fundamental rights); Lee v. Poudre Sch. Dist. R-1, No. 23-cv-01117, 2023 WL 8780860, at *12 (D. Colo. Dec. 19, 2023) (finding that parents lacked a fundamental right to prevent exposure of their kids to a GSA in public school); Doe v. Del. Valley Reg'l High Sch. Bd. of Ed., No. 3:24-CV-00107, 2024 WL 706797, at *6–7 (D.N.J. Feb. 21, 2024) (concluding that parent had not shown a likelihood of success on the merits where they claimed a fundamental right to prevent school officials from referring to their child with the child's gender identity–accurate pronouns and name). *But cf.* Mirabelli v. Olson, No. 23-cv-00768, 2023 WL 5976992, at *8–9 (S.D. Cal. Sept. 14, 2023) (suggesting in dicta that policy that required withholding information about a student's gender identity or presentation at school from parents would violate parental rights under the Due Process Clause); Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658, 665–66, 668–69 (8th Cir. 2023) (appeal of study case finding due process claim moot, but granting preliminary injunction in part based on First Amendment overbreadth grounds).

183. *See, e.g.*, *Parents for Priv.*, 949 F.3d at 1231–33 (conclusive); *Jones*, 2021 WL 5264188, at *15–17 (conclusive); *John & Jane Parents 1*, 622 F. Supp. 3d at 136 (rational basis review); *Students & Parents for Priv.*, 377 F. Supp. 3d at 904 (conclusive); *Regino*, 2023 WL 2432920, at *3 (conclusive); *Willey*, 2023 WL 4297186, at *13–14 (conclusive); *see also Parents Defending Educ.*, 2023 WL 4848509 (post-study case applying rational basis review).

184. *See, e.g.*, *John & Jane Parents 1*, 622 F. Supp. 3d at 136–37 (satisfies rational basis review, may also be compelling).

185. *E.g.*, Foote v. Town of Ludlow, No. CV 22-30041, 2022 WL 18356421, at *6–8 (D. Mass. Dec. 14, 2022) (internal quotation marks omitted) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998)) (holding that school's actions in treating transgender students in a gender-affirming way and in not immediately informing parents did not shock the conscience); *Willey*, 2023 WL 4297186, at *16 (holding that a school's preferred names policy did not shock the conscience). It is not clear that this approach is doctrinally consistent with the Supreme Court's approach to substantive due process, but it does appear to be consistent with extant circuit case law in several circuits, at least where the relevant actor is an executive actor. *See, e.g.*, Christensen v. County of Boone, 483 F.3d 454, 462 (7th Cir. 2007) (requiring a showing *both* that a fundamental right was impaired, and that the government's conduct was conscience shocking).

rather a good faith attempt to deal with the "difficult"[186] issue of supporting transgender students), some courts also dismissed claims on this basis.[187] Collectively, the vast majority of courts endorsed one or both of these arguments and thus dismissed substantive due process challenges to schools' trans-affirming policies and practices.[188]

These cases demonstrate that school districts can generally adopt trans-affirming policies and curriculum without concerns that such policies will be found to infringe on parental rights.[189] (Cisgender students' rights to privacy, which were another common claim, were also commonly rejected and are addressed below.) While there may be limited circumstances—such as interpreting a policy to require affirmative lies to parents about a child's gender identity—that could be constitutionally problematic, it should be fairly easy for schools to accommodate such limitations.[190] Thus, although challenges to trans-affirming school district policies were among the most commonly raised claims in the study, they were also among the least successful.[191]

It is nonetheless worth concluding on a cautionary note. As study cases demonstrated, many educational institutions are currently adopting policies that prohibit disclosure of information regarding students' gender identity even to students' parents without student consent.[192] In some cases, such policies could be construed as requiring affirmative lies or deception to parents, the one area that study cases suggest may well be vulnerable to constitutional attack.[193] Moreover, it

186. *Foote*, 2022 WL 18356421, at *6, 8.

187. *See, e.g.*, *id.*; *Willey*, 2023 WL 4297186, at *16.

188. *See* Appendix B, *supra* note 10.

189. Other related claims by parents, such as interference with familial autonomy, and interference with parental control over medical care, were also commonly rejected. *See, e.g.*, *Willey*, 2023 WL 4297186, at *11 (medical care); *Foote*, 2022 WL 18356421, at *5 (medical care).

190. *See, e.g.*, *Willey*, 2023 WL 4297186, at *13–14 (noting that to the extent policy could be construed as requiring active deception, it would be both unconstitutional and conscience shocking). After the study period, the Eighth Circuit also found a likelihood of success on the merits on a First Amendment overbreadth claim where a school district policy required "respect[ing]" a student's gender identity, as opposed to simply specifying that teachers must use gender identity–appropriate pronouns and names. *See* Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658, 669 (8th Cir. 2023). As these cases make clear, there are *some* versions of trans-affirming policies that could be constitutionally problematic, and schools should be careful to tailor their policies to avoid such conflicts.

191. *See* Appendix B, *supra* note 10.

192. *See, e.g.*, *Willey*, 2023 WL 4297186, at *13–14; *see also Mirabelli*, 2023 WL 5976992, at *12; *cf.* Petition for Certiorari at 1, John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., No. 23-601 (U.S. Nov. 13, 2023), 2023 WL 8481912, at *1 ("One monitoring organization lists over 1,000 such policies affecting over 10,000,000 school children.").

193. *See, e.g.*, *Willey*, 2023 WL 4297186, at *13–14. A school may also run the risk of a FERPA violation if they refuse or fail to disclose all school records to a parent upon request. *See Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html (last visited Apr. 22, 2024) [https://perma.cc/32QT-ZVVX]

seems plausible that such active deception could render school policies *generally* more suspect in the eyes of the courts insofar as it could suggest purposeful efforts to interfere with the parent-child relationship.[194] Schools should thus carefully consider the limits of the confidentiality requirements that they include in policies intended to support transgender students. While there is currently no constitutional obligation to affirmatively *notify* parents of a child's trans status (just as schools do not proactively contact parents regarding innumerable other day-to-day conduct by students), policies that can be construed as requiring active *deception* may well be constitutionally problematic.

3. Substantive Due Process Rights of Parental Care and Control in Relation to Individual Support of a Trans Child

While many of the study cases focused on challenges to *policies* intended to be supportive of transgender youth, some also focused on the efforts of *individuals* to support particular transgender youth.[195]

("Parents or eligible students have the right to inspect and review the student's education records maintained by the school.").

194. *Cf.* Petition for Certiorari, *supra* note 192, at 1 (in arguing for certiorari review, stating that "[s]chools across the country over the past few years have adopted policies . . . that require school personnel to hide from parents—lying if need be—that the school is assisting their child to transition gender at school").

195. *See, e.g.*, Littlejohn v. Sch. Bd. of Leon Cnty., 647 F. Supp. 3d 1271, 1275 (N.D. Fla. 2022) (claiming school officials violated parents' due process rights by meeting with student outside parents' presence to discuss supporting student's gender identity); Seifert v. Hamilton County, 951 F.3d 753, 765–66 (6th Cir. 2020) (parents claimed substantive due process violation when county officials refused to release to their custody child who claimed parents engaged in abusive conduct after he disclosed his transgender identity); Anderson v. Nebraska, No. 4:17-CV-3073, 2018 WL 4599832, at *4, 6 (D. Neb. Sept. 25, 2018) (claiming that teacher violated parent's substantive due process rights by allowing trans child to confide in him about child's gender identity and not informing parent immediately); Leontiev v. Corbett Sch. Dist., 333 F. Supp. 3d 1054, 1059–60, 1066 (D. Or. 2018) (rejecting claim that school volunteers and others violated substantive due process by allowing transgender child to stay with them after the child chose to leave home temporarily due to non-affirming home environment); Vesely v. Ill. Sch. Dist. 45, No. 22 CV 2035, 2023 WL 2988833, at *1 (N.D. Ill. Apr. 18, 2023) (alleging that school had violated due process by referring to child by preferred pronouns and name and permitting her to wear feminine attire and makeup); Calgaro v. St. Louis County, 919 F.3d 1054, 1057–58 (8th Cir. 2019) (alleging medical providers and school officials violated parental rights by permitting what they believed to be a legally emancipated child to seek medical treatment without parental consent and not providing parent with child's records); *In re* A.C., 198 N.E.3d 1, 7–8 (Ind. Ct. App. 2022) (appealing trial court dispositional order requiring family therapy and treatment services for child and prohibiting parents from discussing child's transgender identity outside of therapy sessions, arguing that it violated parents' right to care, custody, and control of child); *In re* K.L., 258 A.3d 932, 952 (Md. Ct. Spec. App. 2021) (alleging that mother was denied decisionmaking right regarding consent to transgender child's name change, where child was in state custody due to parental neglect); Paul E. v. Courtney F., 439 P.3d 1169, 1171 (Ariz. 2019) (claiming family court's appointment of specific therapist for child and consulting expert for court and parties violated father's rights as sole legal decisionmaker for child).

Thus, the efforts of teachers, extracurricular volunteers, social welfare personnel, and even judges to support particular trans youth were at times challenged as unconstitutional.[196] In these circumstances, parents typically alleged that other adults' support of their child's transgender status amounted to a violation of the parents' fundamental right of parental care and control of their child.[197]

Here too, AT litigants were generally unsuccessful in their constitutional arguments. While the reasoning for rejecting such arguments varied, courts often found "conscience shocking" behavior to be necessary—and lacking.[198] As courts repeatedly observed, good faith efforts to support transgender youth are not conscience shocking, even where they occur in a context that prevents the parent from fully exercising their parental prerogatives.[199] Similarly, there were also contexts (such as simply respecting a youth's preferred name or pronouns at school) that were found not to infringe a parent's rights in the first instance.[200]

Another cluster of cases centered on the conduct of family and juvenile court judges in adjudicating custody and dependency matters. In these cases, judges were typically found not to have violated parental rights of care and control insofar as their actions were necessary to protect a transgender child's best interests.[201] While courts were

196. *See supra* note 195.

197. *See supra* note 195.

198. *See, e.g.*, *Littlejohn*, 647 F. Supp. 3d at 1277, 1283 (finding that the relevant standard for substantive due process violations was shocking the conscience and that defendants' support of a transgender student did not meet that standard); *Anderson*, 2018 WL 4599832, at *6 (same); *Leontiev*, 333 F. Supp. 3d at 1064–66 (same); *see also Siefert*, 951 F.3d at 764–67 (finding that substantive due process did not state a claim in the absence of conscience shocking behavior, but that allegation of a denial of procedural due process did).

199. *See, e.g.*, *Littlejohn*, 647 F. Supp. 3d at 1278, 1283 (finding that school officials not involving parents in decisions regarding use of their child's preferred name, pronouns, and support plan at school did not shock the conscience); *Siefert*, 951 F.3d at 767 (holding that county officials not returning child to parents while abuse claims were investigated did not shock the conscience); *Anderson*, 2018 WL 4599832, at *6 (finding that a teacher permitting a student to confide in him regarding their gender identity and not immediately notifying parent did not suggest conscience-shocking misconduct); *Leontiev*, 333 F. Supp. 3d at 1067 (finding that school program volunteers did not shock the conscience by not calling law enforcement or actively sending teen home, when teen had left home due to a non-gender-affirming environment).

200. *See, e.g.*, *Vesely*, 2023 WL 2988833, at *2–4 (finding that parent did not state a substantive due process claim by alleging school's support of student's preferred name, pronouns, and clothing); *see also Calgaro*, 919 F.3d at 1059 (concluding that qualified immunity applied to bar claims due to a lack of "clearly established" law "that parents have a constitutional right to manage all details of their children's education or to obtain consultation with school officials on everyday matters"). *But cf.* Tatel v. Mt. Lebanon Sch. Dist., 637 F. Supp. 3d 295, 328–30 (W.D. Pa. 2022) (allegation of teacher encouraging young child to identify as trans stated claims of interference with familial privacy).

201. *See In re* A.C., 198 N.E.3d 1, 19 (Ind. Ct. App. 2022) (holding that court order requiring individual and family therapy and treatment services for child, and limiting discussion of child's

expected to defer to parental judgment where possible (such as, for example, allowing parents to select a treatment professional rather than appointing one themselves), where a youth's well-being was ultimately implicated, transgender-supportive orders were typically affirmed.[202]

Thus, just like formal school policies supporting transgender youth, individual actions by state actors to support particular transgender youth have ordinarily been deemed constitutional by the courts.[203] It is, of course, still concerning that litigation is being brought against individuals who are seeking to provide support to transgender youth, especially where such litigation is retrospective damages litigation targeting particular individuals—since such litigation might deter the risk-averse from offering support in the first instance. But ultimately, study cases suggest that such litigation is unlikely to succeed.

4. Students' Substantive Due Process Right to Privacy in Restrooms and Locker Rooms

In addition to parents' rights, several of the study cases also raised claims on behalf of students, typically alleging that cisgender *students'* fundamental right to privacy was implicated by school policies allowing the use of gender identity–appropriate facilities by transgender students.[204] While such claims were less commonly adjudicated on the merits, they were universally rejected where they were raised. Specifically, courts concluded that cisgender students lacked a privacy interest in not being physically present in the same space with transgender students sharing their gender identity.[205] Courts were more mixed on whether students possessed any privacy right in their partially clothed bodies.[206] However, the one court to

transgender identity outside of therapy, did not violate parents' rights); *In re* K.L., 258 A.3d 932, 937 (Md. Ct. Spec. App. 2021) (holding that the "juvenile court did not err" in granting the department of social services the "authority to consent to a change in name and gender marker" on child's behalf); *see also* Paul E. v. Courtney F., 439 P.3d 1169, 1178–79 (Ariz. 2019) (partially invalidating trial court order as too invasive, but making clear that a more carefully tailored order would be appropriate).

202. *See supra* note 201.

203. *See supra* notes 198–201 and accompanying text.

204. *See, e.g.*, Parents for Priv. v. Barr, 949 F.3d 1210 (9th Cir. 2020) (challenging school policy allowing transgender students to use bathrooms matching their gender identities); Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (same); Students & Parents for Priv. v. Sch. Dirs. of Twp. High Sch. Dist. 211, 377 F. Supp. 3d 891 (N.D. Ill. 2019) (same).

205. *See, e.g.*, *Parents for Priv.*, 949 F.3d at 1226; *Boyertown Area Sch. Dist.*, 897 F.3d. at 528.

206. *Compare Boyertown Area Sch. Dist.*, 897 F.3d at 527–28 (right exists, but strict scrutiny is satisfied), *with Students & Parents for Priv.*, 377 F. Supp. 3d at 902 (no right exists).

recognize such a right also found that there was a narrowly tailored compelling state interest in allowing transgender youth gender identity–appropriate facilities access.[207]

5. Equal Protection

The final area where study cases showed consistent results was in the area of equal protection claims. While it was fairly common for AT litigants to raise equal protection claims, such claims almost always failed.[208] The reason for such failure was typically that claimants had not even alleged—or could not prove at later stages of the litigation—that they had been treated differently than others.[209] Rather, courts found that public entities typically treated all individuals (whether religious or not, whether objecting to transgender rights or not) in the same fashion.[210] Because it is a prerequisite of equal protection claims for the plaintiff to allege disparate treatment, such claims typically failed for this reason.

It is important to note, however, that there were a very small number of cases in which courts did decline to dismiss equal protection claims at the motion to dismiss phase.[211] Moreover, in the context of a Free Exercise claim, two study cases did find sufficient allegations of "non-neutrality" at the motion to dismiss phase on the basis of

207. *See Boyertown Area Sch. Dist.*, 897 F.3d. at 528–30 (finding that school policy allowing transgender students to use bathrooms consistent with gender identity serves compelling interest of protecting transgender students against discrimination).

208. *See, e.g.*, Penkoski v. Justice, No. 18-CV-10, 2018 WL 6597322, at *8 (N.D. W. Va. Aug. 3, 2018); Menders v. Loudoun Cnty. Sch. Bd., 580 F. Supp. 3d 316 (E.D. Va. 2022), *vacated on other grounds*, 65 F.4th 157 (4th Cir. 2023); Jones v. Boulder Valley Sch. Dist., No. 20-CV-03399, 2021 WL 5264188 (D. Colo. Oct. 4, 2021); Taking Offense v. State, 281 Cal. Rptr. 3d 298 (Cal. Ct. App. 2021), *petition for rev. granted*, 498 P.3d 90 (Cal. 2021) (mem.); Melvin v. City of Philadelphia, No. 21-3209, 2022 WL 3018187 (E.D. Pa. July 29, 2022); King v. City of New York, No. 22-231, 2023 WL 2398679, at *2 n.2 (2d Cir. Mar. 8, 2023); Misjuns v. Lynchburg Fire Dep't, No. 21-CV-25, 2023 WL 3026727 (W.D. Va. Apr. 20, 2023); Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2019 WL 4222598 (S.D. Ohio Sept. 5, 2019), *report and recommendation adopted by* 2020 WL 704615 (S.D. Ohio Feb. 12, 2020), *rev'd on other grounds sub nom.* Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021). *But cf. infra* notes 211–212 and accompanying text (noting cases in which courts did not dismiss equality claims at motion to dismiss phase). For post-study case law rejecting equal protection arguments, see Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ., No. 22-cv-337, 2023 WL 5018511, at *16–17 (S.D. Ohio Aug. 7, 2023); Lee v. Poudre Sch. Dist. R-1, No. 23-cv-01117, 2023 WL 8780860, at *19 (D. Colo. Dec. 19, 2023).

209. *See, e.g.*, *Jones*, 2021 WL 5264188, at *18; *Taking Offense*, 281 Cal. Rptr. 3d at 325; *Melvin*, 2022 WL 3018187, at *8; *Misjuns*, 2023 WL 3026727, at *9; *Meriwether*, 2019 WL 4222598, at *29.

210. *See supra* note 209.

211. *See* Tatel v. Mt. Lebanon Sch. Dist., 637 F. Supp. 3d 295, 335 (W.D. Pa. 2022) (allegations that opt-out was provided for other topics but not for transgender issues raised plausible equal protection claim at motion to dismiss stage); Bethel Ministries v. Salmon, No. SAG-19-01853, 2019 WL 6034988, at *5 (D. Md. Nov. 14, 2019) (complaint raised plausible equal protection claim at motion to dismiss stage—appears claim abandoned at later stages of litigation).

allegations of differential treatment of or disfavor for religion.[212] Thus, while AT litigants were often unable to substantiate—or sometimes even plausibly plead—differential treatment, this was not universally the case.

* * *

An examination of AT constitutional law cases over the last ten years thus shows mixed results from the perspective of the transgender community. Such litigation has increased dramatically, going from virtually nonexistent at the study's inception to an increasingly common source of constitutional litigation in the lower federal and state courts.[213] Apparently spurred by the increased protections for and visibility of the transgender community—as well as factors such as the redeployment of resources by conservative groups following *Obergefell*—the radical increase in AT constitutional law cases is striking in and of itself.[214]

Moreover, study results show that such AT cases are—when looked at in the aggregate—experiencing greater successes over time, though they remain predominantly unsuccessful.[215] Thus, both the proportion and number of cases resulting in some relief to the AT party has substantially increased over the course of the study.[216] So too the number (but not proportion) of rulings each year favorable to AT litigants has consistently increased.[217] Thus, study cases show that not only are trans equality measures facing legal attack, they are also increasingly likely to be limited or invalidated in at least some respects.

But there were also reassuring findings for the transgender community and their allies in the study cases. Rulings in relation to transgender-supportive public school policies, for example, typically affirmed the validity of such policies against the most common argument raised by parents (that such policies represent a violation of substantive due process).[218] So too, individual efforts to support

212. *Meriwether*, 992 F.3d at 514, 518 (finding sufficient allegations of religious bias to reverse award of motion to dismiss); *see also, e.g.*, Students & Parents for Priv. v. Sch. Dirs., 377 F. Supp. 3d 891, 907 (concluding, at the motion to dismiss phase, that while the policy was a neutral rule of general applicability, the allegations of hostility toward cisgender students seeking accommodation based on religious beliefs might not be).

213. *See supra* Section II.A.

214. *See supra* notes 123–132 and accompanying text.

215. *See supra* Section II.A (finding an increased success rate for AT parties in recent years, but still lower rates of success than transgender litigants).

216. *See supra* Section II.A.

217. *See supra* Section II.A.

218. *See supra* notes 179–191 and accompanying text.

transgender youth were rarely found to run afoul of constitutional rights.[219] Even areas such as public employees' rights to misgender—which saw some well-publicized rulings unfavorable to the transgender community—appear in a different light (and one more favorable to transgender rights) when considered in global context.[220]

Nonetheless, as taken up in the following Part, certain rulings in the study—especially with respect to speech and religion rights to discriminate—are deeply troubling. Such rulings demonstrate the downstream consequences of the Supreme Court's failure to clearly reaffirm the default rule of non-protection for discrimination—even as it has carved out many exceptions to that default. These rulings suggest that without substantial efforts to stabilize and clarify the Court's current speech/religion doctrine (taken up in Part IV), such rulings could indeed pose a threat to all of anti-discrimination law.

III. ANTI-TRANSGENDER RULINGS AND THE BROADER LANDSCAPE OF CONSTITUTIONAL CHALLENGES TO ANTI-DISCRIMINATION LAW

For years, scholars and advocates have expressed increasing concerns regarding the Supreme Court's precedents in the speech and religion context, and their potential implications for anti-discrimination law.[221] Rulings in the AT constitutional law cases in the instant study suggest that scholars and advocates have been right—and indeed that the lower federal and state courts are already construing speech and religion law in ways that have the potential to radically undermine anti-discrimination law.[222] As I take up more fully in Part IV, some of these lower court decisions are likely wrong, as they ignore remaining limitations in the Supreme Court's doctrine on where speech and religion claims can prevail.[223] But others track genuine shifts in the Court's doctrine over the course of the last thirty years—toward increasingly greater solicitude for speech- and religion-based claims of rights to discriminate.

Moreover, even those decisions that are arguably wrong may reflect the genuine confusion (or, more cynically, strategic openings) that the Court's shifting doctrine has produced. While, as described more fully below and in Part IV, the Court has *not* abandoned its default rule of treating discrimination as generally unprotected conduct, it has created numerous exceptions—while only opaquely

219. *See supra* notes 195–203.

220. *See supra* notes 157–177.

221. *See, e.g.*, *supra* note 9; *infra* note 352.

222. *See infra* Sections III.B–E.

223. *See infra* Part IV.

reaffirming the default.[224] It is thus unsurprising that we see litigants pushing farther; and the lower federal and state courts at times crediting those claims. Nonetheless, such cases are deeply troubling—for all of anti-discrimination law—insofar as they offer a vision of (and potential stepping stones to) a future in which anti-discrimination law is pervasively under constitutional threat.

By way of background, Section III.A below provides a brief history of the Supreme Court's doctrine in the area of speech- and religion-based rights to discriminate. Sections III.B through III.E take up the study cases and describe the ways in which courts in the transgender rights context have expanded speech and religion arguments against anti-discrimination law, reaching far beyond where the Supreme Court has gone to date. As explored below, such rulings—which at times *in fact* also reached other protected characteristics (including race, sexual orientation, and sex)—ought to be of substantial concern to all who care about anti-discrimination law.

A. Background and History

Arguments for a First Amendment right to discriminate date back as far as modern anti-discrimination law. Leading First Amendment scholar Herbert Wechsler famously questioned whether *Brown v. Board of Education* rested on "neutral principles" due to its tension with segregationists' "freedom of association."[225] In the decades of resistance to racial equality that followed *Brown*, segregationists (and other opponents of civil rights) repeatedly invoked their rights to freedom of association and other speech and religion concerns.[226] In opposing court-ordered desegregation—and in opposing the enactment and application of anti-discrimination statutes—segregationists regularly relied on an alleged First Amendment right to discriminate.[227]

But when the question of whether discrimination could be considered a First Amendment right first reached the Court in the 1960s and 1970s, the Court roundly rejected it.[228] Across a series of

224. *See infra* Section III.A; Part IV.

225. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

226. *See, e.g.*, *Text of Goldwater Speech on Rights*, N.Y. TIMES, June 19, 1964, at 18 (Senator Goldwater, opposing the Civil Rights Act of 1964 inter alia on freedom of association grounds); Kevin M. Kruse, *The Fight for "Freedom of Association": Segregationist Rights and Resistance in Atlanta*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 99 (Clive Webb ed., 2005); Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21; *see also* Bagenstos, *supra* note 9, at 1209–19 (describing the history of these arguments).

227. *See supra* note 226.

228. *See infra* notes 229–231 and accompanying text.

cases implicating racial justice, the Court stated that "the Constitution . . . places no value on discrimination."[229] While "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment" the Court stated, "it has never been accorded affirmative constitutional protections."[230] So too, with respect to a Free Exercise–based right to discriminate, the Court initially characterized such arguments as "patently frivolous."[231]

This bright-line rule—that discrimination was simply lacking in constitutional value and could not in any circumstances be the basis for First Amendment claims—nominally lasted through the end of the 1970s.[232] But even during this early time frame, this ostensibly categorical approach appeared likely to be overstated. For example, exceptions for private clubs were common in statutory anti-discrimination law, and thought to be constitutionally grounded.[233] Moreover, even during this early time frame, some protections for religion were generally recognized by the lower courts as constitutionally required, such as the so-called "ministerial exception."[234]

By the early 1980s, a more significant shift in the Court's jurisprudence had started to occur. As the Court began to take up freedom of association cases in the sex context, it de-emphasized its assertions that private discrimination was entirely carved out of

229. Norwood v. Harrison, 413 U.S. 455, 469–70 (1973); *see also* Runyon v. McCrary, 427 U.S. 160, 176–77 (1976) (quoting *Norwood*, 413 U.S. at 469–70). *See generally* Ry. Mail Ass'n v. Corsi, 326 U.S. 88 (1945) (rejecting substantive due process challenge to law requiring nondiscrimination in union membership rules).

230. *Norwood*, 413 U.S. at 470; *see also Runyon*, 427 U.S. at 176 (1976) (quoting *Norwood*, 413 U.S. at 470); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (quoting *Norwood*, 413 U.S. at 470); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (citing *Runyon*, 427 U.S. at 175–76, for this principle). As Kate Redburn points out, there was also a speech claim raised in *Katzenbach v. McClung*, 379 U.S. 294 (1964), but it was apparently deemed so insubstantial that it was not even addressed by the Justices. *See* Redburn, *supra* note 23 (manuscript at 6 n.21).

231. Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.5 (1968).

232. *See supra* note 230.

233. *See, e.g.*, Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 644–51 (2016); *see also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171 (1972) (noting that even the appellee generally conceded "the right of private clubs to choose members upon a discriminatory basis"); *id.* at 179–80 (Douglas, J., dissenting) (observing that "[t]he associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed," but arguing that Moose Lodge's activities in the public domain were not of the same character).

234. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 558–60 (5th Cir. 1972) (recognizing a constitutionally based ministerial exception from Title VII); Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791, 805–12 (D. Utah 1984) (canvassing the legislative history behind the 1972 amendment of Title VII's religious exemption, which makes clear at least some legislators viewed such an exemption as constitutionally required), *rev'd on other grounds*, 483 U.S. 327 (1987).

otherwise applicable First Amendment protections (such as the rights of expressive associations to be free from undue government interference).[235] Instead, the Court shifted to allowing the alleged threat posed by anti-discrimination law to rights of expressive organizations to be constitutionally cognizable in some circumstances—though it also ultimately concluded in each case that came before it that the government's compelling interests outweighed any infringement of organizational rights.[236]

At the same time, Free Exercise law also seemed to shift to a somewhat more favorable paradigm for would-be discriminators in the case of *Bob Jones University v. United States*.[237] While *Bob Jones* ultimately rejected the Free Exercise–based challenge by racially discriminatory private schools to the withdrawal of their 501(c)(3) status, it did not treat such arguments as it once did as "frivolous."[238] Instead, relying on then-extant precedents like *Wisconsin v. Yoder*,[239] the Court applied strict scrutiny to the government's actions insofar as they allegedly burdened the religious exercise of segregated schools.[240] But as in the case of its freedom of association cases, the government's interests were found to be both compelling and narrowly tailored.[241]

Despite these shifts, it was clear that the Supreme Court of the 1990s retained a *default* rule of constitutional non-protection for discrimination—though that default now permitted certain exceptions. Most importantly, into the 1990s, the Court continued to characterize discrimination—and its associated speech—as a type of unprotected conduct that was generally outside of the boundaries of the First Amendment's protections.[242] Thus, for example, in the case of *R.A.V. v. City of St. Paul*, the Court—while constitutionally invalidating a hate

235. *See Roberts*, 468 U.S. at 622–28 (observing that discrimination is "entitled to no constitutional protection," but only after extensively discussing the alleged burdens on the Jaycees' expression, and the government's interests in prohibiting public accommodations discrimination); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544–49 (1987) (analyzing the burden on Rotary without any discussion of the *Norwood* language). *See generally* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988) (rejecting facial challenge to City anti-discrimination ordinance, but making clear that some applications of the ordinance might impermissibly infringe on freedom of expressive association).

236. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

237. 461 U.S. at 603–04 (rejecting Free Exercise challenge, but not relying on *Newman*); *see also* Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.5 (1968).

238. *See* 461 U.S. at 603–04.

239. 406 U.S. 205 (1972).

240. *Bob Jones*, 461 U.S. at 603–04.

241. *Id.*

242. *See infra* notes 243–248 and accompanying text. The Court also around this time briefly completely abandoned the possibility of a religion-based right to discriminate in *Employment Division v. Smith*, 494 U.S. 872 (1990), though the potential for such arguments was promptly partially reinstated by the Religious Freedom Restoration Act. *See* 42 U.S.C. § 2000bb-1.

speech law—articulated the view that First Amendment generally did not "shield[ ]" discriminatory acts (including "incidental[ ]" speech).[243] The following Term in *Wisconsin v. Mitchell*, the Court reiterated this account, affirming that hate crime laws regulate only unprotected conduct—and doing so by analogy to anti-discrimination law.[244] And later that same year, the Court declined to even address an employer's First Amendment defense to a hostile work environment claim—treating such a claim as essentially frivolous.[245]

Moreover, even in those limited contexts (freedom of association and Free Exercise) where "right to discriminate" claims were cognizable by the mid-1990s, other factors appeared to substantially limit the possibility of such arguments. Practically speaking, the Court as of the mid-1990s still had yet to decide *any* case in which it found for a would-be discriminator, suggesting that—in all but perhaps extraordinary circumstances—the government's compelling interests in nondiscrimination would be found to prevail.[246] In the expressive association context, the Court seemed to treat most discrimination as implicating only limited expressive value—absent a central mission on the part of the organization to spread a discriminatory message.[247] And some Justices, such as Justice O'Connor, explicitly questioned whether expressive association protections should extend at all to "commercial" organizations.[248]

Thus, as of the mid-1990s, there were few reasons to believe that speech or religion law posed a serious threat to anti-discrimination protections. But a series of developments from the mid-1990s to the present have gradually changed that—and, as described below, created opportunities for litigants to urge the lower and state courts to go even farther. Most notably, in 1995 (*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*[249]), the Court for the first time ruled in favor of a speech or religion defense to anti-discrimination law—and

243. 505 U.S. 377, 389–90 (1992).

244. 508 U.S. 476, 487 (1993).

245. *See* Brief for Respondent at 31, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 302223 (raising a First Amendment defense to hostile work environment claim). *See generally* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1 (discussing the Court's failure to address the First Amendment issue in *Harris* and its significance).

246. *See supra* notes 235–241.

247. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622–29 (1984) (finding that application of antidiscrimination act to require nonprofit to admit women did not violate the male members' freedom of expressive association); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544–49 (1987) (relying on *Roberts* to come to similar conclusion).

248. *See Roberts*, 468 U.S. at 632–37 (O'Connor, J., concurring).

249. 515 U.S. 557 (1995).

then again in 2000 (*Boy Scouts of America v. Dale*[250]), 2018 (*Masterpiece Cakeshop*[251]), 2021 (*Fulton v. City of Philadelphia*[252]) and 2023 (*303 Creative*[253]). During the same time frame, the Court abandoned the notion that not-for-profit (or noncommercial) entities were constitutionally special—extending the same First Amendment rights even to for-profit commercial actors.[254] The Court also gradually increased its deference to discriminatory actors' assertions that compliance with anti-discrimination law imposed a constitutionally cognizable burden—while reducing its deference to the government's assertion of compelling interests in nondiscrimination.[255] Furthermore, the Court embraced a third context (compelled speech, in addition to Free Exercise and expressive association) in which it would recognize "right to discriminate" claims.[256]

But perhaps most importantly, the Court did all this without clearly reaffirming the default rule of non-protection for discrimination (as unprotected conduct, rather than speech). As I argue in Section IV.A, the best account of the Court's doctrine is that such a default remains. But the Court's failure to clearly and robustly reaffirm it—even as the Court has increasingly endorsed exceptions—has created openings for substantial slippage in the lower courts' doctrinal approach to speech and religion claims. As set out below, AT parties have exploited this slippage to argue for dramatic extensions of speech- and religion-based rights to discriminate—arguments that could, if more widely adopted, threaten the foundations of anti-discrimination law.

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250. 530 U.S. 640 (2000).

251. 584 U.S. 617 (2018).

252. 593 U.S. 522 (2021).

253. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

254. *See, e.g.*, *Masterpiece Cakeshop*, 584 U.S. at 621–25 (extending First Amendment Free Exercise rights to for-profit business); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014) (holding "that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA"); Citizens United v. FEC, 558 U.S. 310, 365 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."); *see also 303 Creative*, 600 U.S. at 587–90 (same, but post-dating study cases).

255. *See Dale*, 530 U.S. at 650–56, 659 (2000) (taking a very deferential approach to the question of whether there was a substantial burden on the Boy Scouts' expression, while declining to defer to the government's assertions that their compelling interests should prevail); *see also Burwell*, 573 U.S. at 690–91, 726 (stating that in a RFRA case, the Court's role "is not . . . to say [whether] religious beliefs are mistaken or insubstantial," but that its " 'narrow function . . . in this context is to determine' " whether the line drawn reflects "an honest conviction" (second alteration in original) (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981))).

256. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–73 (1995) (holding that application of state anti-discrimination law amounted to unconstitutional compelled speech where it required parade to accommodate gay group "as its own parade unit carrying its own banner"); *see also 303 Creative*, 600 U.S. 570 (also recognizing compelled speech claim, but post-dating study cases).

B. Speech

As described above, into the 1990s, the Court continued to conceptualize discrimination as an unprotected class of conduct—and discrimination-related speech, such as harassment, as "a proscribable class of speech . . . swept up incidentally within the reach of a statute directed at conduct [i.e., discrimination]."[257] Thus, as the Court observed in *R.A.V.*, "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[258] As described more fully in Section IV.A, the best account of the *Supreme Court*'s doctrine is that this default rule still exists, albeit with exceptions. But as the AT study cases demonstrate, litigants are increasingly arguing for a far different proposition: that discrimination (and its associated speech) is *generally* subject to First Amendment speech protections, even where it does not fit into one of the exceptions (freedom of association, Free Exercise/RFRA, compelled speech) that the Supreme Court has recognized.

Strikingly, there were a number of study cases in which courts appeared to accept these arguments, treating discrimination and its verbal manifestations as *generally* subject to the rules for when government regulates speech.[259] In part this may be due to questionable legal strategy on the part of public entities drafting and defending anti-discrimination policies, since it seems that in a number of instances such entities themselves had either: (a) not drafted their policies to make clear that discriminatory conduct (of which harassing speech is but a sub-category) was the target; and/or (b) not argued for why speech could in certain contexts be considered a discriminatory *act*.[260]

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257. R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (rejecting First Amendment challenge to hate crimes enhancement on the grounds that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge" as "permissible content-neutral regulation[s] of conduct"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 389 (1973) (upholding ban on placing of job advertisements in "sex-designated" newspaper column where "the commercial activity [i.e., discrimination] itself is illegal and the restriction on advertising is incidental to a valid limitation [i.e., anti-discrimination law] on economic activity"). *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1799–1800 (2004) (citing sexual harassment enforcement as one of the domains which the Court has treated as outside of the boundaries of the First Amendment's protections).

258. 505 U.S. at 390; *see also Mitchell*, 508 U.S. at 487; *Pittsburgh Press*, 413 U.S. at 388–89.

259. *See infra* notes 261–269 and accompanying text.

260. *See infra* notes 261–269 and accompanying text. This distinction ought to have been apparent to public entities, at least since the early 1990s and the cases of *Wisconsin v. Mitchell* and *R.A.V. v. City of St. Paul*. *Compare R.A.V.*, 505 U.S. at 380–81, 383–84, 389 (treating municipal ordinance that had been construed in the lower courts as prohibiting "fighting words" likely to

Nevertheless, the types of rulings reached in several of the AT cases should be cause for concern for all those groups protected by anti-discrimination law. For example, in at least two study cases, courts treated government penalization of those who published a policy of discrimination or expressed a categorical intent to discriminate (contrary to the nondiscrimination requirements to which they were subject) as the regulation of speech—as opposed to simply the government taking at face value the best evidence of intent to engage in a constitutionally proscribable act (i.e., discrimination).[261] To put this in context, this is the equivalent of finding that the EEOC had trenched on free speech rights if it relied on an employer's "Help Wanted: No Blacks" sign to conclude that the employer was in violation of Title VII.[262]

Other study cases extended Free Speech principles to other contexts, concluding, for example, that the regulation of discrimination (and incidental speech) was "viewpoint" or "content" discrimination.[263]

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produce "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" as impermissible content and viewpoint discrimination—but also stating that regular harassment proscriptions under Title VII were permissible as simply being "incidentally within the reach of a statute directed at conduct rather than speech"), *with Mitchell*, 508 U.S. at 487 (in the context of a hate crimes statute, affirming that because the statute targeted conduct rather than speech, it was permissible on First Amendment grounds, and reiterating that Title VII is an example of "permissible content-neutral regulation of conduct").

261. *See, e.g.*, Bethel Ministries, Inc. v. Salmon, No. SAG-19-01853, 2019 WL 6034988, at *4–5 (D. Md. Nov. 14, 2019) (where government entity relied on handbook statement regarding discriminatory admissions policies as basis for concluding there was a violation of anti-discrimination requirements of the program, treating this as presumptively implicating First Amendment scrutiny); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at *1, 4–5 (Va. Aug. 30, 2021) (finding that a teacher was likely to succeed on his free speech claims when he was penalized for publicly announcing his intention not to follow school district's policy of respecting gender identity–appropriate names and pronouns of transgender students).

262. *See, e.g.*, Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 62 (2006) (observing that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language" and observing that "Congress . . . can prohibit employers from discriminating in hiring on the basis of race" and "[t]he fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech" (internal quotation marks omitted) (citation omitted)); *cf. Pittsburgh Press*, 413 U.S. at 388–89 (noting that newspaper could be enjoined from having separate men's interest and women's interest job listings since the "commercial activity [i.e., discrimination] itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity"); *Mitchell*, 508 U.S. at 489–90 (noting that the "First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent" in the context of a hate crimes statute—also in dicta noting the same rule in the context of anti-discrimination law).

263. *See, e.g.*, Taking Offense v. State, 281 Cal. Rptr. 3d 298, 305 (Cal. Ct. App. 2021) (holding that a statute prohibiting "staff members of long-term care facilities from willfully and repeatedly referring to a facility resident by other than the resident's preferred name or pronoun" was a "content-based restriction of speech that does not survive strict scrutiny"), *petition for rev. granted*, 498 P.3d 90 (Cal. 2021) (mem.); Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1113 (11th Cir. 2022) (holding that a "discriminatory-harassment policy likely violates the First Amendment on

Such cases also sometimes included challenges to policies reaching far beyond transgender status to include all protected classes, including race, sex, disability, and others.[264] While, again, some of the issues in these cases may have arisen from sloppy drafting and legal defense by public institutions (which seem not always to emphasize themselves that their concern is discriminatory conduct, of which discriminatory speech is just a subset), they create a set of precedents that may have troubling effects going forward.[265]

Even the public employee cases described above in Part II, while they were commonly unsuccessful due to *Garcetti*, show a troubling slippage away from the conception of discrimination and incidental harassing speech as unprotected conduct.[266] Why is there any speech claim at all in the context where an employer seeks to sanction an employee for violating anti-discrimination policies if such

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the grounds that it is an overbroad and content- and viewpoint-based regulation of constitutionally-protected expression"); *see also* Otto v. City of Boca Raton, 981 F.3d 854, 859 (11th Cir. 2020) (same in context of ban on conversion therapy); Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658, 668–69 (8th Cir. 2023) (post-study decision, finding a likelihood of success on the merits as to a First Amendment "void for vagueness" and overbreadth claim where the policy prohibited failing to "respect a student's gender identity"); Bates v. Pakseresht, No. 2:23-cv-00474, 2023 WL 7546002, at *18, 29 (D. Or. Nov. 14, 2023) (finding that foster parent rules requiring that parents use gender identity–appropriate pronouns and otherwise not disparage LGBTQ foster children regulated speech and were content and viewpoint discriminatory—though concluding that such requirements nonetheless satisfied strict scrutiny); Bloch v. Bouchey, No. 2:23-cv-00209, 2023 WL 9058377, at *26, 28–29 (D. Vt. Dec. 28, 2023) (concluding that school rules prohibiting discriminatory harassment were content-based and denying motion to dismiss, also finding policy potentially overbroad). *But cf.* Geoffrey R. Stone, *Introductory Remarks: The Roberts Court and the First Amendment: An Introduction*, 87 BROOK. L. REV. 133, 142 (2021) (observing that laws barring discrimination on the basis of sexual orientation are content-neutral).

264. *See, e.g.*, *Speech First*, 32 F.4th at 1125.

265. These cases are especially troubling insofar as they involved contexts where regulations of discrimination (including discriminatory or harassing speech) are especially important to permitting all groups equal access to the marketplace of ideas. *See, e.g.*, *Speech First*, 32 F.4th at 1127 (campus speech); *see also* Koustuv Saha, Eshwar Chandrasekharan & Munmun De Choudhury, *Prevalence and Psychological Effects of Hateful Speech in Online College Communities*, PROC ACM WEB SCI CONF., June 2019, at 255, 256 ("[H]ateful speech exposure has negative effects on [minority] students' academic lives and performance, with lowered self-esteem, and poorer task quality and goal clarity-disrupting the very educational and vocational foundations that underscore college experience."); *cf.* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1245, 1328–30 (2020) (arguing that the real *Lochner* problem with the Supreme Court's First Amendment jurisprudence is not its recognition of rights for corporate entities, but rather its failure to take account of "the economic, political, and social conditions" that impact the effective exercise of rights—and that taking account of such conditions should complicate the Court's conclusion in cases like *Dale* that the burdens that anti-discrimination law imposes harm, rather than promote, First Amendment values).

266. *See supra* notes 157–177 and accompanying text; *see also* Darren Patterson Christian Acad. v. Roy, No. 1:23-cv-01557, 2023 WL 7270874, at *1–2, 17 (D. Colo. Oct. 20, 2023) (in post-study case, finding that it likely would violate ban on compelled speech to enforce a requirement against misgendering students as a condition on access to government funding to operate pre-K program).

discrimination is unprotected conduct?[267] While not all of these cases involved sanction for acts of discrimination or harassing speech, many did.[268] Given that harassing speech has traditionally been treated as simply incidental to bans on unprotected conduct (i.e., discrimination), it is not clear why an employee should be afforded protections for misgendering any more than they would for illegally harassing or firing an employee because of their race, sex, or disability.[269]

Thus, while victories for AT litigants in the speech context remain sporadic and inconsistent, they show troubling trends in the doctrine. Most notably, they suggest the potential breakdown of the background default that once limited the treatment of discrimination and related speech as constitutionally protected only in extraordinary contexts, as opposed to ordinary ones.[270] Once again, such cases ought to be of substantial concern to all groups protected by anti-discrimination law, since they suggest the fundamental destabilization of the set of legal doctrines that once protected anti-discrimination law from routine First Amendment scrutiny. Moreover, as noted above, a number of the cases at issue in the study *in fact* involved claims involving other protected classes, including even the alleged "third rail" of race.[271]

As set out in Part IV, there remains time for the reestablishment of boundaries around what types of claims are cognizable in the First Amendment context, and for a reset of the default rule that discrimination itself is not constitutionally protected.[272] But achieving that end will require public entities to understand and be consistent in how they address the issue of *why* it is that certain types of constitutional claims are permitted despite the lack of global

267. *See supra* notes 157–177 and accompanying text.

268. *See supra* notes 157–177 and accompanying text.

269. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (stating that discriminatory harassment proscriptions under Title VII are "incidentally within the reach of a statute directed at conduct rather than speech" and thus are constitutional); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (in the context of a hate crimes statute, affirming that because the statute targeted conduct rather than speech, it was permissible on First Amendment grounds, and reiterating that Title VII is an example of "permissible content-neutral regulation of conduct"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 389 (1973) (upholding ban on "sex-designated" job advertisements in newspaper where "the commercial activity [i.e., discrimination] itself is illegal and the restriction on advertising is incidental to a valid limitation [i.e., anti-discrimination law] on economic activity"); *cf.* McNamarah, *supra* note 9, at 2236–58 (situating misgendering and deadnaming within longer traditions of using dishonorifics as a type of discrimination).

270. For a further discussion of this issue, see *infra* Section IV.A.

271. *See, e.g.*, Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1125 (11th Cir. 2022); Menders v. Loudoun Cnty. Sch. Bd., 65 F.4th 157, 159–61, 166 (4th Cir. 2023).

272. *See infra* Section IV.A.

constitutional protections for discrimination—and why the default rule remains non-protection.

C. Freedom of Association

Freedom of association cases represented only a small subset of the study cases, and of these only a few succeeded at any stage.[273] Nonetheless, they hold warning signs for wider anti-discrimination law. As described below, study cases with successful freedom of association arguments extended far beyond the traditional heartland of freedom of association case law—attempts to resist compelled group membership by nonprofit membership groups—to far more central concerns of anti-discrimination law, such as employment discrimination by for-profit entities. Moreover, the study cases show that an ever-greater array of entities—united by little more than a sincere desire to discriminate—could be found to be "expressive associations" entitled to protections.

The most concerning of these decisions—though it was ultimately resolved on appeal on other grounds[274]—is the district court's decision in *Bear Creek Bible Church v. EEOC* (recaptioned on appeal *Braidwood v. EEOC*).[275] *Bear Creek* was a case brought in the aftermath of *Bostock* by religious employers opposed to employing LGBTQ employees.[276] In the case, the district court certified a class of religious businesses who "object to homosexual or transgender behavior" and found that Title VII's requirement of employment nondiscrimination with respect to the LGBTQ community could not be constitutionally applied to such businesses pursuant to freedom of association law.[277] Observing that "for-profit businesses like [class representative] Braidwood may pursue a right of association claim" and

273. *See* Appendix B, *supra* note 10. Note that freedom of intimate association cases, which are arguably predicated on a different set of constitutional rights, and which were never successful in the study sample are not discussed in this Section, even though they can also be characterized as "freedom of association" claims.

274. I do not mean to suggest that the ultimate outcome in *Bear Creek* on appeal was unconcerning—as I write in Section III.D, *infra*, the appellate decision was deeply troubling on other grounds. I am simply making here a descriptive observation that *freedom of association* law was not the basis for the appellate decision, and thus, my discussion here only relates to the original trial opinion.

275. 571 F. Supp. 3d 571 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023).

276. *Id.* at 585, 587. The district judge refused to apply the "LGBTQ" label at the AT parties' request, asserting that its opinion "refers to the individuals at issue based on behavior, not identity, because to do otherwise misconstrues Plaintiffs' contentions." *Id.* at 585 n.1. For a discussion of historical efforts to characterize discriminatory objections to LGBTQ people in terms of conduct, not status, see, for example, Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 251–52 (2023).

277. *Bear Creek*, 571 F. Supp. at 602, 608, 614–16.

that "Braidwood['s] . . . overt expression regarding its religious views of homosexuality and transgender behavior" was sufficient to render it an expressive association, the court concluded that "the Religious Business-Type Employers are engaged in expressive association."[278] Drawing a comparison to *Dale*, the court further concluded:

> For the same reasons that Defendants do not have a compelling interest in forcing an organization to retain, as a scoutmaster, a member who is a gay rights activist, Defendants do not have a compelling interest in forcing Religious Business-Type Employers to hire and retain individuals that engage in conduct that is contrary to the employers' expressive interests.[279]

In a very different context, the study case of *Green v. Miss United States of America* also endorsed a freedom of association argument for why an organization should not need to comply with transgender-protective anti-discrimination law.[280] In *Green*, the freedom of association claim was raised as a defense to an affirmative anti-discrimination claim—here by a transgender pageant contestant who was excluded from the Miss United States of America pageant under their requirement that all contestants be a "natural born female."[281] The trial court reasoned that Miss USA (a for-profit organization) was indeed an expressive association, despite its lack of a specific AT message.[282] And it further concluded that "especially in light of the deference I must give to Miss USA under *Dale* . . . the forced inclusion of [a transgender contestant] would significantly affect Miss USA's ability to advocate its viewpoints on female identity and womanhood."[283] Finally, analogizing to *Dale*, the Court concluded that "Miss USA's interest in expressive association outweighs Oregon's interest in preventing gender-identity discrimination in places of public accommodation."[284]

Both *Braidwood* and *Green* were ultimately resolved on appeal on different grounds (albeit still in favor of the AT party).[285] It thus might be easy to dismiss them as aberrational or idiosyncratic. But it is

278. *Id.* at 614–16.

279. *Id.* at 616.

280. 533 F. Supp. 3d 978 (D. Or. 2021), *aff'd on other grounds*, 52 F.4th 773 (9th Cir. 2022).

281. *Id.* at 982–83.

282. *Id.* at 989–90, 994.

283. *Id.* at 997.

284. *Id.* at 998.

285. *See* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 940 & n.60 (5th Cir. 2023) (awarding summary judgment to Braidwood on RFRA grounds and declining to reach constitutional arguments); *Green*, 52 F.4th at 777 (ruling for Miss USA based on compelled speech arguments and declining to reach freedom of association claim). Again, I am not suggesting here that the appellate decisions in those cases were unproblematic, simply making the descriptive observation that the Courts of Appeals in both cases did not rely on freedom of association as the basis for their decision.

important to note that—while neither case is clearly compelled by existing Supreme Court case law—neither were they patently wrong under existing Supreme Court law.[286] Because the Supreme Court has gradually eliminated so many of the bright-line rules that once would have forestalled such expressive association claims, much space remains for lower court judges to make rulings like the courts in *Braidwood* and *Miss USA*. It should be evident that such rulings—especially extending freedom of association law to protect biased organizations from employment discrimination law—could have truly radical (and negative) implications for anti-discrimination law.[287] Moreover, there are few reasons to believe that such rulings will be limited to the context of litigation involving transgender rights.

And indeed, while a full exploration of freedom of association in the context of other protected classes is beyond the scope of this project, it is not hard to find examples outside of the transgender context in which freedom of association claims are succeeding, including in the employment discrimination context.[288] Most notably, the Second Circuit recently held in *Slattery v. Hochul* that a crisis pregnancy center had plausibly alleged a constitutionally cognizable burden on its freedom of association where state law prohibited discrimination "because of or on the basis of the employee's or dependent's reproductive health decision making."[289] Other cases have also argued—albeit ordinarily unsuccessfully—for the extension of freedom of association arguments to preclude claims in the context of, for example, sexual orientation, disability, and sex.[290] And while such arguments appear not to be commonly raised in race cases today, that seems likely more

286. *See supra* Section III.A. While the Court has not yet extended freedom of expressive association doctrine to the context of for-profit entities, its receptivity to arguments by for-profit entities in other contexts strongly suggest that it is likely to do so. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 621–25 (2018); Burwell v. Hobby Lobby, Inc., 573 U.S. 682, 719 (2014); Citizens United v. FEC, 558 U.S. 310, 365 (2010); 303 Creative LLC v. Elenis, 600 U.S. 570, 577–80, 601–03 (2023).

287. As described *infra* Section IV.B., there are good reasons to believe that the government's compelling interests, especially in prohibiting employment discrimination, should prevail in many such cases.

288. For other recent work discussing the rise of freedom of association defenses to anti-discrimination law, see Elizabeth Sepper, *The Return of* Boy Scouts of America v. Dale, 68 ST. LOUIS U. L.J. (forthcoming 2024).

289. 61 F.4th 278, 283–84 (2d Cir. 2023) (internal quotation marks omitted).

290. Billard v. Charlotte Cath. High Sch., No. 3:17-cv-00011, 2021 WL 4037431 (W.D.N.C. Sept. 3, 2021) (sexual orientation); Stevens v. Optimum Health Inst.—San Diego, 810 F. Supp. 2d 1074 (S.D. Cal. 2011) (disability); Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 121 P.3d 671 (Or. Ct. App. 2005) (sex); *cf.* New Hope Fam. Servs. v. Poole, 966 F.3d 145, 179–80 (2d Cir. 2020) (finding plausible freedom of association claim where organization alleged that being required to comply with nondiscrimination requirements of state adoption law would burden its expressive association by requiring it to penalize employees that articulated anti-gay views).

attributable to the reluctance of employers to openly embrace a commitment to race discrimination than to any formal limitation in the doctrine.[291]

As this demonstrates, members of all groups ought to be concerned about cases like those observed in the instant study, which could extend far beyond the context of transgender rights. Read broadly (as some lower courts have done), freedom of expressive association claims could in theory empower *any* entity willing to openly embrace discriminatory positions in litigation to claim a burden on its expressive association when it must follow anti-discrimination law—a burden that anti-discrimination law does not, under *Dale*, categorically outweigh.[292] While, as described in Part IV there are important ways that the courts can and should shore up limitations on the scope of expressive association doctrine, current rulings in the transgender context should serve as a warning regarding where such doctrine could go if it remains unconstrained.

D. RFRA

By far the most successful set of claims in the study were claims raised under the Federal Religious Freedom Restoration Act ("RFRA") and state law equivalents. Under RFRA (and most of its state equivalents), "Government shall not substantially burden a person's exercise of religion . . . [unless] it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."[293] In the study, a full seven of

291. See *infra* Section IV.E. for further discussion of the inherent limits that public opinion impose on which claims or defenses employers and other entities are likely to raise in the first instance.

292. While it is certainly possible that the Court *could* hold that government interests are more compelling in, for example, the context of race discrimination, categorically outweighing competing burdens on expressive organizations, they have not so held to date. For example, in the analysis of sex discrimination cases, the Court has also appeared not to apply a categorial approach, instead balancing compelling interests against the extent of burden. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987) ("We therefore conclude that application of the Unruh Act to local Rotary Clubs does not interfere unduly with the members' freedom of private association."). Thus, while it may be that sexual orientation exceptionalism has *as a matter of fact* been a driving factor in the drift of the doctrine, formally that doctrine could be picked up to raise expressive association arguments in any context.

293. 42 U.S.C. § 2000bb-1.

eleven, or 63.6% of intermediate rulings on RFRA (or state equivalent) claims were successful.[294]

Nevertheless, it is important to stress at the outset that RFRA claims were *also* numerically underrepresented in the study (as compared, for example, to speech claims), likely due to a number of structural constraints on RFRA's applicability.[295] First, under *City of Boerne v. Flores*, federal RFRA claims cannot be raised with respect to state or local anti-discrimination laws (or policies),[296] though at times state-law RFRA equivalents offered an alternative in study cases.[297] Most circuits to have addressed the issue also have held that RFRA is simply inapplicable in cases where the government is not a party, thus eliminating the possibility of such arguments in study cases that arose in that posture.[298]

This latter rule has important implications for the reach of even some of the most wide reaching and troubling of opinions in the AT constitutional law study: those relying on RFRA to issue injunctions against the application of LGBTQ-inclusive anti-discrimination rules under federal sex discrimination law.[299] While, as described below, such opinions are certainly concerning, their reach is not as wide as it might initially appear. Because many circuits hold RFRA to be simply inapplicable to private party lawsuits (which constitute the vast majority of anti-discrimination enforcement), the reach of such decisions is necessarily limited (at least in those circuits) at this time.[300] Thus, while the EEOC, HHS, and other federal agencies may *themselves* be restrained from anti-discrimination enforcement activity

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294. *See* Appendix B, *supra* note 10; *see also* Vlaming v. West Point Sch. Bd., 895 S.E.2d 705, 734–36 (Va. 2023) (post-study decision finding for plaintiff at the motion to dismiss stage under state RFRA equivalent).

295. *See supra* Figure F.

296. 521 U.S. 507, 533–35 (1997).

297. *See, e.g.*, Students & Parents for Priv. v. Sch. Dir. of Twp. High Sch. Dist. 211, 377 F. Supp. 3d 891, 905–06 (N.D. Ill. 2019) (analyzing Illinois's RFRA equivalent).

298. *See, e.g.*, Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated on other grounds by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 834 (9th Cir. 1999); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 584 (6th Cir. 2018), *aff'd on other grounds sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020); *see also* Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013) (same as to the New Mexico Religious Freedom Restoration Act). *But cf.* Hankins v. Lyght, 441 F.3d 96, 103 (2d Cir. 2006) (reaching the opposite conclusion in dicta).

299. *See, e.g.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 937 (5th Cir. 2023); Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361, 376 (N.D. Tex. 2021), *aff'd on nonmerits grounds*, 47 F.4th 368 (5th Cir. 2022); Christian Emps. All. v. EEOC, No. 1:21-cv-195, 2022 WL 1573689, at *1, 9 (D.N.D. May 16, 2022); Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1154 (D.N.D. 2021), *aff'd on nonmerits grounds sub nom.* Religious Sisters of Mercy v. Becerra, 55 F.4th 583 (8th Cir. 2022).

300. *See supra* note 298.

via RFRA, most courts would hold that private parties are still free to raise comparable anti-discrimination claims.[301]

On the other hand, this does not mean that one should be sanguine regarding the potential reach of the AT cases in the study, validating RFRA claims. Drawing on the Court's deferential approach in *Hobby Lobby*, courts in the study almost always deferred to the AT parties' characterization of nondiscrimination as imposing a substantial burden on their religious exercise.[302] Thus, where RFRA was found to apply in the first instance, courts almost always found, regardless of context (employment nondiscrimination, healthcare nondiscrimination, educational nondiscrimination) and regardless of the entity at issue (for-profit corporation, not-for-profit organization), that nondiscrimination imposed a substantial burden on the AT party, thus triggering strict scrutiny.[303]

Moreover, the version of strict scrutiny that cases in the study commonly applied was one that typically offered scant consideration for the compelling government interests that anti-discrimination law promotes, and that often (erroneously) treated global anti-discrimination law rules as unnecessary to those purposes. Specifically, courts, relying on *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*[304] as well as *Fulton*[305] and *Hobby Lobby*,[306] applied a "to the person" standard under which it was common to question whether there was truly a compelling interest in applying nondiscrimination requirements *to this entity*, and whether the government had other alternatives (thus obviating narrow tailoring).[307] As a result, except for

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301. *See, e.g.*, C.P. *ex rel.* Pritchard v. Blue Cross Blue Shield of Ill., No. 3:20-cv-06145, 2022 WL 17788148, at *9 (W.D. Wash. Dec. 19, 2022) (finding RFRA inapplicable because "[t]he government is not a party here").

302. *See, e.g.*, *Braidwood Mgmt.*, 70 F.4th at 937–38 (accepting without meaningful scrutiny employer's argument that forcing it to employ LGBTQ workers was a substantial burden on its religious practice); *Students & Parents for Priv.*, 377 F. Supp. 3d at 905–06 (finding that Plaintiff alleged "sufficient facts to provide notice to District 211 of a plausible claim" of substantial burden under the state RFRA equivalent); *Christian Emps. All.*, 2022 WL 1573689, at *8 (concluding that case-by-case assessment of religious exemptions *itself* posed a substantial burden); *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1147 (accepting without meaningful scrutiny that providing insurance coverage for or otherwise facilitating gender-affirming care would impose a substantial burden on plaintiffs' religious beliefs); *see also* West v. Radke, 48 F.4th 836, 847 (7th Cir. 2022) (finding substantial burden in Religious Land Use and Institutionalized Persons Act ("RLUIPA") case).

303. *See supra* note 302.

304. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

305. Fulton v. City of Philadelphia, 593 U.S. 522 (2021).

306. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

307. *See, e.g.*, *Braidwood Mgmt.*, 70 F.4th at 939; *Christian Emps. All.*, 2022 WL 1573689, at *8; *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1148; *see also West*, 48 F.4th 836 (RLUIPA case acknowledging that the need to comply with Title VII and the equal protection clause were compelling, but finding them not implicated in the context of the case).

a single case early in the study, all of the RFRA cases that reached back-end review were losses for the government.[308] (Importantly, this was not true across *all* claims—in non-RFRA contexts, courts often found government interests to satisfy higher levels of constitutional scrutiny.[309])

If adopted more widely, these cases hold deeply troubling implications, as they suggest that wherever RFRA (or its state equivalents) does apply, any entity that is willing to allege a sincere religious belief in discrimination will be presumptively exempted from anti-discrimination law. Under *Hobby Lobby* this extends to for-profit entities[310]—and the study cases suggest even to critical contexts such as employment and healthcare.[311] Moreover, while the current majority rule (observed above) disallows RFRA claims or defenses in private party anti-discrimination lawsuits, one should not assume that this will persist if the issue reaches the Supreme Court.[312] At least one circuit has taken a contrary position, and the current Supreme Court is clearly deeply sympathetic to religious liberties claims.[313]

As described below in Part IV even under the "to the person" standard, there are good arguments that the study cases described herein are wrong: most notably, the government's compelling interests in anti-discrimination rules are implicated each and every time an entity discriminates against a member of a protected class, and there generally is no more tailored way to avoid the serious harms of discrimination. Indeed, at least one Supreme Court case, *Hobby Lobby*,

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308. *Compare* cases cited *supra* note 307, *with* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 590–97 (6th Cir. 2018) (holding that the government had a compelling interest in enforcing Title VII's sex discrimination protections in the context of a transgender employee and that applying the law as written was the "least restrictive means" of fulfilling that interest), *aff'd on other grounds sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020).

309. *See* Appendix B, *supra* note 10 (listing study cases finding intermediate or strict scrutiny to be satisfied).

310. *See* 573 U.S. at 719.

311. *See, e.g.*, *Braidwood Mgmt.*, 70 F.4th 914 (employment context); Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361 (N.D. Tex. 2021) (healthcare context), *aff'd on nonmerits grounds*, 47 F.4th 368 (5th Cir. 2022); *Christian Emps. All.*, 2022 WL 1573689 (healthcare context); *Religious Sisters of Mercy*, 513 F. Supp. 3d 1113 (healthcare context).

312. *See supra* note 298 and accompanying text.

313. *See* Hankins v. Lyght, 441 F.3d 96, 104 (2d Cir. 2006) (allowing a defendant "to assert the RFRA as a defense to any action asserting a claim based on the ADEA," including one brought by a private party); Steven K. Green, *How the Supreme Court Found Its Faith and Put 'Religious Liberty' on a Winning Streak*, CONVERSATION (Apr. 13, 2021, 8:38 AM), https://theconversation.com/how-the-supreme-court-found-its-faith-and-put-religious-liberty-on-a-winning-streak-158509 [https://perma.cc/XB6H-ANP4] (identifying recent trends in the Supreme Court's religious freedom jurisprudence).

states exactly this.[314] Moreover, there also are potential legislative fixes that could mitigate or eliminate the impact of RFRA for anti-discrimination law, such as clearly codifying the current rule limiting its application to cases where the government is a party or even explicitly clarifying that it does not extend to anti-discrimination law.[315] Study cases make clear the urgency of such measures, if the vitality anti-discrimination law is to be preserved.

E. Free Exercise

The Supreme Court's 1990 ruling in *Employment Division v. Smith*—which held that the Free Exercise Clause does not generally protect against burdens imposed by neutral laws of general applicability ("NLGA")—appeared to foreclose the meaningful possibility of Free Exercise claims in opposition to anti-discrimination law.[316] After all, anti-discrimination laws typically are, as the Supreme Court has affirmed, paradigmatic neutral laws of general applicability: neither motivated by religious animus nor gerrymandered to disfavor religious conduct.[317] While RFRA quickly restored the possibility of *some* religion-based arguments for a right to discriminate, it appeared to do so only partially—not reaching, for example, the enforcement of state and local anti-discrimination laws.

Nonetheless, recent cases such as *Masterpiece Cakeshop*[318] and *Fulton*[319] have chipped away at this post-*Smith* understanding of Free Exercise law, holding that even de minimis evidence of hostility to religion in the administration of anti-discrimination law may trigger strict scrutiny—as can a refusal to extend a system of individualized exemptions to the religion context.[320] Only a few study cases resulted in

314. *See* 573 U.S. at 733 ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

315. *See infra* Section IV.C.

316. 494 U.S. 872, 879–82 (1990).

317. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (recognizing a constitutionally-based "ministerial exception" to anti-discrimination law, but also recognizing that the ADA's prohibition on retaliation is a "valid and neutral law of general applicability").

318. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018).

319. Fulton v. City of Philadelphia, 593 U.S. 522 (2021).

320. Although *Employment Division v. Smith* largely repudiated preexisting Free Exercise law under which even neutral laws of general applicability could trigger strict scrutiny where they burdened religious exercise, the Court did so by distinguishing, rather than formally overruling key precedents such as *Sherbert v. Verner*, 374 U.S. 398 (1963). *See Smith*, 494 U.S. at 884 (declining to formally overrule *Sherbert*, but recharacterizing its holding as, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"). *Fulton* drew on this language from *Smith* to find

victories for AT parties on either of those grounds—as it was unusual for a court to find any evidence of religious hostility or intolerance, and the type of system of individualized exemptions at issue in *Fulton* is uncommon in anti-discrimination laws and policies.[321] Thus, a majority of Free Exercise claims in the study still failed based on the conclusion that the law at issue was NLGA—and that the reasons for anti-discrimination laws and policies were at least rational (and indeed potentially compelling).[322]

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that the presence of a contract provision qualifying the contract anti-discrimination mandate by providing that such mandate applied "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion" required strict scrutiny of the decision to decline to extend a discretionary exemption to religiously-motivated discrimination. 593 U.S. at 535 (internal quotation marks omitted).

321. *See* sources cited *infra* note 322. Of course, anti-discrimination laws do commonly have some exceptions, such as limitations for smaller employers, but they are ordinarily not of the kind referred to in *Fulton* and *Sherbert*, i.e., they do not " 'invite[ ]' the government to consider the particular reasons for a person's conduct." *Fulton*, 593 U.S. at 533.

322. This included both cases that predated, and many cases that post-dated, the Supreme Court's turn to "most favored nation" approaches, described *infra* notes 328–330. *See, e.g.*, Doe *ex rel.* Doe v. Governor of N.J., 783 F.3d 150 (3d Cir. 2015); Fort Des Moines Church of Christ v. Jackson, 215 F. Supp. 3d 776 (S.D. Iowa 2016); Minton v. Dignity Health, 252 Cal. Rptr. 3d 616 (Cal. Ct. App. 2019); Doyle v. Hogan, 411 F. Supp. 3d 337 (D. Md. 2019), *vacated*, 1 F.4th 249 (4th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823 (S.D. Ind. 2020); Parents for Priv. v. Barr, 949 F.3d 1210 (9th Cir. 2020); Jones v. Boulder Valley Sch. Dist. RE-2, No. 20-CV-03399-RM, 2021 WL 5264188 (D. Colo. Oct. 4, 2021); Bethel Ministries, Inc. v. Salmon, No. CV SAG-19-01853, 2020 WL 292055 (D. Md. Jan. 21, 2020); Tingley v. Ferguson, 47 F.4th 1055 (9th Cir. 2022); YU Pride All. v. Yeshiva Univ., 180 N.Y.S.3d 141 (N.Y. App. Div. 2022); Chiles v. Salazar, No. 22-CV-02287, 2022 WL 17770837 (D. Colo. Dec. 19, 2022); Scardina v. Masterpiece Cakeshop, Inc., 528 P.3d 926 (Colo. App. 2023), *cert. granted in part*, No. 23SC116, 2023 WL 6542667 (Colo. Oct. 3, 2023); Olympus Spa v. Armstrong, No. 22-CV-00340, 2023 WL 3818536 (W.D. Wash. June 5, 2023); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs, No. 23-CV-069, 2023 WL 4297186 (D. Wyo. June 30, 2023); *see also* King v. City of New York, No. 22-231, 2023 WL 2398679, at *2 (2d Cir. Mar. 8, 2023) (no plausible allegation of religious targeting); Tennessee v. U.S. Dep't of Agric., No. 3:22-CV-257, 2023 WL 3048342, at *24–25 (E.D. Tenn. Mar. 29, 2023) (no plausible allegation of how USDA rules regarding LGBTQ nondiscrimination would compel states to violate Free Exercise rights); *cf.* Students & Parents for Priv. v. Sch. Dir. of Twp. High Sch. Dist. 211, 377 F. Supp. 3d 891, 907 (N.D. Ill. 2019) (finding trans-affirming rules to be NLGA, but finding that response to those cisgender students seeking accommodation may not have been); St. Mary Cath. Par. in Littleton v. Roy, No. 23-cv-02079, 2024 WL 195885, at *11–13 (D. Colo. Jan. 3, 2024) (denying plaintiffs' motion for summary judgment claiming that anti-discrimination conditions on funding were not NLGA, but also noting possible facts that could support such a conclusion and setting the issue for trial). *But cf.* Meriwether v. Hartop, 992 F.3d 492, 512 (6th Cir. 2021) (finding sufficient allegations of religious bias to reverse award of motion to dismiss); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at *1–2, 6 (Va. Aug. 30, 2021) (finding that employer's adverse action was based in part on assumption would not follow pro-trans policy due to religion—but in a context where the employee had announced his intention not to follow the policy), *aff'g* CL21-3524 (Va. Cir. Ct. 2021). The limited post-study case law in this area was, however, somewhat more divided, and thus this may be an issue to watch. *Compare* Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ., No. 3:22-CV-337, 2023 WL 5018511, at *18–19 (S.D. Ohio Aug. 7, 2023) (finding policy to be NLGA, and in the alternative finding no substantial burden), Mahmoud v. McKnight, No. CV DLB-23-1380, 2023 WL 5487218, at *15, 20–24 (D. Md. Aug. 24, 2023) (finding no substantial burden or coercion in context where children were exposed to pro-LGBT books at school), *and* Bates v. Pakseresht, No. 2:23-CV-00474, 2023 WL 7546002, at

While many Free Exercise claims in the study thus failed on these grounds, there were significant reasons for concern in other Free Exercise study cases. Most notably, a small number of study cases found the relevant anti-discrimination law *not* to be "generally applicable"—and thus not an NLGA even where none of the conditions that have previously been found to trigger such a conclusion (such as gerrymandering anti-discrimination rules to target religious conduct or refusing to allow a discretionary exemption to be applied to religiously motivated exemption requests) were at issue.[323]

Rather, in such cases, courts often treated *any* limitations in the law—such as, for example, Title VII's limitation to employers with fifteen or more employees, or even *exemptions* for certain religious institutions like churches—as evidence of a lack of "general applicability."[324] Because almost all anti-discrimination laws have some exceptions—indeed, some that are arguably required to comply with *other* parts of constitutional law—this approach would almost always

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*4–12 (D. Or. Nov. 14, 2023) (finding requirement that foster parents affirm children's identity, including LGBTQ identity, was NLGA and satisfied constitutional review), *with* Mirabelli v. Olson, No. 323CV00768, 2023 WL 5976992, *12 (S.D. Cal. Sept. 14, 2023) (finding that a school policy prohibiting disclosure of transgender presentation and identification to parents was not NLGA based on limited exceptions in the policy, and finding that the policy failed both rational basis review and strict scrutiny), Willey v. Sweetwater Cnty. Sch. Dist. #1, No. 23-CV-0069, 2023 WL 9597101, at *8 (D. Wyo. Dec. 18, 2023) (in case where the Court had dismissed a Free Exercise claim in the original Complaint on the grounds that policy was NLGA, denying motion to dismiss based on Amended Complaint where Plaintiff alleged that policy included some religious accommodation provisions, and thus was not "generally applicable"), *and* Darren Patterson Christian Acad. v. Roy, No. 1:23-CV-01557, 2023 WL 7270874, at *14–16 (D. Colo. Oct. 20, 2023) (citing numerous factors, including the fact that program allowed exemptions from its requirements, in concluding nondiscrimination requirement was not NLGA and refusal to grant an exemption could not satisfy strict scrutiny).

323. *See, e.g.*, Blais v. Hunter, 493 F. Supp. 3d 984 (E.D. Wash. 2020); Ricard v. USD 475 Geary Cnty. Sch. Bd., No. 522CV04015, 2022 WL 1471372 (D. Kan. May 9, 2022); Tatel v. Mt. Lebanon Sch. Dist., 637 F. Supp. 3d 295 (W.D. Pa. 2022), *clarified on denial of reconsideration*, No. CV22-837, 2023 WL 3740822 (W.D. Pa. May 31, 2023); Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571 (N.D. Tex. 2023), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023); *see also Mirabelli*, 2023 WL 5976992, at *12 (post-study case finding that a school policy prohibiting disclosure of transgender presentation and identification to parents was not NLGA based on limited exceptions in the policy); *Willey*, 2023 WL 9597101, at *8 (post-study decision in study case finding policy appeared not to be NLGA where Plaintiff alleged that policy included religious accommodation provisions); *Darren Patterson Christian Acad.*, 2023 WL 7270874, at *14–16 (citing numerous factors, including the fact that program allowed exemptions from its requirements, in concluding nondiscrimination requirement was not NLGA).

324. *See* sources cited *supra* note 323; *cf.* Brief of Douglas Laycock et al. as Amici Curiae in Support of Petitioners at 34, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556), 2015 WL 1048450, at *34 (arguing that not all anti-discrimination laws are neutral and generally applicable and offering that "[i]f, for example, an anti-discrimination law exempts very small businesses—at least if that exemption reflects a purpose to respect their privacy or free them from the burden of regulation—then the Constitution requires exemptions for religious conscience, subject to the compelling interest test").

lead to a conclusion that anti-discrimination laws are not NLGA (with the attendant consequence that strict scrutiny must be applied).

This conclusion seems likely wrong under existing precedents like *Hosanna-Tabor Evangelical Church & School v. EEOC*, which recognize that anti-discrimination laws (even those with some exceptions) are NLGA.[325] In a context where the government has not gerrymandered or applied the law with disfavor to religion, and affords religious applications the same opportunities to have the benefit of individualized exceptions as all others, a law cannot be said to be "non-neutral" or "not generally applicable" within the meaning of *Smith*—at least, that was what most courts and scholars assumed until recently.[326] The Court's statement in *Hosanna-Tabor* that the ADA's prohibition on retaliation was (despite the ADA's exceptions) a "valid and neutral law of general applicability" reflects this understanding of *Smith* and what can render a law non-neutral or non-generally applicable under *Smith*.[327]

On the other hand, it is not difficult to see where the impetus for these study cases has come from—as scholars have observed, the Court has gone increasingly far in articulating what could be understood as a "most favored nation" ("MFN") approach to religion in its shadow docket.[328] Taken to its logical extremes, one could read this case law as adopting precisely the rule that some lower courts have endorsed, that is, that *any* exceptions at all will generally render a law not NLGA (and thus subject to strict scrutiny).[329] If that is the case, then not only anti-

325. *See, e.g.*, 565 U.S. 171, 190 (2012) (recognizing the ADA's retaliation prohibition as a NLGA).

326. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–34, 542–43 (1993) (defining what it means to be "neutral" and "generally applicable" under *Smith*). *But cf.* Andrew Koppelman, Essay, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2238–39 (2023) (describing the Court's trajectory in its shadow docket toward even more expansive versions of the "most-favored-nation" theory for when government action will be deemed not "generally applicable"); Zalman Rothschild, *The Impossibility of Religious Equality*, COLUM. L. REV. (forthcoming 2024–2025) (manuscript at 2) (on file with author) (reading the Court as having adopted an extreme version of "most-favored nation" law).

327. *See Hosanna-Tabor*, 565 U.S. at 190 (recognizing the ADA as a "valid and neutral law of general applicability" despite its many exceptions).

328. *See, e.g.*, Koppelman, *supra* note 326, at 2296 (describing a variant of the MFN theory as "ubiquitous in the recent shadow docket Covid cases"); Rothschild, *supra* note 326, at 2 (relying on the Court's shadow docket case of *Tandon v. Newsom* to contend that "[t]he Supreme Court has recently adopted a new rule of religious equality" such that "whenever the government grants an exemption from a general law for a 'secular' entity, activity, or motivation, it unconstitutionally discriminates against religion if it does not also offer an exemption to all 'comparable' religious entities, activities, and motivations"); Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam) (granting an injunction pending appeal of California's Covid restrictions on at-home religious activity).

329. *See* sources cited *supra* note 328.

discrimination law but virtually all law (which, as others have observed, almost always has *some* "exceptions") would be strictly scrutinized where it fails to exempt religion from its postulates.[330]

But there are a number of reasons not to read the Supreme Court's shadow docket jurisprudence this broadly. As an initial matter, the Court has *not* overruled cases such as *Hialeah* and *Hosanna-Tabor*, and thus recent cases such as *Tandon v. Newsom* ought to be read consistently with such precedents.[331] It is arguably possible to do so—among other things, given their factual context, one might understand the Court as adopting something akin to a prophylactic rule against intentional religious discrimination in its MFN cases.[332] Moreover, *all* of the Court's shadow docket cases dealt with a context (restrictions on participation in collective worship) that would clearly be unconstitutional outside of the context of an emergency, such as a pandemic, and might be seen as a direct prohibition on religion itself.[333] They thus implicate core Free Exercise concerns on any plausible account of the Free Exercise clause, and are arguably sui generis, despite their admittedly broad language.

Additionally, the sheer breadth of the rule that would be produced by the "any exceptions" rule that some scholars have

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330. *See* Rothschild, *supra* note 326, at 57 n.282 (noting that even murder would arguably be subject to strict scrutiny under this rule, since state criminal law provides exemptions for those who kill in self-defense).

331. *See Hosanna-Tabor*, 565 U.S. at 190 (holding that the ADA's anti-retaliation provisions are neutral and generally applicable, even though the ADA has exceptions); *Lukumi*, 508 U.S. at 532 (adopting what appears to be essentially an intentional discrimination standard).

332. This seems like an especially plausible reading given that all of the shadow docket MFN cases except *Tandon* involved circumstances where there was actually an explicit classification of religious entities in the law, arguably rendering such laws non-neutral on their face. *See* Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021) (mem.) (explicitly prohibiting indoor worship); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.) (same); Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 17 (2020) ("In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish."). And all of the cases, including *Tandon*, dealt with circumstances where the Court found that arguably trivial activities (e.g., hair salons, indoor restaurants, and movie theaters) were permitted to continue on more favorable terms than religious worship. *See* cases cited *supra*; *see also Tandon*, 593 U.S. at 63 (noting that the state treated "some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time").

333. *Cf. Hosanna-Tabor*, 565 U.S. at 190 (recognizing that the ADA was a "neutral law of general applicability" but nonetheless finding a constitutionally-grounded ministerial exemption from anti-discrimination law because application of such law to the selection of ministers would "affect[ ] the faith and mission of the church itself"). Although it is true that the Court did not in its shadow docket cases choose to embrace the *Hosanna-Tabor* rationale, it seems perhaps a more sustainable long-term doctrinal explanation for the Court's objections to affirmative government shutdowns of the practice of worship. Another alternative, described *supra*, would be to read the MFN cases as essentially adopting something like a prophylactic rule against suspected intentional discrimination. *See supra* note 332 and accompanying text.

postulated (and some lower courts have endorsed) seems likely to ultimately lead the Court away from such an approach.[334] As scholars such as Zalman Rothschild have observed, such a rule could, in theory, even extend to religiously motivated murder, since most state murder laws have exceptions for self-defense.[335] It is even broader and more disruptive of basic governance than the liberty approach that preceded *Smith*.[336] Thus, there are numerous reasons for thinking that the approach taken by the study cases, which have mostly read the MFN developments more modestly, will in the long run prevail.[337]

Finally, it is of course important to note that a majority of the Court has recently signaled its willingness to entirely overrule *Smith*—and with it the lesser solicitude it affords to the application of neutral laws of general applicability.[338] Moreover, at least one state supreme court has recently held that its own state constitution reaches more broadly than *Smith* in its protections for religious exercise.[339] Thus, it is possible that a broader revolution in constitutional religious liberties may be on the horizon—one that no doubt could have substantial effects on success of the types of constitutional arguments raised by AT

334. *See infra* note 337 and accompanying text.

335. *See* Rothschild, *supra* note 326, at 57 n.282.

336. *Id.* at 5–6.

337. There are other (admittedly weak) signals of the Court's lack of interest in extending MFN to its logical extremes, including its failure to clearly rely on MFN reasoning in *Fulton*, and its denial of petitions for certiorari review in a number of recent vaccine cases relying on MFN reasoning. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 535–36 (2021) (relying on *Sherbert*'s rule for discretionary exemptions, instead of *Tandon*'s MFN rule as the reason to apply strict scrutiny); Does 1–3 v. Mills, 142 S. Ct. 17 (2021) (mem.) (denying application for injunctive relief from vaccination rule for healthcare workers lacking a religious exemption, but having an exception for medical contraindications); Dr. A v. Hochul, 142 S. Ct. 552 (2021) (mem.) (same); Dr. A. v. Hochul, 142 S. Ct. 2569 (2022) (mem.) (same, later denying certiorari); 303 Creative, LLC v. Elenis, 142 S. Ct 1106 (2022) (mem.) (denying certiorari review on MFN challenge to anti-discrimination law, even while granting review on Free Speech argument).

338. *See Fulton,* 593 U.S. at 543–44 (Barrett, J., concurring) (joined by Justice Kavanaugh); *id.* at 545–47 (Alito, J., concurring in judgment) (joined by Justices Thomas and Gorsuch). It is not clear whether a majority of the Court would reinstate the "strict scrutiny" approach that preceded *Smith*—even if *Smith* is overruled. *See Fulton,* 593 U.S. at 543–44 (Barrett, J., concurring) (expressing skepticism about "swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime"). Indeed, it appears likely that a number of Justices who might join in overruling *Smith* are unlikely to go that far. *See id.* As importantly, as numerous scholars have observed, the Court's application of strict scrutiny in the religion context pre-*Smith* was "feeble in fact"—and thus it is not even clear what the reinstantiation of a formal strict scrutiny standard might mean. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994).

339. *See* Vlaming v. West Point Sch. Bd., 895 S.E.2d 705, 721–22 (Va. 2023) (after surveying the history of Virginia's religious liberties provision in its state constitution, concluding that "the constitutional right to Free Exercise of religion is among the 'natural and unalienable rights of mankind' and that 'overt acts against peace and good order' correctly defines the limiting principle for this right" (citations omitted)).

parties.[340] Indeed, were such a broad rejection of *Smith* to occur (either piecemeal via state constitutions, or wholesale at the Federal Supreme Court), this could have profound implications for anti-discrimination law generally, especially in an environment where courts seem inclined to discount the compelling government purposes that anti-discrimination law serve.

Thus, there are numerous reasons for potential concern about the possible impact of Free Exercise arguments for anti-discrimination law—although those concerns showed up only sporadically in the study case law. The Supreme Court's nascent "most favored nation" approach to Free Exercise has the potential (if read broadly) to result in virtually all anti-discrimination law being considered *not* NLGA. More generally, anti-discrimination plaintiffs evidently will have to grapple with any broader shifts in the Court's (or state supreme courts') religious liberties jurisprudence, including any ultimate move away from *Smith*.

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As described herein, although sporadic, many of the speech and religion rulings in the AT study cases ought to be of deep concern—not only to transgender litigants but to all those who care about anti-discrimination law. In every one of the major contexts in which such claims arose—speech, expressive association, RFRA and Free Exercise—study cases showed courts pushing the boundaries of existing doctrine in ways that could radically undermine anti-discrimination law. Moreover, such rulings were based on doctrinal arguments that are not specific to the transgender rights context—but rather would extend to all other protected classes, including race, (non-LGBTQ) sex claims, disability, age, national origin, and religion.

The expansion of speech and religion rights in the study cases is in some sense unsurprising, given that the Supreme Court has dismantled many of the bright-line rules that once limited such arguments—even while failing to clearly reaffirm the default rule of non-protection. But, as explored in the following Part, it may yet be possible to reestablish a stable equilibrium between speech/religion claims and anti-discrimination law. But doing so will require concerted efforts to reestablish clarity in the doctrine—as well as taking proactive steps to minimize the spheres of conflict between speech/religion and anti-discrimination law.

340. *See supra* notes 338–339 and accompanying text.

IV. RESTORING AN EQUILIBRIUM BETWEEN ANTI-DISCRIMINATION LAW AND SPEECH AND RELIGION LAW

As Jamal Greene has observed, American constitutional law—with its absolutist approach to rights—is poorly situated to mediating rights conflicts like the ongoing conflict between speech/religion and equality rights.[341] Rights are seen as trumps, and thus any legal settlement—and even discourse—tends away from compromise.[342] Perhaps this is why the Supreme Court initially avoided such conflicts by denying that discrimination lacked any constitutional value[343]— and why today it seems to the lower courts in some of the AT cases that the only alternative is to categorically privilege speech and religion over equality.[344] If rights are absolute, there must be a "winner"—and that winner appears to no longer be equality.

This Part makes the case that an intermediate position is possible—and indeed most faithfully represents the Supreme Court's existing doctrinal position. Thus the Court, at least to date, has continued to walk a line that does not treat discrimination *itself* as specially constitutionally privileged—and in so doing has preserved space for equality law.[345] But the Court has also insisted that discrimination not be entirely carved out of otherwise existing speech and religion protections.[346] Otherwise stated, while the Court has retreated from its position that treats discrimination as categorically constitutionally valueless—it has refused to go as far as to treat discrimination as categorically constitutionally valuable.

But perhaps unsurprisingly in a system not built for pluralist compromise, this intermediate position appears to be fundamentally unstable. As the AT study cases demonstrate, advocates of speech and religion claims have increasingly persuaded the lower courts not only to treat speech/religion claims as available in extraordinary circumstances but to defeat the ordinary application of anti-discrimination laws.[347] And advocates of equality have been no more receptive to the Court's intermediate position, perhaps hoping to

341. JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART xvii–xxi (2021).

342. *See* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 32 (2018) (describing how the conception of rights as trumps makes conflict "reconcilable only at wholesale, and without mercy to the loser").

343. *See supra* Section II.A.

344. *See supra* Part III.

345. *See infra* Sections IV.A–B.

346. *See infra* Sections IV.A–B.

347. *See supra* Part III.

persuade the Court to return to its once-held position that discrimination is constitutionally valueless.[348]

This Part suggests that whether or not advocates for equality desire a system of constitutional pluralism, it is likely that they must embrace such a system, if they wish to preserve constitutional space for equality. The Court has long since abandoned its absolutist position in support of equality, and conservative proponents of speech and religion have few incentives to defend the pluralist aspects of the Court's current regime.[349] And without any constituency to defend the Court's current compromise position, it seems likely to ultimately unravel (as the AT study cases suggest it may already be doing in the lower courts). Thus, for those who believe that equality ought not to be entirely subordinated to speech and religion, it is important to take steps to stabilize those parts of the Court's current position that represent a compromise between constitutional speech/religion claims and equality.

As this Part suggests, some of these steps should be easy for advocates of equality to embrace—such as simply recognizing and emphasizing the equality-favoring aspects of the Court's current position.[350] But others—such as trying to minimize the possible sites of conflict between speech/religion and anti-discrimination law by stepping back certain forms of enforcement—may be far less attractive to those whose primary commitments are to equality. Nonetheless, it is likely that a combination of such strategies will be necessary to bring stability to this area of the doctrine and to shore up the equality-favoring elements of the Supreme Court's existing doctrine.

A. Reestablishing the Default Rule That Discrimination (and Incidental Speech) Is Not Constitutionally Protected

One of the most troubling aspects of the AT study cases is that they reveal a First Amendment right to discriminate run amok: rather than *exceptions* to a default rule that discrimination (and incidental speech) is not protected expression, the lower courts appear in many

348. *See, e.g.*, GREENE, *supra* note 341, at xxxiii (describing progressive rhetoric around *Masterpiece Cakeshop*).

349. *See supra* Section III.A. Conservative actors have few incentives to shore up the Court's current pluralist approach because the current slippage in the law is, as the AT study cases suggest, toward affording speech and religion the dominant position in the constitutional settlement. *See supra* Part III.

350. In theory, this ought not be the difficult component of the various strategies offered below for proponents of equality to embrace. On the other hand, I should acknowledge that it is in genuine tension with the desire of progressive commentators and scholars to call attention to the problematic nature of recent jurisprudence of the Supreme Court, including, most notably, *303 Creative*. *See, e.g.*, *infra* note 352.

instances to be treating discrimination (and incidental speech) as generally constitutionally protected.[351] To some extent this is unsurprising: as described above in Section III.A, the Supreme Court has, over time, created increasing exceptions to its default rule of non-protection for discrimination, without clearly reaffirming the rule itself. But this Section suggests that the view of discrimination as *generally* affirmatively protected (as opposed to protected only in exceptional circumstances) rests on a fundamental misreading of the Court's precedents—and that, improbably, *303 Creative* itself reaffirms the default rule that discrimination (and incidental speech) is not protected.[352]

Understanding this contention requires close consideration of the cases in which the Court has recognized discrimination as constitutionally cognizable. Such consideration reveals that all of the cases in which the Supreme Court has found a First Amendment (or RFRA) right to discriminate involve circumstances where the expressive value of discrimination *itself* was *not* the reason for the protections.[353] That is to say, each of the circumstances where the Court has recognized a right to discriminate has involved circumstances where an independent right existed to be free from *all* forms of substantial government interference or burden (absent satisfaction of strict scrutiny)—discrimination was not treated as special or inherently

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351. *See supra* Section III.C.

352. In this regard, my account herein certainly differs in emphasis, and in some cases in substance, from most other scholars who have emphasized *303 Creative*'s problematic nature. *See, e.g.*, Redburn, *supra* note 23 (emphasizing the landmark nature and troubling implications of *303 Creative*); Craig Konnoth, Anti-Gay Gaslighting: Discrimination Denial in Public Accommodation Refusal Cases (unpublished manuscript) (on file with author) (emphasizing the problematic nature of the Court's access/content distinction); Laura Portuondo, *Gendered Liberty*, GEO. L.J. (forthcoming 2024) (reading *303 Creative* broadly and stressing its problematic nature for anti-discrimination protections), https://ssrn.com/abstract=4755198 [https://perma.cc/9DBC-R4TU]; Andrew Koppelman, *Why Gorsuch's Opinion in '*303 Creative' *Is so Dangerous*, AM. PROSPECT (July 12, 2023), https://prospect.org/justice/2023-07-12-gorsuch-opinion-303-creative-dangerous/ [https://perma.cc/W9WK-8EXG] ("In *303 Creative v. Elenis*, the Supreme Court has now declared for the first time that some for-profit businesses have a constitutional right to discriminate against anyone for any reason they like."); Elizabeth Sepper, Opinion, *With Its* 303 Creative *Decision, the Supreme Court Opens the Door to Discrimination*, L.A. TIMES (June 30, 2023, 1:27 PM), https://www.latimes.com/opinion/story/2023-06-30/supreme-court-303-creative-gay-rights-first-amendment-lorie-smith-neil-gorsuch-sonia-sotomayor [https://perma.cc/RK99-VJ3G] (stressing the negative implications of *303 Creative* for provision of equal services). To be clear, despite this difference in emphasis, I agree with the concerns expressed by many other scholars about the opinion. My observation herein is simply that *303 Creative*, as written, retains important limiting principles—and that any possible settlement between anti-discrimination law and the First Amendment will likely need to rely on those limiting principles. *Cf.* Dale Carpenter, *How to Read* 303 Creative v. Elenis, VOLOKH CONSPIRACY (July 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis/ [https://perma.cc/FV7T-R4P4] (similarly emphasizing *303 Creative*'s important limiting principles).

353. *See infra* notes 354–370 and accompanying text.

expressive but rather was simply given equal stature to all other types of conduct.[354]

This is most obvious in the context of RFRA and freedom of expressive association claims—any form of government law, including criminal law, can be found to impose a burden on religious exercise, or on an expressive association's ability to organize and further its message.[355] And all such laws must be subjected to strict scrutiny where they impose such a substantial burden.[356] Thus, neither RFRA nor freedom of expressive association claims turn on any finding that discrimination itself is worthy of independent constitutional protection. Rather, any action that an individual or expressive association may take—even, for example, use of illegal drugs—is entitled to the same protections.[357] (Of course it is descriptively true that most expressive association claims have arisen in the context of the application of anti-discrimination law—but *formally*, expressive association protections exist against *any* substantial burdens, regardless of their origin.[358])

The compelled speech doctrine applied in contexts such as *Hurley* and *303 Creative* at first glance appears not to fit this rule as it seems to recognize discrimination as speech, or at least as expressive. But again, this is a misreading of what *leads* to protections in cases like *Hurley* and *303 Creative*, which is not the act of discrimination—but rather the nature of the *product* or *public accommodation* being regulated (as speech in its own right).[359] Again, the Court's reasoning suggests that anything that might lead to regulation of the content of a

354. *See infra* notes 354–370 and accompanying text.

355. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (RFRA, criminal drug law); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461–62 (1958) (freedom of association, disclosure of membership roles).

356. *See supra* note 355.

357. *See, e.g.*, *Gonzales*, 546 U.S. at 439 (concluding that the government failed to demonstrate "a compelling interest in barring the UDV's sacramental use of *hoasca*").

358. *See, e.g.*, *Alabama ex rel. Patterson*, 357 U.S. at 461–62 (disclosure of membership); Tashjian v. Republican Party of Conn., 479 U.S. 208, 225 (1986) (state's closed primary rule); *In re* First Nat'l Bank, Englewood, 701 F.2d 115, 116 (10th Cir. 1983) (disclosure of membership); *cf.* Pathfinder Fund v. Agency for Int'l Dev., 746 F. Supp. 192, 194–99 (D.D.C. 1990) (recognizing that rules requiring foreign NGOs to affirm they would not promote or perform abortions could affect the expressive associational rights of U.S. organizations, but finding as a matter of fact that no substantial burden existed in this case); City of Tacoma v. Luvene, 827 P.2d 1374, 1383–84 (Wash. 1992) (drug loitering ordinance implicated freedom of expressive association, but could be limited by construing to include mens rea and overt acts requirements).

359. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 586–91 (2023); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 571–75 (1995). *But cf.* Vlaming v. West Point Sch. Bd., 895 S.E.2d 705, 737–38 (Va. 2023) (in case arising under the Virginia constitution, applying *303 Creative* and "compelled speech" reasoning to routine application of anti-discrimination policy to prohibit misgendering).

"speech-product" or "speech-public accommodation"[360] is subject to constitutional scrutiny (and indeed potentially invalidation).[361] Thus, the reasoning of cases like *Hurley* and *303 Creative* does not rest on a special solicitude for discrimination per se—although it of course does lead to constitutional protections for discrimination in certain contexts.[362]

This explains why the Court in cases like *Hurley* and *303 Creative* has continued to make much of the fact that the would-be discriminators served gays and lesbians in other contexts—a distinction that would be irrelevant if all discrimination is protected speech (or protected expressive conduct).[363] It is only because discrimination as an act is generally *unprotected* (despite its obvious expressive content) that it matters in cases such as *Hurley* and *303 Creative* that the public accommodation itself (or its product) were speech, and that the entity did not discriminate globally. Thus, like the other contexts where the Court has recognized some protections for discrimination, the compelled speech cases are predicated on an independent protection (here for speaker autonomy with respect to products or public accommodations that are themselves speech)—a protection that would extend to any type of government interference, quite aside from any special solicitude for discrimination.[364]

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360. I use the terms "speech-products" and "speech-public accommodations" herein as a shorthand way of referring to those contexts where public accommodation law is being applied directly to alter the content of products or public accommodations *that are themselves speech*. I recognize that these are not terms formally in use by the Court itself, but think it is useful to have a term of art to refer to the type of contexts where the Court has found that the application of public accommodations anti-discrimination law implicates the compelled speech doctrine.

361. *See* sources cited *supra* note 359.

362. For example, having deemed at least some websites themselves corporate speech in *303 Creative*, it seems likely the Court would subject a law to identical First Amendment scrutiny where it mandated the production of particular website content by an owner who produced websites representing their own speech, regardless of whether such a law related to discrimination at all. Thus, for example, it seems likely that a law requiring a website representing a company's own speech to bear a particular public service notice would trigger similar scrutiny (and likely invalidation). *Cf.* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 775–75 (2018) (holding that a required state notice at crisis pregnancy centers of the availability of free state reproductive health services was compelled speech and violated the First Amendment). Similarly, given that under *Hurley*, a parade is considered "pure speech," it is likely that any legal requirement that a parade include a particular unwanted banner/message (as opposed to unwanted participants) would be deemed constitutionally problematic. *Cf. Hurley*, 515 U.S. at 565, 572–73 (observing that the issue was not whether gay individuals could participate in the parade, but rather whether they could march under their own banner and observing that "every participating unit affects the message conveyed by the private organizers").

363. *303 Creative*, 600 U.S. at 594–95; *Hurley*, 515 U.S. at 572.

364. To be clear, it would be naïve to believe that *303 Creative* represents the limitations of the ambitions of the conservative legal movement, or even of some of the Justices who joined the opinion. *See, e.g.*, Redburn, *supra* note 23 (manuscript at 59) (providing an in-depth historical account of the conservative legal movement's campaign to constitutionalize protections for

Indeed, *303 Creative* itself—while not with utmost clarity—appears to reaffirm this position explicitly. In responding to the dissent's assertions that status and message could not be disentangled, the Court majority explicitly reaffirms that the First Amendment "does *not* protect status-based discrimination unrelated to expression"—distinguishing this from the First Amendment protections afforded to "a speaker's right to control her own message."[365] While the Court's inclusion here of "unrelated to expression" muddies the water—what discrimination is wholly non-expressive?—it appears to reaffirm the default rule that discrimination itself remains unprotected.[366]

Why does this distinction matter? It may seem at first glance to slice things fairly thin to suggest that it matters that the cases in which the Court has allowed a constitutional right to discriminate are cases in which *any* type of government burden would have allowed the same result. After all, the Court in those cases has indeed recognized a right to discriminate under the Constitution, even if other types of burdens (such as, for example, a requirement to disclose one's member roles,[367] a blanket criminal ban on the importation and use of hallucinogenics,[368] or required dissemination of a government message unrelated to discrimination[369]) might also have triggered comparable constitutional entitlements to be exempt from government regulation.

But upon even minimal reflection, the distinction between treating discrimination itself (and its associated speech) as subject to its own inherent First Amendment protections and treating discrimination, like drug use, as simply not categorically *exempt* from certain other existing protections is important indeed. The latter formulation allows that discrimination may still be considered constitutionally unprotected conduct—and speech incidental to it also unprotected—in most circumstances.[370] It is the difference between a possible right to discriminate being recognized as an exception to the

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discrimination and observing that they are likely to "seek to extend *303 Creative* into other domains of anti-discrimination law"). Some may therefore view the perspective offered herein as unduly optimistic. My own view is that such fatalism about *303 Creative*'s ultimate impact is not useful, especially since it is not clear at this time whether there is (yet) a majority on the Court prepared to embrace the proposition that discrimination itself ought to be globally entitled to constitutional protections.

365. *303 Creative*, 600 U.S. at 595 n.3.

366. *Id.*; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 389–90 (1992) (articulating this rule); Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (same); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 388–89 (1973) (same).

367. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461–62 (1958).

368. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

369. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).

370. *See, e.g.*, *303 Creative*, 600 U.S. at 595 n.3; *R.A.V.*, 505 U.S. at 389–90; *Mitchell*, 508 U.S. at 487; *Pittsburgh Press*, 413 U.S. at 388–89.

usual rule of no protections (in the limited contexts of RFRA, expressive association, and speech-product cases like *303 Creative*)—rather than a "right to discriminate" being the rule itself.

Of course, the fact that the Court has *not yet* arrived at the conclusion that discrimination is categorically protected by the First Amendment does not mean that it will not do so in the future. Most probably, it seems plausible that the Court may reach this outcome through death by a thousand small cuts, gradually expanding its existing doctrine until the exception becomes so common as to be the norm.[371] Or, it seems plausible that the Supreme Court may, like the lower courts, simply gradually lose sight of its default position (that discrimination is unprotected conduct), allowing what started as exceptions to become the rule.[372] It is also possible that *other* developments in the Court's broader First Amendment jurisprudence (unrelated to discrimination) could also lead to far broader First Amendment protections for discrimination than currently exist.[373]

All of these prospects are deeply troubling, and I do not mean to minimize them here. But it is also the case that such developments are

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371. *See, e.g.*, Klein v. Or. Bureau of Lab. & Indus., 143 S. Ct. 2686, 2687 (2023) (mem.) (vacating and remanding in light of *303 Creative* in a case involving wedding cakes). I thank Liz Sepper for this insight.

372. *See supra* Section III.C.

373. Most notably, in at least some recent cases, the Supreme Court has called into question its *general* approach to exempting incidental speech where it is swept up in the regulation of proscribable conduct. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 26–28, 27 n.5 (2010) (subjecting incidental regulation of speech pursuant to broader ban on conduct constituting material support for terrorist organizations as subject to meaningful First Amendment scrutiny); *cf.* Counterman v. Colorado, 600 U.S. 66, 72–74 (2023) (treating an individual who was prosecuted for stalking as presumptively entitled to the protections of the First Amendment because his stalking conduct was carried out via written messages). *But cf.* Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 62 (2006) (rejecting a compelled speech argument on the ground that the speech was "plainly incidental to the Solomon Amendment's regulation of conduct, and 'it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed' " (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949))).

Should this nascent shift in the Court's doctrine be applied to the anti-discrimination law context (which, as I argue above, it has not yet been, at least by the Supreme Court), it would almost surely have devastating effects for anti-discrimination law. While harassment claims under anti-discrimination law are the most obvious target of such First Amendment arguments, virtually all discrimination can be characterized as expressive—the vast majority of discrimination involves direct speech of some kind. Even in a termination case, a supervisor's bigoted speech may be used as evidence of disparate treatment—and the termination itself will almost always be carried out through the spoken or written word. *Cf.* Lakier, *supra* note 265, at 1276 ("A rule that require[s] heightened scrutiny whenever the government regulates speech, let alone expressive conduct, would effectively constitutionalize great swathes of both criminal and civil law."); Schauer, *supra* note 257, at 1773 (" 'Speech' is what we use to enter into contracts, make wills, sell securities, warrant the quality of the goods we sell, fix prices, place bets, bid at auctions, enter into conspiracies, commit blackmail, threaten, give evidence at trials, and do most of the other things that occupy our days and occupy the courts.").

not yet the law—though in some instances the lower courts are treating them as if they are. Until the Court itself repudiates its baseline rule (that discrimination and its incidental speech is presumptively unprotected conduct), it is thus worth continuing to be clear in both scholarship and advocacy that First Amendment protections for discrimination are the exceptional, rather than the ordinary, constitutional rule.

B. Reaffirming the Compelling and Narrowly Tailored Interest in Enforcing Anti-Discrimination Law

As described above in Section III.A, even after the Court's initial retreat from the assertion that discrimination could be given no constitutional value, it continued for many years to uniformly hold that anti-discrimination laws should nevertheless prevail—because the government interests supporting them were compelling, narrowly tailored, and unrelated to the suppression of ideas. As late as *Hobby Lobby* in 2014, the Court stated that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[374]

And yet, study cases in the AT context show lower courts often rejecting the proposition that anti-discrimination measures satisfy strict scrutiny in the speech and religion context (though courts often found strict scrutiny to be *satisfied* by the government's anti-discrimination interests in other contexts).[375] It is often assumed that such rulings rest on reasoning that would be inapplicable to other groups—for example, that courts have held that eradicating anti-LGBT discrimination is, unlike race discrimination, not compelling.[376] But in fact, in the study cases, the basis for such holdings was almost always reasoning that would apply equally to all groups—such as that measures prohibiting healthcare discrimination were not narrowly tailored because government could always provide that healthcare itself, or that there was no compelling interest in forcing *this* biased

374. 573 U.S. 682, 733 (2014).

375. *See* Appendix B, *supra* note 10.

376. This would be a difficult conclusion for courts to reach given the concurrent rise in judicial holdings that anti-transgender conduct warrants heightened scrutiny—and the pervasiveness of anti-transgender discrimination. *See, e.g.*, Eyer, *Transgender Constitutional Law*, *supra* note *, at 1425–32. In addition, the Supreme Court's ruling in *Bostock* that anti-LGBT discrimination is, at least in the Title VII context, sex discrimination, arguably brings anti-transgender discrimination within the scope of existing rulings holding the eradication of sex discrimination to be compelling. *See* Bostock v. Clayton County, 590 U.S. 644, 655–65 (2020); *see also* Eyer, *Transgender Constitutional Law*, *supra* note *, at 1432–45.

religious entity to hire members of a group to which they had religious objections.[377]

As such, one of the most urgent goals for *all* protected classes at this moment (including race, sex, disability, religion, and more) should be to reestablish that—in many run-of-the-mine cases—government interests in prohibiting discrimination ought to supersede private interests in discrimination. In fact, there is a strong argument that this is still the case—outside of highly idiosyncratic contexts, only one Supreme Court case (*Dale*) has ever found that private interests in discrimination should prevail over the government's countervailing interest in nondiscrimination.[378] And as explored more fully below, *Dale* should not be understood to endorse a broad conclusion that government interests in anti-discrimination law are generally inadequate.[379]

Understanding this argument, again, requires close consideration of the cases where the Court has allowed a First Amendment (or RFRA) right to discriminate. Three of those cases hold that certain types of applications of anti-discrimination law—to require the inclusion of an unwanted message in the context of speech-products (*303 Creative*, *Hurley*) or as applied by a religiously intolerant administrator (*Masterpiece Cakeshop*)—will almost certainly be deemed categorically unconstitutional.[380] These cases appear not to truly turn on the application of strict scrutiny at all, and advocates should not assume they can win such cases if they arise.[381] Human

377. *See, e.g.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023); Speech First v. Cartwright, 32 F.4th 1110 (11th Cir. 2022); Christian Emps. All. v. EEOC, No. 1:21-CV-195, 2022 WL 1573689 (D.N.D. May 16, 2022).

378. *See infra* notes 380–392 and accompanying text.

379. *See infra* notes 380–392 and accompanying text.

380. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–81 (1995); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 638–39 (2018); 303 Creative LLC v. Elenis, 600 U.S. 570, 589–92 (2023); *see also* Yoshino, *supra* note 276, at 280–81 (reading *303 Creative* as not applying strict scrutiny and instead "adher[ing] to a categorical approach, finding that if the conduct is speech, government compulsion is absolutely forbidden").

381. *See* sources cited *supra* note 380. Alternatively, one could read *303 Creative* and *Hurley* as cases where the Court concluded that the government lacked *any* sufficient interest (perhaps under any standard of review), because its only purpose was directly related to suppressing expression, i.e., to eliminate dissenting speech. *See, e.g.*, *Hurley*, 515 U.S. at 578–79 ("[The law] is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one . . . ."); *303 Creative*, 600 U.S. at 589 ("[T]he Tenth Circuit recognized that the coercive '[e]liminati[on]' of dissenting ideas about marriage constitutes Colorado's 'very purpose' in seeking to apply its law to Ms. Smith." (second and third alterations in original) (quotation omitted)). Even if one reads the opinions in this way, they are still clearly distinguishable from the ordinary context in which anti-discrimination law is applied, where there are clear government interests beyond stifling opposing views. (Note that many sympathetic to anti-discrimination law may resist the Court's characterization of the government's interests in *Hurley* and *303 Creative*. I fully concede such critiques. My point here is simply that approaching

relations commissions should of course seek to scrupulously avoid religious bias or intolerance—and states and localities should strongly consider adopting administrative guidance to comply with the Court's speech-product/speech-public accommodations doctrine.[382]

A fourth case—*Fulton*—also dealt with a highly idiosyncratic context: an entity that had included a system of entirely discretionary exemptions in its anti-discrimination provision and declined to extend such an exemption to a religious-based request.[383] The Court thus reasoned that although the City's interest in the "equal treatment of prospective foster parents and foster children" was "a weighty one," ultimately, "[t]he creation of a system of exceptions . . . undermines the City's contention that its non-discrimination policies can brook no departures."[384] As the Court concluded, "The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[385] But the vast majority of anti-discrimination laws do not include open-ended, discretionary exemptions and thus are not susceptible of this reasoning. Most entities do not undermine their own interests in anti-discrimination by broadly allowing that all discrimination may be subject to a wholly discretionary waiver.

Only one case—*Dale*—has dealt with a circumstance in which an ordinary application of anti-discrimination law was found to be insufficiently compelling on back-end review.[386] But even *Dale*, as understood by the majority, involved an unusual, and from the Court's perspective, especially troubling circumstance: the compelled inclusion of a leader in an expressive organization whose very identity contradicted the organization's preferred message.[387] (Consider, for example, the KKK being required to include a Black person in leadership, or the Nation of Islam being required to include a white person.) The majority thus found the burden at issue in *Dale* to be "severe" and the government's interests insufficient to "justify" the burden imposed.[388]

One can disagree with the *Dale* majority's account of the facts here (as many people do and did), but it is important to note that this

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Hurley and *303 Creative* on their own terms offers important limiting principles going forward that a dissenters' reading would not.)

382. *See supra* Section IV.C. for further discussion of this issue.

383. Fulton v. City of Philadelphia, 593 U.S. 522 (2021).

384. *Id.* at 542.

385. *Id.*

386. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

387. *Id.* at 651–56.

388. *Id.* at 659.

was the understanding on which *Dale* was decided.[389] Thus, while *Dale* does of course suggest that the government's interests in anti-discrimination law cannot be categorically *assumed* to supersede the constitutionally cognizable burdens that are put on entities by such laws, it is far from suggesting that such interests are not compelling or that, in a run-of-the-mine circumstance, discrimination should prevail over such interests.[390]

Indeed, to the contrary, the Court has repeatedly stressed—including in its most recent cases—that there are many circumstances where the application of anti-discrimination law will indeed be compelling. As noted above in *Hobby Lobby*—some fourteen years after *Dale*—the Court stated (albeit in dicta) that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[391] And even in cases like *303 Creative*, the Court went out of its way to stress that it "d[id] not question" that "governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation."[392]

On the other hand, cases in this area, including *Dale*, *Hobby Lobby*, and *O Centro Espirita*, probably *do* spell the end of *categorical* rules of affirmation for anti-discrimination (based on a presumed universally superseding compelling interest), regardless of context.[393] While the nuances of the strict scrutiny test applied in the expressive association and the RFRA contexts are somewhat different,[394] for both contexts the Court appears to have adopted a test that requires consideration of (a) the individual circumstances at issue, and (b) whether the government's interests in the application of anti-discrimination law outweigh the burdens imposed *in this particular instance*.[395] Nonetheless, even within this individualized assessment,

389. *See id.* at 651–56 (emphasizing the BSA's beliefs that gay conduct was immoral and inconsistent with the Scout Oath and Law, and that having a gay leader would implicitly endorse such conduct).

390. *Id.*

391. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 733 (2014).

392. 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023).

393. *See Dale*, 530 U.S. at 659 (apparently applying context-specific balancing test); Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418, 430–32 (2006) (making clear that the RFRA test is an as-applied test); *Hobby Lobby*, 573 U.S. at 728–32 (same). To be clear I am making a descriptive point here, not a prescriptive one.

394. As noted, *supra* note 393, the Court does not appear to apply a strict scrutiny test in the context of applications of anti-discrimination law to compel the alteration of the message of speech-products—rather, the Court has strongly suggested that such applications of anti-discrimination law are categorically impermissible.

395. *See* sources cited *supra* note 393.

there are certain arenas that seem likely, on such an individualized analysis, to satisfy strict scrutiny in the vast majority of cases.[396]

Most notably, as the Court itself stated in *Hobby Lobby*, "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[397] While the Court's statement there was specific to race, this same observation is true with respect to the vast majority of (if not all) protected groups.[398] Jobs are central to most individuals' financial well-being as well as their personal identity.[399] Moreover, jobs are not fungible—and the harms of discrimination in this context are especially hard to mitigate.[400] While there may thus be unusual circumstances in which speech or religion burdens might outweigh the government's compelling interests in forbidding employment discrimination—such as, for example, a requirement that an expressive organization hire a president whose status runs contrary to their core expression—in most circumstances, it seems clear that the government's interests should prevail.

Other areas, such as healthcare, public benefits, and housing, also seem likely to be areas in which the government should almost always have compelling interests that are narrowly tailored to its goals and that outweigh any burdens that anti-discrimination law may

396. The converse of this reasoning is, of course, that some arenas are unlikely to be found to satisfy such an individualized assessment. Some applications of public accommodations law seem likely to be most vulnerable, as I suggest *infra* note 404 and accompanying text. I recognize that denial of access to public accommodations, even in limited contexts, can be extremely harmful to groups—thus my point here is a descriptive, not a prescriptive, one.

397. 573 U.S. at 733.

398. Certainly, it is true with respect to the transgender community, which is often subject to employment discrimination. *See* SANDY E. JAMES, JODY L. HERMAN, LAURA E. DURSO & RODRIGO HENG-LEHTINEN, EARLY INSIGHTS: A REPORT OF THE 2022 U.S. TRANSGENDER SURVEY 21 (2023), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf [https://perma.cc/UC4B-7GQ7] ("More than one in ten (11%) respondents who had ever held a job said they had been fired, forced to resign, lost the job, or been laid off because of their gender identity or expression.") It is important to note in this regard also, that the Court has not required that a group be a "suspect class" in order for eradicating discrimination against that group to be considered compelling. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (finding a compelling interest in eradicating public accommodations discrimination in the context of sex); 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023) (in a sexual orientation case, observing that "[t]his Court has recognized that governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation").

399. *See, e.g.*, Rebecca Riffkin, *In U.S., 55% of Workers Get Sense of Identity from Their Job*, GALLUP (Aug. 22, 2014), https://news.gallup.com/poll/175400/workers-sense-identity-job.aspx [https://perma.cc/5JUX-GXD2] (showing trends over time).

400. This may be especially true where an employee is terminated. *See* Jennie E. Brand, *The Far-Reaching Impact of Job Loss and Unemployment*, 41 ANN. REV. SOCIO. 359, 359–60 (2015) ("Job loss is an involuntary disruptive life event with a far-reaching impact on workers' life trajectories.").

impose.[401] These areas of anti-discrimination law protect people in arenas that are core to their well-being, at times when they are often at their most vulnerable. Again, absent unusual circumstances, or (as in *Hobby Lobby*) a clear way of mitigating harm, such interests should ordinarily outweigh the burden on an individual entity imposed by compliance with anti-discrimination law.[402]

All of this highlights an important point: if the assessment of burdens and of the government's interests is (as the Court's doctrines suggest) individualized, it matters quite a lot in what circumstances these issues come to the courts. And unfortunately, the cases that have gone up to the Supreme Court recently have generally been unsympathetic ones for the government. In *Fulton*, for example, no family had ever been turned away from fostering, nor under the referral system seemed especially likely to be.[403] Similarly, while there is surely a harm from denial of services by public accommodations, the types of wedding vendor cases at issue in *Masterpiece Cakeshop* and *303 Creative* have not involved the necessities of life in a way that would

401. Certainly if, as the Court has held, the eradication of discrimination in public accommodations is compelling, it is hard to see how life-or-death contexts such as housing, social welfare services, and healthcare could be deemed noncompelling. *See, e.g.*, *Roberts*, 468 U.S. at 624; *303 Creative*, 600 U.S. at 590. On the narrow tailoring side, the lower courts have sometimes found that a more narrowly tailored alternative would be for the government to provide a service where a private defendant is unwilling to do so. *See, e.g.*, Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1148–49 (D.N.D. 2021), *aff'd on nonmerits grounds*, 55 F.4th 538 (8th Cir. 2022). While this argument has some pedigree in dicta from *Hobby Lobby* (though other language in *Hobby Lobby* also contradicts this proposition), it seems an obviously unrealistic solution to the vast multiplicity of forms of discrimination that exist in society. *See Hobby Lobby*, 573 U.S. at 728 (suggesting in dicta that "[t]he most straightforward way of [providing contraception coverage] would be for the Government to assume the cost"). *But cf. id.* at 733 (also suggesting in dicta that employment discrimination laws are precisely tailored to the government interests they seek to enforce). Indeed, the government-run shadow economy that would be required to fully make up for private discrimination would no doubt be viewed as highly problematic by many of the same entities that are arguing that the government should undertake such obligations.

402. Unfortunately, *should* does not necessarily mean courts *will* reach these conclusions. Study cases suggest that healthcare, in particular, is especially vulnerable to findings that the government lacks a compelling, narrowly tailored interest in enforcing its anti-discrimination rules, though some courts ruled to the contrary. *Compare* Minton v. Dignity Health, 252 Cal. Rptr. 3d 616, 624–25 (Cal. Ct. App. 2019) (finding nondiscrimination in healthcare to be compelling and narrowly tailored), *with Religious Sisters of Mercy*, 513 F. Supp. 3d at 1149 (reaching the opposite conclusion), Franciscan All., Inc. v. Becerra, 414 F. Supp. 3d 928, 944 (N.D. Tex. 2019) (same), *and* Christian Emps. All. v. EEOC, No. 1:21-CV-195, 2022 WL 1573689, at *8 (D.N.D. May 16, 2022) (same). It is perhaps worth observing that none of the cases finding the government's interests to be inadequate dealt with an actual concrete instance of healthcare discrimination—which simply emphasizes the obvious that deciding these issues outside of the context of actual harmed plaintiffs may cause courts to erroneously minimize the likely harms.

403. Fulton v. City of Philadelphia, 593 U.S. 522, 530 (2021) (observing that "[n]o same-sex couple has ever sought certification from CSS" and that "[i]f one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples").

have made the stakes of such discrimination more plain.[404] Even *Dale* itself involved a context that—while surely meaningful—did not implicate access to a job, a medical procedure, or a home.[405]

Of course, as the AT study cases show, anti-discrimination advocates appear to possess little control at this time over the contexts in which these cases arise. Because opponents of transgender rights (and of other anti-discrimination measures) are not awaiting enforcement litigation to bring claims—but are instead filing their own litigation seeking to prospectively enjoin possible enforcement—they are typically the entities shaping the landscape against which these claims are being litigated. Nonetheless, there may be steps that governments, as well as individual litigants, can take to reassert some control over the landscape against which these claims are being litigated.

Perhaps most importantly, litigants should continue to strongly press justiciability arguments, such as standing and ripeness, where cases are brought outside of the context of actual enforcement by a transgender litigant or the government.[406] If, as the Supreme Court's cases suggest, the evaluation of both the burden on the party resisting anti-discrimination law and *the government's interests* must be an individualized one, it is hard to see how such considerations can take place outside of the context of a concrete dispute.[407] It is, for example,

404. *See 303 Creative*, 600 U.S. at 579 (prospective litigation over whether wedding website designer could be compelled to serve same-sex couples); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617, 625–26 (2018) (discriminatory denial of services of a particular bakery with respect to same-sex wedding). Many types of *other* services that public accommodations laws cover—such as access to important professional spaces, access to healthcare, or even nondiscriminatory access to hotel lodging—seem likely to be more sympathetic terrain for arguing the importance of the government's interests.

405. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 640 (2000) (discriminatory discharge from services as a volunteer Assistant Scoutmaster).

406. I do not mean to suggest that such arguments will prevail in every context. Courts in the study often were notably dismissive of such arguments, even where plaintiffs were seeking permanent injunctive relief under RFRA. *See, e.g.*, *Franciscan All.*, 47 F.4th at 379–80 (rejecting the government's arguments that the government's interests must be assessed in a context-specific way, and thus that the plaintiffs lacked standing to seek a permanent injunction at this time); Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 923–33 (5th Cir. 2023) (rejecting standing and ripeness arguments, including arguments that greater contextual specificity was required for RFRA analysis). On the other hand, there are good reasons to believe that many of the fundamental values at stake in standing and especially ripeness doctrine are implicated by adjudicating RFRA claims outside of the context of an actual allegation of discrimination. *See infra* notes 407–409 and accompanying text.

407. *See, e.g.*, Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, MICH. L. REV. (forthcoming) (manuscript at 16) (on file with author) (observing that a "function of standing is to ensure a concrete frame for the litigation around a particular plaintiff affected by a particular government action" and that this "frame permits a court to see how a challenged measure plays out in real circumstances and to hear from real people about how they have been affected"). Such concerns seem especially pronounced in the context of cases like those at issue

far from clear that either the burden imposed or the strength of the government's interests are the same where anti-discrimination law is applied to the hiring of a janitor, versus when it is applied to the hiring of an executive director—even where both involve the same employer.[408] If anti-discrimination law can no longer be *validated* on a categorical basis because of these individualized considerations, it is equally important to avoid categorical and fact-free assessments of its *invalidity*.[409]

So too, measures seen in some of the AT cases, such as certification of entire classes of exempt entities and nationwide injunctions as to certain types of groups, seem deeply inappropriate to the type of individualized back-end assessment that Supreme Court case law suggests must apply.[410] Without knowing the burden imposed

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here, where there is legally relevant harm on *both* sides—harm from the enforcement of anti-discrimination law and harm from its nonenforcement. The latter is unlikely to be adequately represented outside of the context of a real-world application of anti-discrimination law. *Cf. Franciscan All., Inc.*, 227 F. Supp. 3d at 682–83, 692 (observing that the government did not even argue that it had a compelling state interest in defending against prospective RFRA challenge to anti-discrimination regulations).

408. Some of the Supreme Court's cases, specifically those involving speech-public accommodations and those involving religiously intolerant administration of anti-discrimination law, apparently adopted a categorical rule that the imposition of anti-discrimination law is impermissible. *See supra* notes 380–382 and accompanying text. In those circumstances, individualized assessments are far less relevant, and standing and ripeness arguments may be weaker. *Cf. 303 Creative*, 600 U.S. at 581–83 (describing the Court of Appeals' assessment of standing approvingly, though also noting that no party challenged that standing analysis on appeal); Susan B. Anthony List v. Dreihaus, 573 U.S. 149, 167 (2014) (noting that prudential ripeness concerns do not apply where the issue is "purely legal, and will not be clarified by further factual development" (quoting Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 581 (1985))). But in contexts such as RFRA and freedom of association, where the Court has required a highly individualized assessment of both the burden imposed by a particular application of anti-discrimination law and the government's interests *in that particular application*, the absence of a concrete application seems far more likely to raise the type of concerns that standing and ripeness doctrine are designed to address. *See, e.g.*, Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 812 (2003) (finding case unripe where "further factual development would 'significantly advance our ability to deal with the legal issues presented.' " (quoting Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 82 (1978))).

409. Unfortunately, some study cases seemed to suggest that this type of case-by-case assessment was itself impermissibly burdensome on religious entities. *See, e.g.*, Christian Emps. All. v. EEOC, No. 1:21-CV-195, 2022 WL 1573689, at *7 (D.N.D May 16, 2022) (rejecting the government's argument that it needed to assess exemptions on a case-by-case basis and stating that "[r]eligious freedom cannot be encumbered on a case-by-case basis"). *But cf.* Christian Healthcare Ctrs. Inc. v. Nessel, No. 1:22-cv-787, 2023 WL 9058379, at *9, 11 (W.D. Mich. Mar. 29, 2023) (finding a lack of standing where state law included a religious exemption which the plaintiff had not sought, recognizing the state could not categorically disavow "application of a Michigan statute as broad as the ELCRA and Equal Accommodations Act as to any religious entity where the religious freedom inquiry would be so fact-dependent").

410. *See, e.g.*, Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 600–01 (N.D. Tex. 2023) (allowing certification of two broad sub-classes of employers who oppose employing LGBTQ workers because of their religious beliefs), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023) (reversing class certification); *cf.*

on an individual entity—or the government's particular interest in enforcing anti-discrimination law, the harms to third parties, or any other consideration—it should be impossible to undertake the type of granular assessment that the Court's precedents suggest is required.[411] Advocates ought to strongly resist such measures, though as the AT cases suggest, they may not always prevail.[412]

Finally, it is worth observing that the time has likely come for government entities, and private litigants, to be judicious in their enforcement activities and open-minded in their settlement practices once litigation has been brought.[413] While obviously there are some cases that cannot be avoided or settled without implicating the core goods of anti-discrimination law, fighting every fight at this juncture is neither legally viable nor strategically wise.[414] Indeed, as set out in the following Section, administrative reforms are likely important to avoid those areas of litigation that almost surely cannot be won under existing speech and religion law.

C. Enacting the Equality Act and Other Legislative Reforms

It seems unlikely that litigation alone will serve to stabilize the current expansionary pressures of religious and expressive rights to discriminate. This Section suggests that both equality-protective legislative reforms (limiting the scope of RFRA via the Equality Act) *and* administrative reforms protective of speech/expression/religion are

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Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, 91 U. CHI. L. REV. (forthcoming 2024) (describing the distortions that are introduced by permitting associational standing, including the possibility of permitting nationwide defendant-oriented injunctions, without Rule 23 certification).

411. *See* sources cited *supra* note 393.

412. *See* sources cited *supra* note 410.

413. The case of *Blais v. Hunter* arguably provides an excellent example of such strategic settlement. While the trial court's decision finding the state's rules to be non-neutral for Free Exercise purposes was likely wrong, the facts—denying great-grandparents the right to foster their own infant great-granddaughter because of their unwillingness to offer affirmative responses to certain LGBTQ questions—were extremely unsympathetic. *See* 493 F. Supp. 3d 984, 994–98 (E.D. Wash. 2020) (concluding, probably incorrectly, that a general antidiscrimination rule was not neutral). Moreover, the settlement, while providing for religious accommodation, also indicated that foster parents must follow the care plan for their foster children, which may include LGBTQ-supportive measures, thus allowing the balancing of religious liberties and the needs of LGBTQ foster youth. Permanent Injunction and Final Judgment at 2–3, *Blais*, 493 F. Supp. 3d 984 (No. 2:20-CV-00187), ECF No. 85-1.

414. It appears that the federal government is already engaging in this type of strategic litigation. In several RFRA cases, the federal government only appealed nonmerits issues relating to the award of a preliminary injunction, presumably because it did not believe it could win the substantive RFRA issues on appeal. *See, e.g.*, Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1128 (D.N.D 2021), *aff'd on nonmerit grounds* 55 F.4th 583, 588 (8th Cir. 2022) (describing which portions of the litigation were appealed); Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361, 366 (N.D. Tex. 2021), *aff'd on nonmerits grounds*, 47 F.4th 368, 371 (5th Cir. 2022) (same).

likely important adjuncts to any litigation efforts. It may also be worth enforcement entities (such as the EEOC and HHS) considering whether the adoption of administrative guidance is worth the cost of contextless adjudication in a climate where such guidance has regularly triggered litigation. All of these steps could serve to limit the incidence of legal conflicts between speech and religion law and anti-discrimination law prospectively and to channel remaining conflicts to important arenas that have, to date, largely been peripheral to the cases that have reached the Supreme Court.

1. Enacting the Equality Act and Limiting RFRA

The Equality Act—proposed in various more or less expansive forms since the 1970s—would amend federal anti-discrimination law to include explicit protections for the LGBTQ community.[415] Once a central objective of the LGBTQ movement, much of the sense of urgency around the Act faded after *Bostock*.[416] But as the AT study cases demonstrate, many of the provisions of the Equality Act remain as important as ever.[417] As relevant here, Section 9 of the most recent version of the Equality Act would provide that "[t]he Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title [of anti-discrimination law], or provide a basis for challenging the application or enforcement of a covered title."[418] While the Equality Act would thus leave RFRA intact as to its application in all other arenas, it would amend RFRA so that it is not available to challenge federal anti-discrimination law.

Though beyond the scope of the discussion herein, enacting the Equality Act is no doubt important to equality law in a number of other respects, as it would codify *Bostock* and leave beyond dispute its reach to other sex discrimination contexts.[419] Importantly, the Equality Act would also provide an opportunity for the federal government to specifically affirm its commitment to the compelling objective of eradicating discrimination against the LGBTQ community. While such a commitment is implicit in the federal government's commitment to eradicate sex discrimination (as set out in Title VII), the Equality Act

415. Equality Act, H.R. 15, 118th Cong. (2023).

416. *See* Katie Eyer, *Why the Equality Act Remains Important to LGBTQ Equality*, REGUL. REV. (July 27, 2020), https://www.theregreview.org/2020/07/27/eyer-equality-act-remains-important-lgbtq-equality/ [https://perma.cc/BCZ4-LKYE].

417. *See supra* Section III.D.

418. Equality Act, H.R. 15, 118th Cong. § 9 (2023).

419. *See* Eyer, *supra* note 416 (explaining how the Equality Act would "clarify and strengthen" protections for members of the LGBTQ community from discrimination).

would constitute a meaningful affirmation of the federal government's commitment to LGBTQ equality, as well as an opportunity for the government to amass an official record on the importance of such anti-discrimination measures.[420]

Finally, it is important to note that enacting the Equality Act would not *only* benefit the LGBTQ community. By amending RFRA, the Equality Act would also ensure that RFRA cannot be used to avoid anti-discrimination obligations in other contexts as well, such as race, sex, disability, and national origin.[421] As observed above, the rationales on which AT litigants prevailed in the RFRA study cases were not specific to transgender rights, or even LGBTQ rights more generally—but rather would extend to all protected classes.[422] Thus, all protected groups should have a common interest in the enactment of the Equality Act and its amendment of RFRA.

Of course, for those who believe that there *should* be religious exemptions to anti-discrimination law beyond those statutorily codified in Title VII and related statutes (and those required by the Constitution, such as the ministerial exemption), the idea of amending RFRA via the Equality Act will be an anathema. But for those who share the view that the longstanding settlement that preceded *Hobby Lobby*—under which core religious institutions, such as churches, had important exemptions from anti-discrimination law, but commercial businesses generally did not—was appropriate, the Equality Act would restore that *status quo*.[423]

It should be acknowledged that of course this suggestion is not politically feasible at this moment: there are not the votes in Congress to amend RFRA via the Equality Act. But the political status quo can shift—at times rather dramatically—and thus it is important for even presently infeasible projects to be within the realm of consideration. If and when a more robust political majority exists for shoring up civil

420. *Id.*

421. *See* sources cited *supra* note 418.

422. *See supra* Section III.D.

423. Alternatively, one might imagine a statutory compromise (such as that adopted when Utah expanded its anti-discrimination law to cover sexual orientation and gender identity) codifying somewhat broader exemptions for core religious institutions, while eliminating RFRA's free-ranging protections for commercial businesses that wish to discriminate. *See, e.g.*, UTAH CODE ANN. § 34A-5-102(i)(ii)(A) (West 2023) (excluding religious organizations and their subsidiaries from the "employer" definition). While the LGBTQ movement rejected such compromise measures in the aftermath of *Bostock*, the shifting legal landscape around this issue may cause the movement to rethink this perspective. On the other hand, there are trenchant critiques of such compromises, and I thus express no view on their normative desirability herein. For a critique of LGBTQ specific religious exemptions, see, e.g., Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 482–83 (2015).

rights, enacting the Equality Act (and amending RFRA to limit its application to civil rights) ought to be a priority.

2. Speech- and Religion-Protective Administrative Guidance

It may seem counterintuitive to suggest that speech- and religion-protective administrative reforms are also an important component of what government entities could do to avoid further subordination of equality law to speech- and religion-based rights to discriminate. But this Article suggests that such measures will likely *also* be necessary in order to stabilize the current state of the doctrine regarding speech- and religion-based rights to discriminate. Given the myriad federal, state, and local entities that enforce the nation's many anti-discrimination laws, this would represent a complex task, but model guidance could assist in the effort, especially among state and local enforcement agencies with lesser resources.

What might such guidance look like? At a minimum, it should include commitments of nonenforcement with respect to applications of anti-discrimination that will alter the message of speech-products or speech-public accommodations—an area that the Supreme Court has signaled is almost certain to be struck down.[424] With respect to applications of the law that might run afoul of federal or state RFRAs or expressive (or intimate) association law, there should be a clear, established system for promptly seeking an exemption once a conflict has arisen (since in such instances, whether the application is impermissible—or justified by the government's interests—will typically depend on the specific factual circumstances).[425]

Why might such administrative guidance be important to *limiting* the further expansionary pressures of speech/religion rights to discriminate? Most notably, taking such administrative measures

424. *See* Hurley v. Irish Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 572–81 (1995); 303 Creative LLC v. Elenis, 600 U.S. 570, 587–90 (2023).

425. *See supra* Section IV.C. These types of exemption systems may be difficult to administer but are of course hardly novel. Indeed, they are a part and parcel of existing practice for many government entities that are at times required to afford religion-based exemptions. *See, e.g.*, *Native American Eagle Take for Religious Purposes*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/service/3-200-77-native-american-eagle-take-religious-purposes (last visited Apr. 22, 2024) [https://perma.cc/HJD2-79VB] (providing links to the permitting process for obtaining permission for religious takings of bald or golden eagles from the wild); *School Immunizations—New Certificate of Religious Exemption Requirement*, ILL. DEP'T OF PUB. HEALTH (Aug. 12, 2015), https://dph.illinois.gov/resource-center/news/2015/august/school-immunizations--new-certificate-religious-exemptionrequirement.html [https://perma.cc/3EEG-BNDK] (providing the paperwork for obtaining a vaccination exemption on religious grounds). Note that issues of timing may be more difficult in many discrimination circumstances, such as where a particular individual has applied for a particular job. It is thus critical that the government have a promptly available process.

would allow entities to avoid being drawn into litigation battles they cannot win, and thus continuing the accretion of damaging losses in this area.[426] Importantly, such reforms would also signal to the Supreme Court, and to other courts, that government entities are taking seriously existing law in this area and are not simply flouting (as may appear to be the case today) what the Court has said are constitutional (or important statutory) commands.[427] Finally, such measures may allow anti-discrimination advocates to some extent to regain some measure of control over the litigation landscape in this area, channeling conflicts to more obviously compelling factual and legal contexts for anti-discrimination law.

3. Weighing the Costs of Affirmative Administrative Guidance

A final area in which public entities' regulatory approach may be worth reconsidering is in the context of weighing the merits—versus the costs—of issuing affirmative administrative guidance on anti-discrimination law (at least in especially controversial areas, such as LGBTQ rights). As described above in Section I.B, one of the Biden Administration's first executive actions was an executive order ordering all federal agencies to consider *Bostock*'s implications for their own programs and enforcement. Many entities subsequently issued guidance or, in some instances, proposed regulations pursuant to that process.[428] Others had issued regulatory guidance or regulations even

426. *Cf.* Christian Healthcare Ctrs., Inc. v. Nessel, No. 1:22-cv-787, 2023 WL 9058379, at *11 (W.D. Mich. Mar. 29, 2023) (finding a lack of standing where the plaintiff could have, but had not, applied for religious exemption included in state law).

427. *Cf. Religious Exemption Final Rule Frequently Asked Questions*, OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/faqs/Religious-Exemption-Final-Rule#Q5 (last updated Feb. 28, 2023) [https://perma.cc/A32M-E5D3] (stating that "[t]here is no formal process for invoking RFRA specifically as a basis for an exemption from Executive Order 11246," but noting that OFCCP will in fact follow RFRA). *But cf.* Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1115, 1125 (11th Cir. 2022) (holding that discriminatory harassment policy was "almost certainly unconstitutionally overbroad" and thus invalid under the First Amendment, even though it explicitly included "[w]hether the conduct implicates concerns related to academic freedom or protected speech" as a consideration in whether particular conduct would be deemed in violation of the policy).

428. *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (final rule,addressing LGTQ discrimination under Title IX); U.S. DEP'T OF AGRIC., CRD 01-2022, APPLICATION OF *BOSTOCK V. CLAYTON COUNTY* IN PROGRAM DISCRIMINATION COMPLAINT PROCESSING—POLICY UPDATE (May 5, 2022) (issuing a guidance memorandum regarding alleged discrimination on the basis of gender identity); EEOC, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION, *supra* note 50 (issuing guidance for LGBTQ employees' Title VII rights); Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984 (May 25, 2021) (to be codified at 45 C.F.R. pts. 86, 92) (notifying the public of the Agency's interpretation of Section 1557's prohibition on discrimination on the basis of sex as inclusive of discrimination based on

prior to *Bostock* (in some instances, withdrawn during the Trump Administration) and updated or reinstated that guidance after the Executive Order.[429]

A significant number of the pre-enforcement study cases—including many that were successful—arose out of challenges to this regulatory output (both during and prior to the Biden Administration).[430] Although they arose in the context of pre-enforcement challenges, these cases are likely to have far-reaching implications, insofar as they included important merits rulings, often coupled with injunctive relief.[431] Moreover, at least some of the challenges addressed regulatory output that may not have materially increased the likelihood of success for anti-discrimination litigants in actual anti-discrimination lawsuits, insofar as it was informal guidance not subject to meaningful administrative deference.[432]

Of course, some of the regulatory output was (or will be) codified in formal regulations—and even informal guidance may still be important insofar as it shapes the behavior of regulated entities, and thereby deters discrimination.[433] This is hardly a trivial benefit, since as I have previously written "[n]o employee, student, or customer

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sexual orientation and gender identity); Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (proposed Aug. 4, 2022) (to be codified in scattered sections of 42 and 45 C.F.R.) (issuing a proposed rule that would, inter alia, prohibit discrimination on the basis of sexual orientation and gender identity under Section 1557 of the Affordable Care Act).

429. For example, the EEOC had already issued rulings in the federal sector context (as well as other guidance) pre-*Bostock* interpreting Title VII to extend to sexual orientation and gender identity. *See, e.g.*, Macy v. Holder, No. 0120120821, slip op. at 2–4 (Equal Emp. Opportunity Comm'n Apr. 20, 2012), 2012 WL 1435995, at *2–3 (holding that anti-transgender discrimination is categorically sex discrimination under Title VII). The EEOC has also issued updated post-Executive Order guidance. *See, e.g.*, EEOC, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION, *supra* note 50 (further affirming that, since the *Bostock* decision, employment discrimination on the basis of sex under Title VII includes discrimination on the basis of sexual orientation and gender identity).

430. *See* Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1122 (D.N.D 2021), *aff'd on nonmerits grounds*, 55 F.4th 583 (8th Cir. 2022); Christian Emps. All. v. EEOC, No. 1:21-CV-195, 2022 WL 1573689, at *1 (D.N.D. May 16, 2022); Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361, 366–67 (N.D. Tex. 2021), *aff'd on nonmerits grounds*, 47 F.4th 368 (5th Cir. 2022); Texas v. EEOC, 633 F. Supp. 3d 824, 828–29 (N.D. Tex. 2022); Tennessee v. U.S. Dep't of Agric., 665 F. Supp. 3d 880, 894–96 (E.D. Tenn. 2023); Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 918–19 (5th Cir. 2023).

431. *See supra* note 430.

432. *See supra* note 430. Of course, there is a significant challenge to *Chevron* deference pending this Term, which may radically reduce the likelihood that *any* administrative interpretation will receive substantial deference from the courts going forward. *See, e.g.,* Amy Howe, *Supreme Court Likely to Discard* Chevron, SCOTUSBLOG (Jan. 17, 2024), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/ [https://perma.cc/HX7S-F5TV].

433. *See supra* note 428 (referencing examples of agencies issuing guidance and proposing regulations pursuant to *Bostock*).

prefers the ability to bring a lawsuit over actual lived equality."[434] Especially in contexts such as healthcare, where a regulation may cause entities to amend their health plans and/or may affect the care afforded in crisis situations, the benefits of administrative guidance may well outweigh the costs.[435] Even in contexts where the effects are more subtle or indirect, such as defining the specifics of what counts as employment discrimination, one should not discount the potential importance of administrative guidance for compliance by regulated entities.

On the other hand, such compliance benefits ought to be weighed against the opportunities for context-free litigation that such regulatory action helps generate. Most notably, such administrative action weakens arguments against standing and ripeness, even where concrete context should be (as I have suggested above) important to evaluating both the burdens on an entity and the government's interests on back-end review.[436] This is important doctrinally insofar as it may lead to overbroad assumptions of cognizable burdens on the plaintiffs, as well as overbroad holdings regarding the government's inability to satisfy strict scrutiny across all contexts.[437] But it is also important practically insofar as it may divest such challenges of any factual context that might assist judges in understanding the genuine stakes of refusing to enforce anti-discrimination law.[438] Regulatory entities thus should at least weigh the possibility of facilitating context-

434. Eyer, *supra* note 416.

435. *See, e.g.*, Kadel v. Folwell, 620 F. Supp. 3d 339, 357 (M.D.N.C. 2022) (describing reforms to state healthcare plan that followed from the Obama Administration's § 1557 regulations—reforms that were walked back after those regulations were rescinded by the Trump Administration).

436. This is most obvious where a regulation requires imminent conduct, such as amending a health plan. *See, e.g.*, Religious Sisters of Mercy v. Becerra, 55 F.4th 583, 603–04 (finding plaintiffs had standing in context where plaintiffs currently refused to "perform or cover" gender affirming care); *cf.* Richard M. Re, Essay, *Does the Discourse on* 303 Creative *Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. REFLECTION 67, 81 (2023) (observing the relevance of the fact that the statute prohibited posting a notice of discrimination on the plaintiff's website as relevant to the assessment of standing). Of course, these are also the contexts where regulatory action is most meaningful; thus the benefits may outweigh the costs. On the other hand, even where administrative action does not require imminent action (for example, nondiscrimination in employment in the context of an employer who has never had a transgender employee), this administrative action has featured as a consideration in the standing and ripeness analysis of the lower courts. *See, e.g.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 923–33 (5th Cir. 2023) (extensively relying on the EEOC's guidance in its standing and ripeness analysis).

437. *See supra* note 430.

438. For example, it seems unlikely to be accidental that all of the study cases that rejected RFRA arguments were cases in which there was an actual transgender party who had been subject to (and harmed by) discrimination, whereas those that credited RFRA arguments were almost all preenforcement challenges in which there was no specific identified victim of discrimination. *See* Appendix B, *supra* note 10; *cf.* Yoshino, *supra* note 276, at 285 (noting, in the context of *303 Creative*, that "there were no actual human beings who could bring to light the dignitary interests on the other side").

free speech and religion challenges in making the cost-benefit analysis of whether to issue new anti-discrimination law guidance.[439] Where they elect do so, they ought to be especially certain to include clear and credible mechanisms for addressing exemption requests, as described above.

D. Re-Centering Equal Protection?

The above represent possible steps—both practical and doctrinal—that could aid in the stabilization of current conflicts between speech/religion doctrine and anti-discrimination law. This Section raises the question of what role, if any, equal protection doctrine ought to be playing in such disputes. Many scholars' intuition is that equal protection *should* be critical to the resolution of whether or not government possess sufficiently important interests to override religious or expressive interests in discrimination.[440] Nonetheless, study cases suggest that the courts rarely consider equal protection at all in adjudicating such disputes.[441] This Section asks whether courts should afford a greater role to equal protection doctrine and concludes that—outside of the context of the *government's own* discrimination—such an approach would (counterintuitively) likely lead to the invalidation of *more*, rather than *fewer*, anti-discrimination measures.

Understanding this requires disaggregating the ways in which equal protection *could* matter to ongoing speech and religion disputes. The most obvious way that it could and should matter is in contexts where the government is arguably seeking to prevent its *own* discrimination.[442] This type of situation exists where the government

439. This is not to suggest that avoiding such regulatory action would necessarily forestall such challenges, as, for example, a number of challenges were *not* withdrawn during the Trump Administration, despite the Trump Administration's reversal of the relevant regulation. *See, e.g.*, *Religious Sisters of Mercy*, 55 F.4th at 591–96 (8th Cir. 2022) (discussing the history of the rule at issue). Of course, this may be in part because it took the Trump Administration a very long time to replace the regulation and did so shortly before the *Bostock* decision and the subsequent change in presidential administration. Regardless, initial filing in all of these cases was prompted by regulatory action, albeit regulatory action from the Obama Administration.

440. *See, e.g.*, Micah Schwartzman (@mjschwartzman), X (July 5, 2023, 4:40 PM), https://twitter.com/mjschwartzman/status/1676707578095575040 [https://perma.cc/Z678-XLU7] (suggesting that the Court would need to address the equal protection stature of the transgender community in order to evaluate whether the government has a compelling interest in anti-discrimination protections); Shannon L. Doering, *Treading on the Constitution to Get a Foot in the Courthouse Door*, 78 NEB. L. REV. 644, 666–67 (1999) (arguing that for eradication against a group to be compelling, that that group must be a suspect class).

441. *See* Appendix B, *supra* note 10.

442. Many of the study cases implicated exactly this type of context, such as where public schools or universities were trying to regulate discrimination or harassment of their own students. *See id.*

penalizes what would be considered unconstitutional discrimination or harassment by its own employees—or otherwise sets out standards for avoiding its own unconstitutional discrimination vis-à-vis protected groups.[443] It may also apply (though less clearly) to government mandates aimed at preventing discrimination or harassment by nonemployees in government spaces, such as public school students.[444]

In these contexts, there is a strong argument that equal protection *should* matter, since presumably the government has a strong interest in avoiding an equal protection violation. Indeed, under the logic of cases such as *Fitzpatrick v. Bitzer*, there is a reasonable (though yet untested) argument that equal protection concerns about the government's own conduct should *always* supersede competing speech or religion claims.[445] At a minimum, it seems clear that equal protection must be at least *relevant* to such contexts, since surely public entities have an obligation to attempt to avoid their own equal protection violations.[446] (And, to borrow a term from the religion context, one might further believe that public entities should be allowed some "play in the joints" so that they need not walk right up to an equal protection violation before acting.[447])

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443. For example, the cases involving misgendering described *supra*, Section II.C, generally fall in this category, as virtually all of them involve disputes over the rights of public school teachers to misgender their own students, something that could be considered a form of discriminatory harassment as a matter of equal protection doctrine. *See, e.g.*, Johnson v. Halstead, 916 F.3d 410, 416–17 (5th Cir. 2019) (recognizing that hostile environment claims are cognizable under equal protection law); Crutcher-Sanchez v. County of Dakota, 687 F.3d 979, 985 (8th Cir. 2012) (same); *see also* McNamarah, *supra* note 9, at 2236–55 (detailing the harms of misgendering and situating it within the tradition of "dishonorifics" as a form of discrimination).

444. Because there is no vicarious liability in this circumstance for the actions of non-state actors, it is more complicated to prove an equal protection violation, but there are certainly contexts in which a failure to act in the face of third-party harassment could constitute an equal protection violation. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 454–55 (7th Cir. 1996) (reversing grant of summary judgment on equal protection claim in case of school district inaction vis-à-vis harassment of a gay public school student).

445. *See* 427 U.S. 445, 456 (1976) (concluding that the Fourteenth Amendment superseded the Eleventh Amendment, at least insofar as it relates to Fourteenth Amendment congressional enforcement action). *But cf.* GREENE, *supra* note 341, at 38–64 (discussing the advantages to mediating, rather than taking an absolutist perspective on conflicts between rights).

446. *Cf.* Ricci v. DeStefano, 557 U.S. 557, 583 (2009) (finding that where an employer had a "strong basis in evidence" for believing it would be subject to disparate impact liability, it could engage in what would otherwise be considered racial disparate treatment); Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (strong basis in evidence of constitutional or statutory violation required to justify race-based remedial efforts).

447. *See* Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 473 (2020) ("We have recognized a 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." (internal quotation marks omitted) (citation omitted)); *see also supra* note 446 (recognizing the rights of public entities to rely on race-based remedial measures short of a full finding of a constitutional violation). Of course, the contemporary Court seems far less receptive to the idea of "play in the joints," arguably requiring public entities to walk right up to the line of an Establishment Clause violation in order to avoid violating Free Exercise. *See, e.g.*, Kennedy v.

It is important, however, to distinguish these contexts from those not involving the government's own discrimination but rather its interests in regulating discrimination by third parties. In this context, some scholars have argued that equal protection still *ought* to be relevant because the equal protection stature of the group may govern how compelling a government entity's interest is in prohibiting private discrimination.[448] (For example, one might reason that prohibiting private race discrimination is compelling because race is a "suspect class"—or conversely that prohibiting disability discrimination is not because disability is "non-suspect.") But the Supreme Court has never adopted this perspective and, indeed, has implicitly repudiated it in a number of cases.[449]

Importantly, the manner in which the Court has repudiated this argument is actually *helpful* not *harmful* to anti-discrimination litigants. Thus, for example, in the sex cases of the 1980s the Court found a compelling interest in eradicating sex discrimination in public accommodations (despite the fact that sex discrimination only receives intermediate scrutiny).[450] More recently in *303 Creative*, the Court strongly implied that governments *generally* have compelling interests in public accommodations anti-discrimination laws, whatever group is protected.[451] Thus, the Court's refusal to link the strength of the government's interests to a group's equal protection stature has allowed *more* groups to benefit from the assumption that prohibiting discrimination against them is compelling.

Of course there may be independent benefits to a group from securing "protected class status" as a matter of equal protection doctrine—though there are also limitations, as the case of race makes clear.[452] But the Court's existing speech and religion doctrine makes clear that protected class status (as a constitutional matter) is *not* a

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Bremerton Sch. Dist., 597 U.S. 507, 532–33 (2022) (holding public school's suspension of coach for praying on field to be violation of coach's Free Exercise and Free Speech rights despite government's asserted interest in avoiding an Establishment clause violation).

448. *See supra* note 440.

449. *See infra* notes 450–451 and accompanying text.

450. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (finding the State's compelling interest in eliminating discrimination against women outweighs the group's right of expressive association).

451. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023) ("[W]e do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation.").

452. *See, e.g.*, Eyer, *Transgender Constitutional Law*, *supra* note *, at 1424–25, 1425 n.80.

prerequisite to the Court finding a compelling government interest in eradicating discrimination against a group.[453] Indeed, to the contrary, the Court's precedents suggest that eradicating private discrimination against *any* group can in theory be compelling.[454] There thus seems little to be gained—and for some groups much to be lost—by urging the Court to treat equal protection stature as dipositive in this context. (Though, as described above, the situation is quite different with respect to the government's *own* discrimination, where equal protection arguably should be playing a much greater role.)

E. The Inherent Limits of Public Opinion

Finally, it is important to observe that practical considerations—most notably the requirement that an organization affirm a discriminatory message or religious purpose in order to raise any of the types of speech/religion claims currently cognizable—will likely limit the willingness of many groups to pursue speech/religion exemptions from anti-discrimination law. For example, the paucity of speech/religion arguments in the race discrimination context today seems much more likely explained by the unwillingness of entities to openly affirm an expressive or religious commitment to opposing racial equality, rather than an inherent limitation of the doctrine.[455] Because, as described in Section IV.A above, an organization must generally show that either its religious exercise or its core expression is burdened by anti-discrimination law, an organization cannot assert a First Amendment or RFRA claim or defense unless they are willing to commit to publicly affirming discriminatory views.

Of course this may seem like cold comfort in contexts such as transgender rights, where open discrimination remains not only acceptable but lauded in many parts of the United States. But even here, there will likely be some limits on the willingness of some entities to affirm a commitment to discrimination. As the case of the Boy Scouts demonstrates, in today's society affirmation of discriminatory purposes can lead to nonlegal costs (such as diminished public opinion and/or an unwillingness to patronize a discriminatory organization)—and sometimes those costs can ultimately lead to change.[456]

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453. *See supra* notes 450–451 and accompanying text.

454. *See supra* notes 450–451 and accompanying text.

455. As repeatedly observed herein, there are no obvious doctrinal obstacles to such claims, since most of the cases allowing speech- and religion-based entrenchments on anti-discrimination law do not turn on factors specific to the protected group.

456. *See, e.g.*, Kurtis Lee, *Here Is How the Boy Scouts Has Evolved on Social Issues over the Years*, L.A. TIMES (Feb. 5, 2017, 3:00 AM), https://www.latimes.com/nation/la-na-boy-scouts-

Moreover, it is important to note that—in the context of most run-of-the-mine discrimination cases (rather than those orchestrated by an impact organization)—defendants are unlikely to raise speech/religion defenses simply because affirming a discriminatory religious belief or expressive message is unwise litigation strategy. This is because in the vast majority of discrimination cases, defendants deny that they discriminated, an assertion that is fundamentally inconsistent with the prerequisites for a speech/religion claim.[457] (It is hard, for example, to insist that one had a fundamental religious opposition to a transgender employee's manner of dress or identification, while also credibly denying that one discriminated based on transgender status.[458]) It is thus worth remembering that it is important—and not simply pro forma—that speech and religion law continue to require at the threshold a willingness to claim a strongly held commitment to discrimination.

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As described above, there are a variety of steps that anti-discrimination advocates and government entities could take to stabilize current conflicts between speech/religion rights and anti-discrimination law. Read closely, the Supreme Court's precedents do *not* validate the type of expansive speech and religion arguments that a number of the AT study cases endorsed. It is important for advocates and government entities to be clear about the limits of Supreme Court precedent and to advocate for maintaining those limits in both the lower courts and the Supreme Court itself. As described above, there are also legislative and administrative reforms that government entities could undertake that could help stabilize the current expansionary pressures of speech/religion arguments for the invalidity of anti-discrimination law.

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evolution-2017-story.html [https://perma.cc/7NLH-27YC] (describing the changes made within the Boy Scouts).

457. Solon Barocas & Andrew D. Selbst, Essay, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 696 (2016) ("[O]nly very rarely will an employer openly admit to discriminatory conduct.").

458. Of course, an entity would not be barred from making these arguments in the alternative as a matter of civil procedure. *See, e.g.*, FED. R. CIV. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."). Nonetheless, in many circumstances doing so—while technically permissible—would be obviously strategically unwise, especially given the very high levels of success that discrimination defendants have in defending on the merits. *See, e.g.*, Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276–79 (2012) ("[L]ess than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief.").

Of course the measures described herein are not exhaustive.[459] Doctrinally, there are numerous other lines that courts could draw—around what constitutes an expressive association, around what is a constitutionally cognizable burden, and more. Moreover, many scholars have offered thoughtful proposals for more fundamentally rethinking the relationship of speech and/or religion to anti-discrimination law.[460] All such proposals are likely worthy of consideration at a time when speech and religion claims pose—as the AT study cases suggest—a serious threat to anti-discrimination law.

CONCLUSION

Virtually nonexistent a decade ago, anti-transgender constitutional litigation has proliferated since 2016. Such litigation has targeted virtually every arena in which governments have sought to ensure equality for the transgender community, from anti-discrimination law, to trans-affirming school policies, to the efforts of individual teachers, judges, and social services personnel to pursue the best interests of transgender children. Although victories for those opposing transgender rights remain, to date, inconsistent, there is no doubt that the rise of such litigation is deeply troubling for the transgender community.

Moreover, as this Article has suggested, litigation targeting the transgender community ought to be of concern to *all* those who care about anti-discrimination law. While it is often assumed that decisions exempting entities from anti-discrimination laws on speech or religion grounds turn on rulings specific to the LGBTQ community, an analysis of such rulings in the AT context shows that they typically are based on reasoning that would equally apply to all groups. As such, the rights of *every* protected class—race, sex, disability, national origin, and religion itself—may be implicated by the current wave of AT constitutional cases.

This Article has suggested that all is not lost for anti-discrimination law. There are limits to the Supreme Court's current speech/religion doctrine—limits that are important to reaffirm in both the lower courts and the Supreme Court itself. But it is also the case that government entities and litigants ought to take seriously the task of avoiding conflict with expressive and religious commitments where

459. While I have tried herein to focus on ideas that crosscut the various claims that are being raised in this context, there are more specific arguments that could be raised about particular claims, such as Professors Schwartzman, Tebbe, and Schragger's argument that religion law generally disallows substantial third-party harms. *See* Schwartzman et al., *supra* note 59, at 782.

460. *See, e.g.*, *supra* note 9.

they can. It will likely take both affirmative efforts to defend anti-discrimination law and efforts to minimize the spheres of conflict to reach a renewed state of equilibrium with respect to the First Amendment and anti-discrimination law.