

## Shedding Tiers: A New Framework for Equal Protection Jurisprudence

Danielle Stefanucci

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# SHEDDING TIERS: A NEW FRAMEWORK FOR EQUAL PROTECTION JURISPRUDENCE

DANIELLE STEFANUCCI<sup>†</sup>

## INTRODUCTION

This Note argues that the Supreme Court of the United States should reconsider the tiers of scrutiny framework that courts use to evaluate equal protection claims. The Supreme Court has recognized government classifications on the bases of race and gender to be suspect and to merit heightened judicial scrutiny.<sup>1</sup> However, any governmental classification among people is subject to review under the Equal Protection Clause.<sup>2</sup> The class itself is not suspect; the basis for the classification, like race or gender, is treated by courts as more or less suspect.

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<sup>†</sup> Senior Articles Editor, *St. John's Law Review*; J.D. Candidate, 2020, St. John's University School of Law; B.A., 2017, Boston College. Thank you to Professor John Q. Barrett for his invaluable advice and assistance on this Note (and throughout my time in law school) and to my friends and family for their constant, unconditional support.

<sup>1</sup> Current equal protection jurisprudence functions as a three-tiered framework: strict scrutiny, intermediate scrutiny, and rational basis review. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Strict scrutiny requires that the government have a compelling interest achieved using the least restrictive means; it is applied to classifications on the basis of race, national origin, and alienage—or when a fundamental interest is implicated—and the burden of proof is on the government to prove the classification is proper. *See, e.g.*, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Intermediate scrutiny requires the law substantially further an important governmental objective; it is applied to classifications on the basis of sex—where the government must have an “exceedingly persuasive justification”—and nonmarital child status, and the burden of proof is on the government to prove the classification is proper. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–90 (2017); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976). Finally, rational basis review requires that the law is rationally related to a cognizable legislative objective; it is applied to classifications on any basis not found to merit heightened scrutiny, and the burden of proof is on the challenger to prove the classification is invalid. *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 676 (2012); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955).

<sup>2</sup> The equal protection guarantee also applies to the federal government through the liberty guarantee of the Fifth Amendment Due Process Clause. *See United States v. Windsor*, 570 U.S. 744, 769–70 (2013) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

However, employing the tiers of scrutiny no longer makes sense in an era when traditional understandings of race and gender continue to break down. Relatedly, it is time to reassess the current jurisprudential approach because the Supreme Court has frequently failed to adhere to the tiers of scrutiny framework it has articulated.<sup>3</sup> Part I of this Note discusses the breakdown of race and gender as definable and cognizable classes, relying on social science evidence-based understandings of these classifications. Section I.A focuses on the current understanding of gender and contemplates the ramifications of this change on equal protection jurisprudence. Section I.B undertakes the same analysis for race.

Part II suggests a new framework for how equal protection jurisprudence should function in light of these scientific and epistemological changes. In employing this framework, a court considering an equal protection claim would balance the government interest against the individual interest on a case-by-case basis. This approach would change equal protection analysis at all levels of the judiciary: in state courts, federal district courts, circuit courts, and at the Supreme Court.

Part III justifies this new framework as a more egalitarian way to undertake equal protection analysis because it allows a court to consider each case's unique factual circumstances, while still operating within the bounds of established constitutional principles. Part IV applies the suggested framework to two cases—one retrospective and one prospective. The retrospective case focuses on a classification on the basis of age and mirrors the

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<sup>3</sup> For cases where laws were struck down under rational basis review, see, for example, *Romer v. Evans*, 517 U.S. 620, 631–32 (1996); *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 448 (1985); *Plyler v. Doe*, 457 U.S. 202, 220 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973). For arguments that contemporary sex discrimination jurisprudence resembles strict scrutiny, see *United States v. Virginia*, 518 U.S. 515, 579 (1996) (Scalia, J., dissenting) (“This unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases and by itself discredits the Court’s decision.”). For cases where laws were upheld under a strict scrutiny framework, see *Fisher*, 136 S. Ct. 2208; *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Korematsu v. United States*, 323 U.S. 214, 219 (1944). While this failure to comply with existing jurisprudence also underscores the need for a new framework, it is not the focus of this Note.

facts of *Massachusetts v. Murgia*.<sup>4</sup> The prospective case focuses on the United States's military ban on transgender individuals and mirrors the facts of *Karnoski v. Trump*.<sup>5</sup>

## I. THE BREAKDOWN OF CLASSIFICATIONS

### A. Gender

In a series of cases litigated in the 1970s, the Supreme Court recognized government classifications on the basis of sex as suspect and meriting increased judicial scrutiny.<sup>6</sup> In establishing intermediate scrutiny as the appropriate level of scrutiny, the Court employed the terms sex and gender interchangeably.<sup>7</sup> At that time, the conception of sex—both in society and among the Supreme Court justices—was binary: male and female.<sup>8</sup> Additionally, the language of the opinions acknowledged the existence of biological differences between men and women.<sup>9</sup> Based on these innate disparities, the justices concluded that sex-based classifications are not always arbitrary, which formed the central argument for why sex-based classifications only merit

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<sup>4</sup> 427 U.S. 307, 308 (1976).

<sup>5</sup> No. C17-1297-MJP, 2018 WL 1784464, at \*1 (W.D. Wash. Apr. 13, 2018). Plaintiffs alleged that President Donald Trump's ban on transgender individuals serving in the military violates the Equal Protection Clause, substantive due process notions, and the First Amendment. *Id.* at \*4. This Note focuses on the equal protection claim.

<sup>6</sup> In *Reed v. Reed*, decided in 1971, the Court struck down a law classifying on the basis of sex for the first time, albeit under rational basis review. 404 U.S. 71, 76–77 (1971). In *Frontiero v. Richardson*, decided in 1973, sex-based classifications failed to receive five votes to warrant strict scrutiny. 411 U.S. 677, 691 (1973). The Court decided on intermediate scrutiny as the appropriate level of scrutiny in *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

<sup>7</sup> *Craig*, 429 U.S. at 204 (“Suffice to say that the showing offered by the appellees does not satisfy us that *sex* represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact . . . the relationship between *gender* and traffic safety becomes far too tenuous to satisfy Reed’s requirement that the *gender-based* difference be substantially related to achievement of the statutory objective.”) (emphasis added).

<sup>8</sup> GEORGE DVORSKY & JAMES HUGHES, INST. FOR ETHICS AND EMERGING TECHNOLOGIES, POSTGENDERISM: BEYOND THE GENDER BINARY 2 (2008). The language of the Court’s opinions also reinforces this conception. See *Craig*, 429 U.S. at 197 (“[S]tatutory classifications that distinguish between *males and females* are ‘subject to scrutiny under the Equal Protection Clause.’ To withstand constitutional challenge, previous cases establish that classifications by *gender* must serve important governmental objectives and must be substantially related to achievement of those objectives.” (quoting *Reed*, 404 U.S. at 75) (citation omitted) (emphasis added)).

<sup>9</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women, however, are enduring . . .”).

intermediate scrutiny.<sup>10</sup> While some feminist and progressive scholars distinguished gender from sex and saw gender as a social construct, this was not the mainstream view at that time.<sup>11</sup>

Today, scientific scholarship distinguishes between sex and gender.<sup>12</sup> Sex refers to a biological classification, whereas gender refers to an individual's self-identity and the social representation of that identity.<sup>13</sup> "One is not born, but rather becomes, a woman," such that an individual is born with a biological sex but must learn feminine or masculine behaviors to accord with societal expectations.<sup>14</sup>

Sex, while less complicated than gender, has its own complexities: male and female are the two principal biological sexes, but other identities exist as well.<sup>15</sup> In terms of chromosomal makeup, most humans are born with forty-six chromosomes in twenty-three pairs, and the X and Y chromosomes determine a person's sex.<sup>16</sup> Therefore, most women manifest as 46XX and most men as 46XY.<sup>17</sup> However, according to the World Health Organization, some individuals are born with a single sex chromosome, such as those with Turner syndrome, and others with three or more sex chromosomes, such as those with Klinefelter syndrome, among other variations.<sup>18</sup> Intersexuality

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<sup>10</sup> See, e.g., *id.* ("Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.")

<sup>11</sup> See DVORSKY & HUGHES, *supra* note 8, at 5; see generally ANN OAKLEY, *SEX, GENDER, AND SOCIETY* 3 (1972).

<sup>12</sup> See, e.g., Joy L. Johnson & Robin Repta, *Sex and Gender: Beyond the Binaries*, in *DESIGNING AND CONDUCTING GENDER, SEX, AND HEALTH RESEARCH* 17, 17 (John Oliffe & Lorraine Greaves, eds., 2011); Albertine J. Odlehinkel, *Editorial: Let's Talk About Sex—The Gender Binary Revisited*, *J. CHILD PSYCHOL. & PSYCHIATRY* 863, 863 (2017); Britta N. Torgrimson & Christopher T. Minson, *Sex and Gender: What is the Difference?*, *J. APPLIED PHYSIOLOGY* 785, 785–86 (2005), <https://www.physiology.org/doi/full/10.1152/jappphysiol.00376.2005>.

<sup>13</sup> See, e.g., Johnson & Repta, *supra* note 12, at 17; Odlehinkel, *supra* note 12, at 863; Torgrimson & Minson, *supra* note 12, at 785–86.

<sup>14</sup> JUDITH LORBER, *PARADOXES OF GENDER* 22 (1994) (quoting SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshley trans., 1953)).

<sup>15</sup> *Gender and Genetics*, WORLD HEALTH ORG., <http://www.who.int/genomics/gender/en/index1.html> (last visited Oct. 20, 2019).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Some females are born 46XY due to mutations in the Y chromosome, and some males are born 46XX due to a translocation of a section of the Y chromosome. *Id.*

<sup>18</sup> *Id.* Turner syndrome, which only affects women, occurs when one of the X chromosomes is missing or partially missing and can lead to a variety of developmental and medical problems, including short stature and heart defects. *Turner Syndrome*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/turner-syndrome/symptoms-causes/syc-20360782> (last visited Oct. 20, 2019).

introduces another complication in differentiating among sexes; the World Health Organization broadly defines intersexuality as a “congenital anomaly of the reproductive and sexual system.”<sup>19</sup> The incidence of intersexuality—while difficult to reliably approximate—is estimated at between one and two percent of the global population, but it may be as high as four percent.<sup>20</sup>

Additionally, scientific scholars no longer consider gender to be binary, a change which has been reflected in the gender identity lexicon.<sup>21</sup> At its core, gender identity is internal and self-identified.<sup>22</sup> According to the American Psychological Association, gender identity refers to a “person’s deeply felt, inherent sense of being a boy, a man, or male; a girl, woman, or female; or an alternative gender . . . that may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristics.”<sup>23</sup> Self-identification permits a multiplicity of gender identities, including transgender, gender-fluid,<sup>24</sup> agender,<sup>25</sup> genderqueer,<sup>26</sup> and the umbrella term

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Klinefelter syndrome, which only affects men, occurs when there is an extra X chromosome and can affect puberty and fertility. *Klinefelter Syndrome*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/klinefelter-syndrome/symptoms-causes/syc-20353949> (last visited Oct. 20, 2019).

<sup>19</sup> *Gender and Genetics*, *supra* note 15.

<sup>20</sup> See DVORSKY & HUGHES, *supra* note 8, at 3. This higher figure for the incidence of intersexuality reflects a definition including “all genital abnormalities.” *Id.*; see also Anne Fausto-Sterling, *How Many Sexes Are There*, N.Y. TIMES, Mar. 12, 1993, at A29 (claiming John Money, a specialist in congenital sex-organ defects at Johns Hopkins University, estimates the incidence of intersexual individuals at four percent).

<sup>21</sup> See, e.g., Cyndney Adams, *The Gender Identity Terms You Need to Know*, CBS NEWS (March 24, 2017, 10:22 AM), <https://www.cbsnews.com/news/transgender-gender-identity-terms-glossary/>.

<sup>22</sup> American Psychological Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AMERICAN PSYCHOLOGIST, 832, 862 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> The term “gender-fluid,” not added to the Oxford English Dictionary until 2016, is defined as “a person who does not identify with a single fixed gender; of or relating to a person having or expressing a fluid or unfixed gender identity.” Noel Gutierrez-Morfin, *‘Gender-Fluid’ Among Recent Additions to Oxford English Dictionary*, NBC NEWS (Sept. 16, 2016, 4:46 P.M.), <https://www.nbcnews.com/feature/nbc-out/gender-fluid-among-recent-additions-oxford-english-dictionary-n649571>.

<sup>25</sup> “Agender” is defined as “[d]esignating a person who does not identify as belonging to a particular gender; of or relating to such people.” *Agender*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/47450702?redirectedFrom=agender> (last visited Oct. 20, 2019).

<sup>26</sup> “Genderqueer” is defined as “designating a person who does not subscribe to conventional gender distinctions, but identifies with neither, both, or a combination of male and female genders”; according to the OED, “*Genderqueer* is used as neutral or positive term of self-reference, without regard to, or in implicit denial of, the

of gender non-binary.<sup>27</sup> Transgender identity encompasses individuals “whose sense of personal identity and gender does not correspond to that person’s sex at birth,” and includes, but is not limited to, those who have undergone gender reassignment surgery.<sup>28</sup> Further, transgender has superseded “transsexual” and “transvestite” as the socially acceptable term.<sup>29</sup>

Perhaps driven by sociological and scientific experts, laypeople have also relaxed their strict conception of gender roles. In the 1970s, the popular stereotype was that women ought to be wives and mothers.<sup>30</sup> This was reflected in the female labor force participation rate, which was between forty-two and fifty percent, compared to around fifty-six percent today.<sup>31</sup> In the early 1970s, only fifteen to twenty members of the House of Representatives and one or two Senators were women; consequently, women were unable to remedy discrimination against them from inside the political process.<sup>32</sup> The 116th Congress, elected in the 2018 midterm elections, has 126 female representatives out of a total of 535 representatives.<sup>33</sup> The House of Representatives also boasts a record number of women, with 100 female representatives—thirty-five newly elected, sixty-five incumbent—compared to a previous high of eighty-five.<sup>34</sup>

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original negative connotations of QUEER.” *Gender*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/77468?redirectedFrom=genderqueer#eid237081402> (last visited Oct. 20, 2019).

<sup>27</sup> Adams, *supra* note 21 (“Non-binary: Any gender that falls outside of the binary system of male/female or man/woman.”).

<sup>28</sup> *Transgender*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/dictionaryentry/Entry/247649> (last visited Oct. 20, 2019).

<sup>29</sup> *A Guide to Transgender Terms*, BBC MAGAZINE (June 3, 2015), <https://www.bbc.com/news/magazine-32979297>.

<sup>30</sup> See, e.g., Kristin Donnelly, et al., *Attitudes Towards Women’s Work and Family Roles in the United States, 1976-2013*, PSYCHOL. WOMEN Q. 41, 41 (2016).

<sup>31</sup> International Labor Organization, *Labor Force Participation Rate, Female*, WORLD BANK, <https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?locations=US> (last visited Oct. 20, 2019); Bureau of Labor Statistics, *Women at Work: A Visual Essay*, MONTHLY LAB. REV., Oct. 2003, at 46, <https://www.bls.gov/opub/mlr/2003/10/ressum3.pdf>.

<sup>32</sup> MILDRED AMER, CONG. RESEARCH SERV., *WOMEN IN THE UNITED STATES CONGRESS: 1917-2008* 96–97 (2008).

<sup>33</sup> Eli Watkins, *Record Number of Women Elected to the House*, CNN (Nov. 9, 2018), <https://www.cnn.com/2018/11/07/politics/women-house-senate/index.html>.

<sup>34</sup> *Id.*

The development of scientific and lay perceptions reveals that sex-based classifications frequently rely on antiquated stereotypes.<sup>35</sup> It is reductive to assume that an entire sex has the same abilities, or inabilities, in any particular area: for example, a particular woman may be less equipped to be an estate administrator than a particular man, but the assumption cannot be made that all men are more equipped than all women for such a role without individualized determinations.<sup>36</sup> In light of scientific evidence that gender is socialized and has no biological basis, gender may in fact always be an invalid basis for classification; by that logic, such a classification would be precluded even when the distinction relates to biological differences.

It is more complicated to employ the characteristics that led to sex-based classifications being deemed suspect in this context of new gender identity descriptors.<sup>37</sup> First, since gender identity is self-identified rather than based on objective biological criteria, there are an ostensibly unlimited number of identities.<sup>38</sup> Consequently, a legislature, or any other government actor, cannot reliably define a class with demarcated boundaries, particularly given that the characteristic may not be visible because it is the product of an individual's wholly valid, but subjective, mental state.<sup>39</sup> For example, the transgender military ban implementation plan excludes from military service both those "with a history or diagnosis of gender dysphoria" and those

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<sup>35</sup> Brief for Appellant at 17, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) ("Whatever differences may exist between the sexes, legislative judgments have frequently been based on inaccurate stereotypes of the capacities and sensibilities of women."). This brief was drafted by Ruth Bader Ginsburg while she was a law professor at Rutgers Law School, along with Melvin Wulf for the American Civil Liberties Union ("ACLU"). Ginsburg was the co-founder of the Women's Rights Project at the ACLU in 1972 and argued six gender discrimination cases before the Supreme Court between 1973 and 1978. *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff> (last visited Oct. 20, 2019); see also *Ruth Bader Ginsburg*, OYEZ, [https://www.oyez.org/justices/ruth\\_bader\\_ginsburg](https://www.oyez.org/justices/ruth_bader_ginsburg) (last visited Oct. 20, 2019).

<sup>36</sup> Brief for Appellant, *supra* note 35, at 20 ("The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members.").

<sup>37</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 686–89 (1973).

<sup>38</sup> See American Psychological Ass'n, *supra* note 22.

<sup>39</sup> *Cf.*, Brief for Appellant, *supra* note 35, at 15 ("Both classifications [of race and gender] create large, natural classes."); see also American Psychological Ass'n, *supra* note 22.



who “require or have undergone gender transition.”<sup>40</sup> This definition of transgender does not include all those who may identify as transgender; it attempts to impose a biological criterion on a self-defined characteristic. Transgender identity, as understood by the scientific community, requires only gender identification different from birth sex; consequently, it also includes individuals who may never have sought treatment for gender dysphoria and may never undergo hormone therapy or sex reassignment surgery.<sup>41</sup>

Second, even if legislatures were able to reliably define classes based on these new categories, the classes could be based on non-binary identity generally or transgender identity specifically. The former defines a class by negative implication: it is not an affirmatively defined class, but a catchall “other” of those who do not identify as male or female.<sup>42</sup> These imprecise classifications are at issue in the cases pertaining to transgender servicemembers in the military and bathroom usage by transgender students.<sup>43</sup> In the latter, certain public schools require individuals to use the bathroom of the sex to which they were biologically assigned at birth or lack a defined policy on the issue.<sup>44</sup> The Trump administration, through Department of Health and Human Services regulations, is also considering amending the legal definition of sex under Title IX.<sup>45</sup> Under the new regulations, sex would be “either male or female, unchangeable, and determined by the genitals a person is born with.”<sup>46</sup> This classification would affect not only transgender people, but anyone who identifies as non-binary, a more expansive category. While Title IX claims are statutory rather than constitutional, this proposed change in

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<sup>40</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*1 (W.D. Wash. Apr. 13, 2018).

<sup>41</sup> S.C. Meier & C.M. Labuski, *The Demographics of the Transgender Population*, in INTERNATIONAL HANDBOOK OF THE DEMOGRAPHY OF SEXUALITY 289, 291 (A.K. Baumle ed. 2013).

<sup>42</sup> *Non-binary*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/non-binary> (last visited Oct. 20, 2019) (“Denoting or relating to a gender or sexual identity that is not defined in terms of traditional binary oppositions such as male and female or homosexual and heterosexual.”).

<sup>43</sup> *See, e.g., Karnoski*, 2018 WL 1784464, at \*1; *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 736–37 (E.D. Va. 2018).

<sup>44</sup> *See, e.g., Grimm*, 302 F. Supp. 3d at 737–38.

<sup>45</sup> Erica L. Green, Katie Benner & Robert Pear, *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

<sup>46</sup> *Id.*

the legal definition of sex could be translated to the equal protection context and would implicate questions of the appropriate reference classes.

Were the courts to move forward with these new proposed bases for classification—like non-binary status or transgender status—courts would have to consider whether to delineate them separately or to include them in the already established areas of sex or sexual orientation. If defined separately, governmental classifications on these bases would likely only be analyzed under rational basis review because the Court infrequently recognizes new suspect classifications.<sup>47</sup> Rational basis review provides very little protection to the challenger and requires a finding of animus—no rational legislative purpose—to be struck down.<sup>48</sup>

If these classifications were included in current gender jurisprudence, the legal inequalities of those groups would be subsumed into those of women; while there are still inequalities between men and women, the issues, both legal and cultural, faced by gender non-binary individuals are distinct from those faced by women.<sup>49</sup> Additionally, a transgender woman may identify as a woman and not necessarily as transgender; would this exclude her from a so-called “transgender” class? Nor do transgender individuals, while included in the LGBT acronym, necessarily have the same concerns as those who identify as lesbian, gay, or bisexual.<sup>50</sup> Recent litigation pertaining to LGB individuals focused on marriage equality, whereas transgender individuals face discrimination in the workplace, housing, school, healthcare, etc.<sup>51</sup> As a result, some transgender activists call for dissociating

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<sup>47</sup> The last recognition of a suspect classification was nonmarital child status in 1988. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>48</sup> However, for cases where laws were struck down under rational basis review, see *supra* text accompanying note 3.

<sup>49</sup> See Nikki Graff, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 9, 2018), <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts> (recognizing a wage gap of around 18% between men and women); see also Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers> (last visited Oct. 20, 2019) (recognizing the leaders of the #MeToo movement as Time people of the year).

<sup>50</sup> See Alexandra Bolles, *5 of the Most Unsettling Realities for America’s Trans Community*, GLAAD (Feb. 19, 2015), <https://www.glaad.org/blog/5-most-unsettling-realities-americas-trans-community>.

<sup>51</sup> *Compare Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03, 2608 (2015) (recognizing same-sex marriage as a right protected by the due process clause of the Fourteenth Amendment and the Equal Protection Clause), *with* National

transgender individuals from the LGBT acronym, and the ACLU has a separate category for transgender issues within LGBT rights on its website.<sup>52</sup>

Gender identity is also distinct from sexual orientation: if a transgender woman also identifies as a lesbian, into which “class” would she be properly categorized?<sup>53</sup> These complicated intersections highlight the conflict between individual identity and governmental classifications. Intersectionality, introduced by Kimberlé Crenshaw in 1989 to describe the unique disadvantages of black women, refers to the “overlapping and interdependent systems of discrimination or disadvantage.”<sup>54</sup> Legislation seeks to work with a set of broad-based facts and, in doing so, may often gloss over individual experiences.

Further, many gender identities are poorly defined or have overlapping definitions.<sup>55</sup> For example, there may not be a meaningful distinction between genderfluidity and genderqueerness.<sup>56</sup> Even if so, these are arguably not distinctions that should be parsed by justices in trying to carve out new protected classes.<sup>57</sup> The proliferation of gender identities raises

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Transgender Discrimination Survey: Full Report, NAT'L CTR. FOR TRANSGENDER EQUALITY (Sept. 11, 2012), <https://transequality.org/issues/resources/national-trans-gender-discrimination-survey-full-report>.

<sup>52</sup> See Katie Glover, *Why It's Time to Take the T out of LGBT*, INDEPENDENT (Sept. 10, 2015), <https://www.independent.co.uk/voices/why-its-time-to-take-the-t-out-of-lgbt-10493352.html>; *LGBT Rights*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/lgbt-rights>.

<sup>53</sup> Carla Moleiro & Nuna Pinto, *Sexual Orientation and Gender Identity: Review of Concepts, Controversies, and Their Relation to Psychopathology Classification Systems*, FRONTIERS PSYCHOL. (2015) (asserting that sexual orientation and gender identity are distinct).

<sup>54</sup> *Intersectionality*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/429843> (last visited Oct. 20, 2019); see also Merrill Perlman, *The Origin of the Term 'Intersectionality'*, COLUM. JOURNALISM REV. (Oct. 23, 2018), [https://www.cjr.org/language\\_corner/intersectionality.php](https://www.cjr.org/language_corner/intersectionality.php).

<sup>55</sup> See *supra* notes 23–28 for a discussion of definitions of different gender identities.

<sup>56</sup> See *supra* notes 24 and 26, specifically highlighting the ambiguities and overlap in these two definitions.

<sup>57</sup> This accords with ideas of judicial restraint. See, e.g., Robert Barnes, *Roberts Emphasizes High Court's Restraint, Independence*, WASHINGTON POST (May 7, 2016), [https://www.washingtonpost.com/politics/courts\\_law/chief-justice-says-independence-and-restraint-should-be-high-courts-guiding-lights/2016/05/07/c42fdf5c-139d-11e6-8967-7ac733c56f12\\_story.html?noredirect=on](https://www.washingtonpost.com/politics/courts_law/chief-justice-says-independence-and-restraint-should-be-high-courts-guiding-lights/2016/05/07/c42fdf5c-139d-11e6-8967-7ac733c56f12_story.html?noredirect=on). Additionally, judges may be more biased than the general public in cases where traditional gender roles are challenged. See *Judges as Susceptible to Gender Bias as Laypeople—and Sometimes More So*, SCIENCE DAILY (Apr. 19, 2018), <https://www.sciencedaily.com/releases/2018/04/>

the question of the stopping point: would each individual gender identity require its own suspect class recognition? In sum, it is likely improper for a judge to reject an individual's self-identification and impose his own conception of what that individual's gender might be.

Courts defer to self-identified characteristics in some areas of constitutional jurisprudence, including religion.<sup>58</sup> In cases implicating the Free Exercise Clause, courts do not inquire into veracity of beliefs, but, once determining that they are sincerely held, deem them valid.<sup>59</sup> This underlies the contention that given the failure of gender as a binary classification, suspect classification analysis—especially given the Court's reluctance to recognize new suspect classes—falls short in considering the new issues faced with a multiplicity of gender identities.

### B. Race

The Supreme Court recognized race and national origin as suspect bases for classification in 1944.<sup>60</sup> The Equal Protection Clause aimed to protect newly-freed African Americans as one of the post-Civil War Reconstruction amendments.<sup>61</sup> In the first definition of the Fourteenth Amendment, the *Slaughter-House Cases* characterized its “pervading purpose” as “the freedom of the slave race, the security and firm establishment of that freedom,

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180419141541.htm (discussing Andrea L. Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, SOC. PSYCHOL. & PERSONALITY SCI. (2018)).

<sup>58</sup> See *United States v. Seeger*, 380 U.S. 163, 184–85 (1965).

<sup>59</sup> *Id.* (“Local boards and courts in this sense are not free to reject beliefs because they consider them ‘incomprehensible.’ Their task is to decide whether the beliefs professed by a registrant are sincerely held . . . . This is the threshold question of sincerity which must be resolved in every case.”).

<sup>60</sup> *Korematsu v. United States* stated that while classifications based on race are not per se unconstitutional, courts must subject them to “the most rigid scrutiny.” 323 U.S. 214, 216 (1944); see also *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”).

<sup>61</sup> The *Slaughterhouse Cases*, 83 U.S. 36, 71 (1872). John Bingham, the amendment's principal drafter, said the following:

No state ever had the right, under the forms of law or otherwise, to deny to any freemen the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.

Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEGAL HIST. 41, 45 (1996) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866)).

and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>62</sup> This paternalistic attitude towards people of color persisted into the 1950s, when most of the race-based classification cases were decided.<sup>63</sup> At this time, race was frequently understood by the general public to have a biological basis, despite contrary statements by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”).<sup>64</sup> The massive pushback against *Brown v. Board of Education* and the continued existence of anti-miscegenation laws underscored the conception that black people were widely considered biologically inferior to white people.<sup>65</sup> Many, including the trial court judge in *Loving v. Virginia*—the case striking down anti-miscegenation statutes as violating the Equal Protection Clause—continued to believe the two races should not mix in schools or in marriages.<sup>66</sup>

While race relations in the United States are still fraught with tension, the country’s popular conception of race has changed dramatically.<sup>67</sup> There is consensus among the biological, anthropological, and sociological academic communities that race is a social construct with no biological basis.<sup>68</sup> Race raises a

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<sup>62</sup> *The Slaughterhouse Cases*, 83 U.S. at 71.

<sup>63</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950).

<sup>64</sup> Robert Wald Sussman, *There Is No Such Thing as Race*, NEWSWEEK (Nov. 8, 2014, 3:01 P.M.), <https://www.newsweek.com/there-no-such-thing-race-283123>.

<sup>65</sup> The governor of Arkansas ordered the Arkansas National Guard to stand shoulder to shoulder to prevent admitted black students from entering the newly desegregated school. *Cooper v. Aaron*, 358 U.S. 1, 11 (1958).

<sup>66</sup> 388 U.S. 1, 3 (1967) (“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.” (quoting the trial court opinion)). Possible governmental purposes for anti-miscegenation statutes were to “‘preserve the racial integrity of its citizens’, and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’” *Id.* at 7.

<sup>67</sup> See, e.g., Andrew Arengé, Stephanie Perry & Dartunorro Clark, *Poll: 64 Percent of Americans Say Racism Remains a Major Problem*, NBC NEWS (May 29, 2018, 4:44 AM), <https://www.nbcnews.com/politics/politics-news/poll-64-percent-americans-say-racism-remains-major-problem-n877536>; see also German Lopez, *There are Huge Racial Disparities in How US Police Use Force*, VOX (Nov. 14, 2018, 4:12 PM), <https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities>.

<sup>68</sup> See, e.g., Audrey Smedley & Brian D. Smedley, *Race as Biology is Fiction, Racism as a Social Problem is Real: Anthropological and Historical Perspective on the*

reference class question similar to gender, namely how to define the proper boundaries of a racial group to best facilitate courts' analyses. This ambiguity extends to dictionary definitions. Merriam-Webster defines race as all of the following: "a family, tribe, people, or nation belonging to the same stock," "a class or kind of people unified by shared interests, habits, or characteristics," and "an actually or potentially interbreeding group within a species."<sup>69</sup>

Given that there are no biological distinctions underlying what we understand as racial groups, there is no valid reason for classifying individuals on the basis of those groups in the first place. However, despite their biological irrelevance, social constructions of racial groups have arguably become endowed with independent cultural significance.<sup>70</sup> Delineation of racial groups allows the dominant group to otherize and to justify subjugation towards minority groups.<sup>71</sup> The question of majoritarianism becomes increasingly complex in light of demographic projections that white Americans will constitute less than half the population in 2044; a group of diminishing size may feel increasingly threatened.<sup>72</sup>

However, even among social constructions of racial groups, proper boundaries are difficult to ascertain. For example, the number of races in the current American cultural context is ambiguous.<sup>73</sup> As of the 2017 census, the United States Census Bureau demarcated five categories for race: White, Black or African American, American Indian or Alaska Native, Asian, and

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*Social Construction of Race*, 60 AM. PSYCHOLOGIST 16, 16 (2005) ("[R]acial distinctions . . . are not genetically discrete, are not reliably measured, and are not scientifically meaningful.").

<sup>69</sup> *Race*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/race> (last visited Oct. 20, 2019).

<sup>70</sup> See, e.g., Smedley & Smedley, *supra* note 68.

<sup>71</sup> See, e.g., Karen D. Pyke, *What Is Internalized Racial Oppression and Why Don't We Study It? Acknowledging Racism's Hidden Injuries*, 53 SOC. PERSP. 551, 557 (2010).

<sup>72</sup> Sabrina Tavernise, *Why the Announcement of a Looming White Minority Makes Demographers Nervous*, N.Y. TIMES (Nov. 22, 2018), [https://www.nytimes.com/2018/11/22/us/white-americans-minority-population.html?emc=edit\\_rr\\_20181123&nl=race-related&nid=4814983420181123&te=1](https://www.nytimes.com/2018/11/22/us/white-americans-minority-population.html?emc=edit_rr_20181123&nl=race-related&nid=4814983420181123&te=1); see Laretta Charlton, *What Is the Great Replacement?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/politics/grand-replacement-explainer.html?login=email&auth=login-email> (stating that the rallying cry of the Charlottesville white nationalists was "[y]ou will not replace us").

<sup>73</sup> See, e.g., *About Race*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (last visited Oct. 20, 2019).

Native Hawaiian or other Pacific Islander.<sup>74</sup> The Bureau also permits reporting of more than one race in the census.<sup>75</sup> The Bureau website explains that “[p]eople who identify their origin as Hispanic, Latino, or Spanish may be of any race,” evincing the imprecision of measuring race even for census purposes.<sup>76</sup>

Furthermore, according to the census definition, “White” includes “[a] person having origins in any of the original peoples of Europe, the Middle East, or North Africa.”<sup>77</sup> Under this imprecise rubric, the United States government homogenizes culturally distinct experiences.<sup>78</sup> The experience of a Middle Eastern or North African (“MENA”) individual in the United States likely differs significantly from that of someone from Western Europe.<sup>79</sup> This disparate treatment has worsened with the presidential election of Donald Trump in 2016.<sup>80</sup> Additionally, someone of North African origin may “pass” as black, but under the current census categories, that individual would be categorized with white individuals of European origin. Additionally, Asian and Middle Eastern are two distinct categories, discounting the fact that the Middle East is a part of Asia.<sup>81</sup> Ostensibly, someone of Middle Eastern descent could be properly categorized as either Asian or White/MENA. While this provides only one illustration, the confusion inherent in the census categories underscores the difficulty of reliably defining racial groups.

The treatment of mixed-race individuals under the Equal Protection Clause raises a new set of questions. In *Plessy v. Ferguson*, the Court treated an individual who was “of mixed descent, in the proportion of seven-eighths Caucasian and

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream*, PEW RES. CTR. (July 26, 2017), <http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/>.

About forty percent of Muslim adults identify as white, including Arabs and people of Middle Eastern descent. *Id.*

<sup>79</sup> See, e.g., Ibrahim Hooper, *CAIR Report: Anti-Muslim Bias Incidents, Hate-Crimes Spike in Second Quarter of 2018*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 12, 2018), [https://www.cair.com/cair\\_report\\_anti\\_muslim\\_bias\\_incidents\\_hate\\_crimes\\_spike\\_in\\_second\\_quarter\\_of\\_2018](https://www.cair.com/cair_report_anti_muslim_bias_incidents_hate_crimes_spike_in_second_quarter_of_2018).

<sup>80</sup> *Id.*

<sup>81</sup> *The Regions of Asia*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Asia/The-regions-of-Asia> (last visited Oct. 20, 2019).

one-eighth African blood” as black.<sup>82</sup> However, the racial identity of a mixed-race person may differ significantly from that of someone who more visibly belongs to a historically disadvantaged minority.<sup>83</sup> Mixed-race Americans with one white parent may also identify culturally as white rather than as a member of the minority group.<sup>84</sup> Additionally, according to Pew Research Center, more than a quarter of Asian people and Hispanic people marry outside of their race, which will lead to a higher percentage of mixed-race individuals in the United States in the coming decades.<sup>85</sup>

These analyses of gender and race emphasize the need to shift the focus of equal protection analysis from classes to individuals. The failure to classify gender and race as discrete, consistently definable classes—if they ever were—requires a court, in determining whether the basis for governmental classifications is indeed proper, to consider the individual at issue, rather than a purported class to which the individual may belong.

## II. A NEW FRAMEWORK FOR EQUAL PROTECTION JURISPRUDENCE

The issues delineated above underscore the need for a new framework for equal protection jurisprudence, one not predicated on defined classes. The Supreme Court itself seems to recognize this need whenever it does not adhere to the three-tiered framework and instead engages in results-oriented decision-making.<sup>86</sup> Consequently, instead of urging the Court to increase the number of suspect classifications and to articulate a level of scrutiny for each, this framework urges that a balancing test should be employed, with candor, on a case-by-case basis.<sup>87</sup> In each case where the Equal Protection Clause is implicated, a court should weigh government interests against individual interests.<sup>88</sup>

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<sup>82</sup> 163 U.S. 537, 538 (1896).

<sup>83</sup> Tavernise, *supra* note 72.

<sup>84</sup> *Id.*

<sup>85</sup> Gretchen Livingston & Anna Brown, *Intermarriage in the United States 50 Years After Loving v. Virginia*, PEW RES. CTR. (May 18, 2017), <http://www.pewsocialtrends.org/2017/05/18/1-trends-and-patterns-in-intermarriage/>.

<sup>86</sup> *See supra* text accompanying note 3.

<sup>87</sup> Only race, national origin, alienage, gender, and nonmarital children constitute suspect or quasi-suspect classes. *See* *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016); *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

<sup>88</sup> Justices Thurgood Marshall and John Paul Stevens advocated balancing tests in equal protection jurisprudence. *See* *Dandridge v. Williams*, 397 U.S. 471, 521 (1970)



This framework applies to any court hearing an equal protection claim, whether in the first instance, on appeal, or on writ of certiorari. If the government's interest is found to be weightier than the individual interest, the government would prevail, and vice versa.

A. *Government Interest*

The government interest side of the balancing test resembles current equal protection jurisprudence: it would consider the government's purpose and how well the challenged classification fits with, or accomplishes, that purpose.<sup>89</sup>

The government must present an intelligible purpose. Unlike existing rational basis review, where the burden is on the challenger and the reviewing court will impute purpose, the government must provide an intelligible and valid purpose to the court.<sup>90</sup> A purpose is invalid if it is grounded in animus. "Animus," as defined by the Supreme Court, is the "bare . . . desire to harm."<sup>91</sup> *Moreno* frames animus in terms of harming a "politically unpopular group"; however, animus can be directed at an individual, both in the class of one context and the notion of harming a person based on a characteristic that reflects his membership in a politically unpopular group.<sup>92</sup>

A reviewing court should not accept the government's statement of purpose as valid on its face: the court must consider the law's purpose ascertain whether the legislature was driven by animus in creating it. The government's proffered purpose also

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(Marshall, J., dissenting) (arguing the Court should balance "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification"); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring) ("What class is harmed by the legislation, and has it been subjected to a tradition of disfavor by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?" (internal quotation marks omitted)).

<sup>89</sup> See, e.g., *Fisher*, 136 S. Ct. at 2208 (articulating the use of purpose and fit in the context of strict scrutiny analysis as "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose" (internal quotation marks omitted)).

<sup>90</sup> See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955) ("Moreover, it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism.").

<sup>91</sup> *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>92</sup> See *id.*; see also *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

should not be a post hoc rationalization of purpose.<sup>93</sup> To the extent possible, the proffered purpose must be the actual purpose. If the government's purpose is invalid, the government would automatically lose.

If the government's purpose is valid and intelligible, a court would next analyze fit—how well the challenged law effectuates the proffered interest. A court would choose among the existing categories to evaluate fit. The categories are as follows: (1) necessary to achieve the interest, (2) substantially related to the interest, (3) rationally related to the interest, and (4) of no relation to the interest.<sup>94</sup> Fit informs whether the classification drawn by the law is overinclusive, underinclusive, or both over- and underinclusive. The legislature need not draw its classifications with “mathematical nicety.”<sup>95</sup> However, the more narrowly tailored the classification, the more likely the legislature is to be effectuating its actual purpose without relying on stereotypes or over-generalizations.<sup>96</sup> The more tailored the fit is to the purpose, the more weight is given to the government's interest.

### *B. Individual Interest*

The individual interest side of the balancing test employs a multi-factor test. This multi-factor test evaluates the individual characteristic upon which the government's classification is based. For example, if a law restricted open service by transgender individuals in the military, gender identity would be the appropriate reference characteristic. Using this framework, a court would both draw on the factors courts have historically evaluated in determining whether a suspect classification exists and apply additional factors.<sup>97</sup> Crucially, a court need not identify

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<sup>93</sup> See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”).

<sup>94</sup> See, e.g., *Fisher*, 136 S. Ct. at 2208; *Virginia*, 518 U.S. at 533; *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>95</sup> *Lindsley v. Nat'l Carbonic Gas, Co.*, 220 U.S. 61, 78 (1920).

<sup>96</sup> *Romer*, 517 U.S. at 633. The Court considered the breadth of the disability imposed by the classification as probative of whether it was valid. *Id.*

<sup>97</sup> In determining the existence of a suspect classification, courts have extrapolated from footnote 4 of *United States vs. Carolene Products*. 304 U.S. 144, 152 n.4 (1938) (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a

a suspect classification implicating every individual with that characteristic. This would provide a more flexible standard for courts to apply. The list of factors is not necessarily exhaustive; however, a court would primarily rely on the factors articulated here and logical outgrowths of those factors that may be particularly applicable in a given case.

The proposed factors are as follows, framed with reference to the individual characteristic upon which the classification is based: (1) Has the government historically discriminated against people with this characteristic, or is this kind of government action a “new”—within the last few decades—discrimination against people with this characteristic? (2) Does this characteristic have no impact on the individual’s ability to contribute to society? (3) Is the characteristic immutable? (4) Does the characteristic cause the individual to be distant from the political process? (5) Is the characteristic visible? (6) Is the government imposing a burden on the individual in classifying on the basis of this characteristic? (7) Does the characteristic lack comprehensive statutory protections? (8) Does the infringed right have a close nexus to protected constitutional rights? (9) Does the right being infringed upon cause a highly burdensome deprivation to the individual?

The factors are listed in roughly decreasing order of importance; consequently, a court should accord more weight to the factors higher on the list. The more factors present, the more weight given to the individual interest. However, there is no level of mathematical precision as to the factors’ relative weight. In past decisions, no single factor has been dispositive in recognizing a suspect class, but the presence of any one factor indicates the classification is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.”<sup>98</sup> However, courts have particularly emphasized history of discrimination and the characteristic’s relation to the individual’s ability to function in society.<sup>99</sup>

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correspondingly more searching judicial inquiry.”). Consequently, courts consider history of discrimination, immutability, and distance from the political process. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 684–87 (1973).

<sup>98</sup> *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

<sup>99</sup> *See, e.g.,* *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985–86 (N.D. Cal. 2012) (expanding on the principles of suspect class recognition from *Plyler v. Doe*); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432–35 (Conn. 2008).

## III. JUSTIFICATIONS FOR THE FRAMEWORK

A. *Justifications for the Individual Interest Factors*

This section explains the inclusion of each of the factors relating to individual interests described above. History of discrimination gets to the heart of the equal protection inquiry: that the government classified based on this characteristic for invalid reasons and in light of past maltreatment suggesting unfounded antipathy.<sup>100</sup> Conversely, in terms of “new” discrimination, governmental discrimination need not be centuries-long to be disabling on a class; an example is discrimination, including by the Trump administration, against transgender individuals.<sup>101</sup>

If the characteristic has no bearing on the individual’s ability to contribute in society, the government is likely invalid in employing it because “legal burdens should bear some relationship to individual responsibility.”<sup>102</sup> In terms of immutability, are sexual orientation and gender identity immutable? While an individual can transition to another gender, which would seem to imply mutability, identification as the gender to which the individual transitioned is immutable. A court would need to grapple with these questions and take into account scientific evidence to determine whether this factor is present. Distance from the political process undergirded the Court’s decision in *Romer v. Evans*, where LGB individuals needed to amend the state constitution rather than merely pass a law to disable discrimination against them.<sup>103</sup> Moreover, courts need to step in and be more scrutinizing when the political process is not a viable

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<sup>100</sup> See, e.g., *Frontiero*, 411 U.S. at 684 (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.”).

<sup>101</sup> See, e.g., *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*10–13 (W.D. Wash. Apr. 13, 2018).

<sup>102</sup> *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); see, e.g., *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (recognizing the imposition of penalties on an “illegitimate child” is illogical and unjust because the penalties have no relation to the child’s individual responsibility or wrongdoing).

<sup>103</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“Homosexuals are forbidden the safeguards that others enjoy or may seek without restraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution . . .”).

vehicle to effect change. If the characteristic is visible, it is more likely that manifesting this disfavored characteristic will detrimentally impact the individual.<sup>104</sup>

Considering whether a burden is imposed elevates the individual interest if the classification is not beneficent.<sup>105</sup> Current affirmative action jurisprudence treats beneficent classifications the same as invidious classifications; specifically in the context of race, this reflects the view that any use of race is problematic.<sup>106</sup> However, if equal protection jurisprudence seeks to “‘smoke out’ illegitimate uses of race,” this factor gives some deference to the government in using race in a beneficent way, particularly if the means are narrowly tailored as evaluated on the governmental interest side of the analysis.<sup>107</sup> The Court, in its current jurisprudence, considers statutory overlay as probative of political process access; statutes also provide extraconstitutional protections against governmental or private discrimination on the basis of the characteristic that would allow a court to defer to the legislature.<sup>108</sup>

Whether the right being infringed upon has a close nexus to protected rights in the Constitution relates to the fundamental interest portion of equal protection analysis. Under this framework, the Court would not have to recognize a fundamental interest that applies to every case moving forward but would evaluate the right on a case-by-case basis. If the right is enumerated in the Constitution or has a close nexus to protected

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<sup>104</sup> Compare *Frontiero*, 411 U.S. at 686 (“Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination . . .”), with *Mathews*, 427 U.S. at 505–06 (“Moreover, while the law has long placed the illegitimate child in an inferior position relative to the legitimate . . . perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.”).

<sup>105</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879) (limiting jury service to white males over twenty-one).

<sup>106</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (“But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination.”).

<sup>107</sup> *Adarand*, 515 U.S. at 226 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

<sup>108</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985); *Massachusetts v. Murgia*, 427 U.S. 307, 325 (1976).

rights, it is more likely to warrant heightened protection.<sup>109</sup> Finally, if the extent of the individual's deprivation is severe, the court should take this into account and elevate the individual interest.<sup>110</sup>

*B. Justifications for the Framework as a Whole*

This section seeks to justify the framework on a macro level. First, balancing tests exist in other areas of constitutional law, particularly procedural due process. The applicable test for procedural due process from *Mathews v. Eldridge* balances the individual interest and the added value of the process sought against the government's interest.<sup>111</sup> While it is true that procedural due process claims differ from equal protection claims, the *Mathews* test shows courts are willing and able to engage in balancing in the constitutional context.<sup>112</sup> If anything, this proposed framework provides more guidance to courts than the *Mathews* test by listing factors courts should consider. More generally, individual interest versus government interest is always the fundamental inquiry in the individual rights arena of constitutional law. When considering the right of free exercise, to bear arms, or to exercise one's parental rights, courts inquire into

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<sup>109</sup> See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 210 (2008) (recognizing voting as a fundamental right undergirding all other Constitutional protections); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (tying the right to contraception for unmarried persons to the right of privacy).

<sup>110</sup> See *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (where depriving undocumented children of the right to education, while not a fundamental right, would impose an "inestimable toll" on the children throughout their lives).

<sup>111</sup> 424 U.S. 319, 335 (1976) ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.")

<sup>112</sup> Procedural due process claims typically entail considering the nature of the property or liberty interest involved and the degree of deprivation, the cost to the government in employing additional procedures, and the reliability of existing and proposed procedures. See *id.* *Mathews* and *Goldberg v. Kelly* juxtapose the need for a pre-termination hearing for the loss of Social Security benefits and welfare benefits, respectively. *Id.* at 323; *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

whether the government is sufficiently justified in curtailing that individual right.<sup>113</sup> For equal protection, the right at issue is to be treated equally to those similarly situated.<sup>114</sup>

Additionally, to mitigate concerns about judicial activism, this framework does not require a court to recognize suspect classifications or fundamental rights. Because recognizing a suspect classification or fundamental right triggers heightened scrutiny, the outcome is weighted against the government; conversely, in rational basis review, the outcome is weighted in favor of the government.<sup>115</sup> The existence of a suspect classification or fundamental interest essentially disables classification on that basis in any situation, including in ways that may be valid. Furthermore, one case may be insufficient to determine whether a classification always merits heightened scrutiny. Based on the particular facts of a given case, the classification may not seem to warrant heightened scrutiny; however, this should not foreclose the possibility that heightened scrutiny may properly be employed in a different context.<sup>116</sup> On the other hand, the situation in a particular case may evince the need for heightened scrutiny, but the Court may be unwilling to extend that protection comprehensively.<sup>117</sup>

These inherent factual discrepancies underscore the merits of case-by-case consideration, something courts have done before. For example, nonmarital child status is recognized as a quasi-suspect classification meriting intermediate scrutiny, and classifications among them are evaluated on a case-by-case basis.<sup>118</sup> While immutable and unrelated to individual responsibility, status as a nonmarital child does not “carry an obvious badge” in the same way that race and gender do, and, consequently, the discrimination has never reached the same

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<sup>113</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701 (2014) (right of free exercise); *McDonald v. City of Chicago*, 561 U.S. 742, 759 (2010) (right to bear arms); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (parental rights).

<sup>114</sup> “The Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike.’” *Plyler*, 457 U.S. at 216 (quoting *F.S. Royser Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920)).

<sup>115</sup> See *supra* text accompanying note 1.

<sup>116</sup> See, e.g., *Massachusetts v. Murgia*, 427 U.S. 307, 314–15 (1976) (finding a valid link between age and physical preparedness for police officers).

<sup>117</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 449–50 (1985) (where classifying on the basis of intellectual disability was impermissible in the context of zoning for a group home, but the Court refused to recognize a protected class).

<sup>118</sup> See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

level.<sup>119</sup> Therefore, courts consider laws that provide a benefit to some nonmarital children but not to others on a case-by-case basis.<sup>120</sup> In this way, courts look within the classification at the specific individuals in that class to determine if the use of the classification is justified.<sup>121</sup>

Additionally, while cabined to one case, the Supreme Court recognized a “class of one” as giving rise to a valid Equal Protection Clause claim—that a plaintiff need not belong to a preordained class for individualized and arbitrary governmental treatment to be unlawful.<sup>122</sup> The text of the Fourteenth Amendment further supports the notion that belonging to a class is not a precondition for an equal protection claim: it details, in relevant part, that “[n]o State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws,” which suggests that the individual is the focus rather than the group.<sup>123</sup> Furthermore, the text does not mention classifications, protected classes, or fundamental interests.<sup>124</sup>

On balance, this framework, in practice, identifies animus.<sup>125</sup> The prevention of classifications based on a bare desire to harm is the most basic purpose of the Equal Protection Clause.<sup>126</sup> Animus holdings, while subject to criticism on other grounds, have the

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<sup>119</sup> *Mathews v. Lucas*, 427 U.S. 495, 506 (1976).

<sup>120</sup> *See Lalli v. Lalli*, 439 U.S. 259, 261 (1978) (analyzing a statute requiring illegitimate children who would inherit from their fathers to provide evidence of acknowledgement of paternity during the father’s lifetime); *Jimenez v. Weinberger*, 417 U.S. 628, 630 (1974) (analyzing a statute that allows illegitimate children who lived with a disabled parent or received support prior to disability to receive benefits).

<sup>121</sup> *See supra* text accompanying note 36.

<sup>122</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 563–64 (2000) (where the village required a thirty-three-foot easement to connect the plaintiff to municipal water supply, when it only required a fifteen-foot easement for those similarly situated). “Class of one” claims do not apply to government employees. *Enquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 594 (2008).

<sup>123</sup> U.S. CONST. amend. XIV, § 1 (emphasis added).

<sup>124</sup> *Id.*

<sup>125</sup> *See infra* Part IV for application of the framework.

<sup>126</sup> *See U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (“Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.”).



merits of being narrow.<sup>127</sup> The Court has relied on animus in other areas of constitutional law, most recently in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>128</sup> The *Masterpiece Cakeshop* Court found antireligious hostility based on the comments of two commissioners that were disparaging towards religion and from the commission's disparate treatment of religious and nonreligious claimants.<sup>129</sup> *Masterpiece Cakeshop* speaks to the proposition that rights-restricting government action is unconstitutional if predicated on bad intentions.<sup>130</sup> It remains to be seen how prevalent animus-based decisions will be after the departure of Justice Anthony Kennedy, who wrote the majority opinions in the animus-based decisions of *Romer*, *Lawrence*, *Windsor*, *Obergefell*, and *Masterpiece Cakeshop*.<sup>131</sup>

This framework essentially advocates for equity judging. Equity means equality as fairness, rather than equality as sameness: it is the idea that the government cannot treat one individual differently from another without justifiable reasons. What constitutes justifiable reasons may vary from one judge to another, which this framework recognizes as possibly leading to disparate outcomes by jurisdiction. This does not mean that judges should be activists: on the contrary, this framework erases the need for judges to be protectionist towards groups that may constitute large swaths of the population. Some judges believe race is unique in the American context—that the Fourteenth Amendment protections were created in the context of “that race and that emergency,” and the political process sufficiently protects any other purported discrete and insular minorities.<sup>132</sup> This framework rejects the notion that race should be treated differently at the outset than any other classification, as well as the slippery slope argument presented in *Cleburne* that recognizing intellectual disability as a suspect classification would also require recognition of “the aging, the disabled, the mentally

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<sup>127</sup> See, e.g., William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 171–73 (2019) (“A foundational critique of the animus idea maintains that it reflects accusations of ill will and subjective prejudice . . . [T]his critique suggests that the animus idea reflects a type of ‘Manichean’ thinking that divides the world into saints (who reject views labelled as animus-driven) and sinners (who embrace such views).”).

<sup>128</sup> 138 S. Ct. 1719, 1723–24 (2018).

<sup>129</sup> *Id.* at 1729, 1731.

<sup>130</sup> *Id.* at 1731.

<sup>131</sup> *Id.* at 1723; *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015); *United States v. Windsor*, 570 U.S. 744, 748 (2013); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Romer v. Evans*, 517 U.S. 620, 623 (1996).

<sup>132</sup> *The Slaughterhouse Cases*, 83 U.S. 36, 81 (1872).

ill, and the infirm.”<sup>133</sup> The fear of over-constitutionalizing the Equal Protection Clause is that any class towards whom the government may have had an intimation of malice is now subject to strict scrutiny analysis, and the government is thus dissuaded from legislating as to that group, even in ways that might have been legitimate.<sup>134</sup> The problems raised in *Cleburne* stem from the Court’s own admission that it needed to “look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us.”<sup>135</sup>

The separation of powers and the proper role of the courts underlie much of equal protection jurisprudence. Rational basis scrutiny seeks to defer to the political branches by assuming that classifications are proper in the vast majority of situations.<sup>136</sup> Based on this logic, judges should only abandon deference for laws that implicate discrete and insular minorities.<sup>137</sup> The argument against recognition of suspect classifications is predicated on deference to the political process—that the political branches should decide these questions, not the judiciary.<sup>138</sup> This framework, which removes the need to recognize suspect classifications, furthers these goals of judicial minimalism. While it may seem like a drastic departure from current equal protection jurisprudence, as demonstrated in the next section, the outcomes under this new framework would often be the same as in employing the tiers of scrutiny.<sup>139</sup>

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<sup>133</sup> *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 446 (1985).

<sup>134</sup> *Id.* at 444 (“Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all.”).

<sup>135</sup> *Id.* at 446.

<sup>136</sup> *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

<sup>137</sup> *See supra* text accompanying note 97.

<sup>138</sup> *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2627, 2629 (2015) (Scalia, J., dissenting) (“This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government.”); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means . . . .”); *see also* *Frontiero v. Richardson*, 411 U.S. 677, 692 (Powell, J., concurring) (“It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.”) (arguing that it was unnecessary for the court to recognize gender as a suspect class because the Equal Rights Amendment was up for ratification by the states and would resolve that very question).

<sup>139</sup> *See infra* Part IV.

## IV. APPLICATION OF THE FRAMEWORK

A. *Retrospective Example*

This example mirrors the facts of *Massachusetts v. Murgia*, where Massachusetts enacted a law requiring state police officers to retire at the age of fifty.<sup>140</sup> The challenger, Robert Murgia, was a former officer of the Uniformed Branch of the Massachusetts State Police.<sup>141</sup> In furtherance of its policy, the police department required that uniformed officers over the age of forty pass a more rigorous annual examination, including an electrocardiogram and tests for gastro-intestinal bleeding.<sup>142</sup> Murgia was in excellent physical and mental health and passed his physical examination four months before his mandatory retirement.<sup>143</sup>

The governmental interests are as follows. The purpose proffered by the government is protection of the public by “physical preparedness of its uniformed police.”<sup>144</sup> The government specifically cited the duties of uniformed officers—including those to “participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel”—as evidence of the need for physical preparedness.<sup>145</sup> This purpose is intelligible, within the exercise of the state’s police powers, and appears to be valid. It does not seem to be driven by animus based on age, given that there is a link between age and physical preparedness.<sup>146</sup>

The fit is substantially related. Forcing police officers to retire at a certain age is not the least restrictive way to effectuate readiness of the police force, given that individualized assessments could be done, which was the remedy that Murgia sought.<sup>147</sup> However, it does serve generally to keep officers who might be in worse physical shape off of the force, and age is correlated with physical decline—“risk of physical failure,

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<sup>140</sup> *Massachusetts v. Murgia*, 427 U.S. 307, 308 (1976).

<sup>141</sup> *Id.* at 309.

<sup>142</sup> *Id.* at 311.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 314.

<sup>145</sup> *Id.* at 310.

<sup>146</sup> *Id.* at 310–11 (“[E]ven (appellee’s) experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job.”).

<sup>147</sup> *Id.* at 316.

particularly in the cardiovascular system, increases with age, and . . . the number of individuals in a given age group incapable of performing stress functions increases with the age of the group.”<sup>148</sup> This makes the fit more than rationally related and rise to the level of substantially related.

The individual interests are as follows. There is some discrimination against the elderly, but not a history of purposeful discrimination.<sup>149</sup> There is a relationship between age and ability to function in society, particularly if function here is narrowly defined as service in the police force.<sup>150</sup> Age is an immutable characteristic; one has no control over one’s age, and everyone experiences aging.<sup>151</sup> Age is visible, but being elderly is not a disfavored visible characteristic in the same way as are race or gender. Further, age itself does not cause distance from the political process.<sup>152</sup> The government is imposing a burden, not conferring a benefit, in considering age in this way. Additionally, age does have statutory protections under federal law, including under the Age Discrimination in Employment Act.<sup>153</sup> As to the right being infringed upon, there may be a property interest in continued government employment.<sup>154</sup> For there to be a property interest, the court considers the nature of the interest, whether there is a mutual understanding by the parties, and whether there is an extraconstitutional source of the interest.<sup>155</sup> The deprivation—mandatory loss of a job—is highly burdensome to the individual, and it is more difficult to find a job at a more advanced age.<sup>156</sup>

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<sup>148</sup> *Id.* at 311.

<sup>149</sup> *Id.* at 313 (“While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons . . . have not experienced a ‘history of purposeful unequal treatment’ . . .”).

<sup>150</sup> *See id.* at 310–11.

<sup>151</sup> *Id.* at 313–14 (“[I]t marks a stage that each of us will reach if we live out our normal span.”).

<sup>152</sup> The average age of House members in the 115th Congress was 57.8 years and 61.8 years for Senators. JENNIFER E. MANNING, CONG. RESEARCH SERV., MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE (2018), <https://www.senate.gov/CR/Spubs/b8f6293e-c235-40fd-b895-6474d0f8e809.pdf>.

<sup>153</sup> *Murgia*, 427 U.S. at 325; *see also* 29 U.S.C. § 623 (2018) (Age Discrimination in Employment Act).

<sup>154</sup> *Compare* *Perry v. Sinderman*, 408 U.S. 593, 602 (1972), *with* *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972).

<sup>155</sup> *See Roth*, 408 U.S. at 577.

<sup>156</sup> *Murgia*, 427 U.S. at 323 (Marshall, J., dissenting) (“While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen.”).

The fact that there is a statutory scheme to protect against age discrimination, while not typically dispositive, would counsel in favor of the government prevailing. Additionally, this is a case in which there is a viable reason—in fact, a good reason—for the government to classify on the basis of age. There is a public interest in having a competent police force, and limiting the age of police officers does serve to effectuate that outcome. Consequently, it seems, in this case, that the court should rule in favor of the government, given the relative tightness of fit and lack of individual interest factors.

*B. Prospective Example*

This example considers the transgender military ban from *Karnoski v. Trump*. This is analyzed from the perspective of a hypothetical individual plaintiff who was injured by the ban. President Obama lifted the ban on transgender military service in 2016; transgender individuals were never statutorily proscribed from military service, unlike gay and lesbian servicemembers who were precluded from service by Don't Ask, Don't Tell.<sup>157</sup> However, in July 2017, President Trump announced on Twitter that the United States would no longer “accept or allow” transgender people “to serve in any capacity in the U.S. military.”<sup>158</sup> Transgender people, for the purposes of the ban, includes people “with a history or diagnosis of gender dysphoria . . . [and those] who require or have undergone gender transition.”<sup>159</sup> The Trump administration's policy has been enjoined by four federal district courts.<sup>160</sup> The Supreme Court subsequently granted defendants' application for a stay of the preliminary injunction pending appeal; the Ninth Circuit heard the appeal in June 2019 and found the class of transgender servicemembers merited intermediate scrutiny based on an analogy to gender and

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<sup>157</sup> Emma Margolin, *With Transgender Military Ban Lifted, Obama Cements Historic LGBT Rights Legacy*, NBC NEWS (June 30, 2016), <https://www.nbcnews.com/feature/nbc-out/transgender-military-ban-lifted-obama-cements-historic-lgbt-rights-legacy-n600541>.

<sup>158</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*2 (W.D. Wash. Apr. 13, 2018). There have been a number of iterations of the ban since the original 2017 declaration; however, the ban referred to in this Note is the 2017 Twitter Announcement and subsequent memorandum. *Id.*

<sup>159</sup> *Id.* at \*3.

<sup>160</sup> *Karnoski*, 2018 WL 1784464, at \*1.

deference to military decision-making.<sup>161</sup> It also emphasized the importance of as-applied reasoning, underscoring the merits of a case-by-case approach.<sup>162</sup>

The governmental interests are as follows. The government's proffered purpose is that transgender individuals could "undermine readiness . . . and impose an unreasonable burden on the military."<sup>163</sup> Increased administrative cost and the conservation of scarce resources may be an intelligible purpose.<sup>164</sup> However, there is a real possibility that this is driven by animus, given the Trump administration's treatment of transgender individuals.<sup>165</sup> The fit is rationally related to the purpose of limiting costs, as banning transgender individuals effectuates the military's purpose of not providing gender dysphoria-related treatment to transgender service members. However, banning those individuals entirely without any particularized consideration is far from the least restrictive means to effectuate that end, and exclusion, as a remedy, is not narrowly tailored.

The individual interests are as follows. There is "new" discrimination against people with this characteristic, particularly from the Trump administration since President Trump took office in January 2017.<sup>166</sup> There is no relationship between being transgender and an individual's ability to contribute to society; the plaintiff would be a transgender individual who voluntarily seeks to serve the country through military service—an extraordinary contribution to society.<sup>167</sup> However, gender dysphoria is still

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<sup>161</sup> *Karnoski v. Trump*, 926 F.3d 1180, 1187, 1201 (9th Cir. 2019).

<sup>162</sup> *Id.* at 1200 ("[A]n as-applied approach 'is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.'" (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985))).

<sup>163</sup> *Trump Signs New Transgender Military Ban*, BBC NEWS (Mar. 24, 2018), <https://www.bbc.com/news/world-us-canada-43525549>.

<sup>164</sup> *See, e.g.*, *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

<sup>165</sup> The Justice Department also informed "the Supreme Court that businesses can discriminate against workers based on their gender identity without violating federal law." Chris Opfer, *DOJ: Businesses Can Discriminate Against Transgender Workers*, BLOOMBERG L. (Oct. 24, 2018), <https://news.bloomberglaw.com/daily-labor-report/justice-department-says-transgender-discrimination-is-lawful>.

<sup>166</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*10 (W.D. Wash. Apr. 13, 2018) (detailing the history of discrimination against transgender people, including "endemic levels of physical and sexual violence, harassment, and discrimination in employment, education, housing, criminal justice, and access to health care").

<sup>167</sup> *Id.* ("Indeed, the Individual Plaintiffs in this case contribute not only to society as a whole, but to the military specifically. For years, they have risked their lives

included in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”), including DSM-V, the most recent iteration.<sup>168</sup> Transgender identity may or may not be visible, depending on the stage of transition or whether the individual has chosen to transition. The characteristic, based on medical consensus, is immutable.<sup>169</sup> Transgender identity also causes distance from the political process, if gauged by the size of the group and its representation in legislatures.<sup>170</sup> The transgender population is less than one percent of the nation’s population, and there are no openly transgender members of Congress or the federal judiciary.<sup>171</sup> The right to serve in the military is not constitutionally enumerated but is considered a civic duty.<sup>172</sup> The deprivation of not being able to serve in armed forces, particularly if the individual was already serving in the military, is highly burdensome to the individual.<sup>173</sup> The government is imposing a burden in considering this characteristic by refusing to allow the individual’s service in the military. There are no statutory protections for transgender individuals in the military, except, perhaps, in the area of workplace discrimination.<sup>174</sup> Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.<sup>175</sup> If transgender identity is found to be included within the meaning of “sex,” this protection might apply.<sup>176</sup>

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serving in combat and non-combat roles, fighting terrorism around the world, and working to secure the safety and security of our forces overseas.”).

<sup>168</sup> *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last updated Feb. 2016).

<sup>169</sup> *Karnoski*, 2018 WL 1784464, at \*10 (“Experts agree that gender identity has a ‘biological component,’ and there is a ‘medical consensus that gender identity is deep-seated, set early in life, and *impervious to external influences.*’”).

<sup>170</sup> *See id.* at \*11.

<sup>171</sup> *See id.*

<sup>172</sup> *See Rostker v. Goldberg*, 453 U.S. 57, 86 (1981) (Marshall, J., dissenting) (characterizing military service as a “fundamental civic obligation”).

<sup>173</sup> *See supra* Section IV.A for discussion of property interests under the Constitution.

<sup>174</sup> 42 U.S.C. § 2000e-2 (2018).

<sup>175</sup> *Id.*

<sup>176</sup> *See Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75, *cert. granted* (6th Cir. 2018) (finding gender identity-based discrimination actionable under Title VII). The Supreme Court has heard arguments in this case and will decide it this term.

Even if the transgender military ban did not automatically fail as based on animus, the individual would likely prevail. Administrative cost, while an intelligible purpose, is not particularly significant when weighed against the myriad individual interests implicated, and a total ban is far from a narrowly tailored way to achieve that objective. Consequently, in weighing the governmental interests against the individual interests, the individual would succeed in an equal protection challenge to the ban.

#### CONCLUSION

The Equal Protection Clause seeks to ensure that the government treats similarly situated persons similarly. However, current equal protection jurisprudence falls short due to the breakdown of the classes on which government classifications are predicated. Gender and race are not understood the same way today as when they were recognized as suspect classifications; using those classes today is limiting and fails to consider changes in scientific attitudes and public perception.

Consequently, courts should no longer engage in suspect classification analysis to determine whether a suspect class merits heightened scrutiny and should instead reorient focus towards the individual who manifests the characteristic upon which the classification is based. This requires eliminating the tiers of scrutiny, as no suspect classification would trigger a heightened form of scrutiny in every case. As Justice John Paul Stevens said, “There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”<sup>177</sup>

In this vein, the framework suggested by this Note balances the government’s interest against the individual interest on a case-by-case basis. While it may seem like a drastic departure from current equal protection jurisprudence, as demonstrated in the application section, the outcomes under this new framework would often be the same as under the tiered framework. However, this new framework no longer relies on outdated classifications and recognizes the Court’s unwillingness to recognize new suspect classifications, as doing so often results in the Court being accused of policymaking. Furthermore, the Supreme Court has engaged in

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<sup>177</sup> Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).



equity judging and de facto balancing in the past. This framework engages in that same balancing—but with openness and frankness to preserve the integrity of the Court's reputation—and does not serve as a complete upending of precedent.