

THE JUDICIAL AND GENERATIONAL DISPUTE OVER TRANSGENDER RIGHTS

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In recent years, courts have split sharply over issues of transgender rights, especially with regard to children and teenagers in public schools. Both federal law and the United States Constitution prohibit these schools from engaging in unjustified sex discrimination, and judges have struggled to determine whether disparate treatment of transgender students comports with this command of gender equality. Some judges have asserted that school policies that single out transgender students constitute unlawful discrimination because of sex; others have argued that these rules are justifiable as measures to respect the privacy of other students.

While the judicial debate continues, the authors used the research technique of content analysis to examine the attitudes of high school students toward LGBTQ people using the largest online dataset of high school newspapers. A total of 1,124 school newspapers with over 8,000 references to LGBTQ terms over a three-year period were analyzed. Results highlight students' growing tolerance of gender minorities, reveal that students have been having conversations about LGBTQ rights for years, and suggest that many students have already decided that their non-gender-binary peers are deserving of equal treatment. The views and values of today's youth may presage a broader transformation in social and legal attitudes to transgender individuals.

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INTRODUCTION

As transgender and gender-nonconforming people have gained visibility in American society through government, media, and culture, the issue of their civil rights has stirred widespread debate, perhaps most visibly in the context of education. As one high-profile case illustrates, litigation over assertions of transgender rights has produced two very different views of transgender individuals among federal judges. The difference stems from divergent understandings of the primary privacy interests at stake in these settings: those of transgender students or of their classmates. While courts grapple with questions about privacy, equality, and fundamental liberties,¹ high school newspapers across the county show that many in Generation Z (those born after 1995)² are quietly rejecting rigid gender identity norms and the male-female gender binary, defining gender classification on their own terms, and offering support for judicial defense of inclusion and human dignity.

Part I of this Article outlines the evolving meaning of sexual discrimination in the Civil Rights Act of 1964,³ then describes two contrasting judicial views of the liberty interests involved in transgender rights issues. Part II presents our new data set drawn from views expressed by high school students in school newspapers that furnishes evidence of the attitudes and behaviors of Generation

1. Transgender students' rights are also frequently framed in terms of liberty and equality. There is some debate among scholars as to whether the rights of women and LGBTQ people should be rooted in conceptions of privacy, liberty, or equality. *See, e.g.*, Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73 (2002) (comparing the constitutional analysis of gay rights under three different frameworks—liberty, equality, and privacy); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137 (2002) (asserting that an amalgam of equality and privacy frameworks provide the best support for women's rights under the Constitution). With regard to transgender students, however, all three principles describe the same concept. It might be said that schools trammel these students' *privacy* by demanding details of their gender identity and segregating them in a public manner; that schools violate these students' *liberty* by forcing them to use a bathroom they do not wish to use; or that schools infringe upon these students' *equality* by treating them differently from non-transgender students. Each framework conveys the same debate over whose competing interests should be protected.

2. *Who is Generation Z?*, ANNIE E. CASEY FOUND.: BLOG (June 21, 2016), <http://www.aecf.org/blog/who-is-generation-z>.

3. 42 U.S.C. § 2000e(k) (2016).

Z. This type of content-analysis study has not been conducted before. While its reach is limited,⁴ the study does provide a useful starting point for further research. The data display the voices of young people who are rejecting gender stereotypes and revising societal norms of personal autonomy and classifications. The conclusion asserts that even if a more restrictive view of transgender rights prevails in the short term because of currently dominant political forces, Generation Z has already begun to change our understanding of gender in the twenty-first century.

I. EXPANDING DEFINITIONS OF SEX DISCRIMINATION

Federal courts have long struggled to define precisely what conduct qualifies as sex discrimination. Through Title VII of the Civil Rights Act of 1964, Congress prohibited employers from discriminating “because of . . . sex” but did not explain what, exactly, this command meant.⁵ Congress also outlawed sex discrimination in education,⁶ housing,⁷ credit,⁸ and other contexts. In addition, the Supreme Court concluded that the Equal Protection Clause of the Fourteenth Amendment bars certain forms of sex discrimination.⁹

4. Given the unprecedented nature of the study, for example, no comparison could be conducted comparing attitudes exhibited during the three-year period reviewed with those expressed in earlier periods. Additionally, it is impossible to gauge precisely how representative the views reported in these newspapers are. *See* text accompanying notes 79-81.

5. 42 U.S.C. § 2000e-2(a) (2016). Title VII’s bar on sex discrimination was not added to the law until late in the legislative process. There are therefore few legislative clues that might help contemporary courts decipher its meaning. Moreover, the plain text of the statute itself does not elaborate upon the meaning of “sex discrimination” at all. *See* 42 U.S.C. § 2000e(k) (2016); *see also* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“[W]e are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”).

6. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2016) (prohibiting sex discrimination in any federally funded educational program or activity).

7. Fair Housing Act, 42 U.S.C. § 3604 (2016) (prohibiting sex discrimination in selling or renting someone housing).

8. Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012) (prohibiting creditors from discrimination against credit applicants on the basis of sex).

9. *See* *United States v. Virginia*, 518 U.S. 515, 531 (1996) (holding that the government must have an “exceedingly persuasive justification” to engage in sex discrimination); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding a state law that prohibited the sale of beer to males under 21 years old and females under 18 years old was a violation of equal protection); *Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973) (applying heightened scrutiny to sex-discriminatory state actions) (plurality opinion of Brennan, J.); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that a sex-discriminatory law failed even the rational basis standard under an equal protection analysis); *see also* *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (applying heightened scrutiny to an immigration law that differentiates between mothers and fathers and explaining that a sex-based classification must “serve an important governmental interest *today*”).

A robust body of federal law now protects individuals against discrimination on the basis of sex in various walks of life.¹⁰

Still, the precise meaning of “sex discrimination” itself has proved elusive. A law like Title VII obviously forbids employers from mistreating a female worker simply because she is a woman. But it also does much more than that. The Supreme Court has declared that Title VII was designed “to strike at the entire spectrum of disparate treatment of men and women” in employment.¹¹ It has interpreted this principle to mean that employers may not force women to make larger contributions to pension plans;¹² sexually harass employees, male or female;¹³ or exclude women from certain jobs out of concern for the health of a hypothetical fetus.¹⁴ The Court has also held that an employer violates Title VII when it engages in “sex stereotyping”—i.e., mistreating a worker for failing to comply with gender norms.¹⁵ A manager thus runs afoul of Title VII if he refuses to promote a female employee who is perceived to be too masculine,¹⁶ or a male employee who is perceived to be overly feminine.¹⁷

10. See *supra* notes 6-8 and accompanying text.

11. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). The Supreme Court affirmed the judgment of the Court of Appeals, noting that “a claim of ‘hostile environment’ sex discrimination is actionable under Title VII.” *Id.* at 73.

12. *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

13. *Meritor Sav. Bank*, 477 U.S. at 73 (holding and setting precedent that Civil Rights Act prohibits hostile work environment due to sex discrimination); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (holding that same-sex sexual harassment qualifies as sex discrimination).

14. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991).

15. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989), *superseded by statute*, Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m)), *as recognized in* *Barrage v. U.S.*, 134 S. Ct. 881 (2014). In *Price Waterhouse*, Hopkins was denied a partnership position in part because she had been, according to one employee, “a tough-talking somewhat masculine hard-nosed” manager. *Id.* at 235. A colleague advised Hopkins to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* A majority of the justices held that Hopkins had suffered sex discrimination, although the Court splintered on a different question regarding standard of proof. *Id.* at 253-54, 295 (Kennedy, J., dissenting). There is thus no majority opinion in *Price Waterhouse*, though six justices explicitly agreed with the sex stereotyping rationale.

16. *Id.* at 251-52; see also *Lewis v. Heartland Inns of Am. LLC*, 591 F.3d 1033 (8th Cir. 2010) (holding that a female employee terminated for being too masculine and not sufficiently “pretty” has a prima facie case of sex stereotyping under Title VII).

17. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3rd Cir. 2009) (explaining that an “effeminate” man, whether heterosexual or homosexual, “can bring a gender stereotyping claim” if he suffered discrimination due to his effeminacy); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1346 (N.D. Fla. 2016) (“When a ‘traditionally masculine’ gay man is fired because he is gay, that firing is no less because of sex than when an ‘effeminate’ gay man is fired.”). Although sex stereotyping decisions immediately after *Price Waterhouse* evaluated only feminine or masculine *mannerisms*, an increasing number of courts have held that employers also engage in sex stereotyping by discriminating against all homosexual employees, whether or not their mannerisms conform

This “sex stereotyping” doctrine, first articulated by the Supreme Court in 1989, has been imported into various bars on sex discrimination, both constitutional and statutory.¹⁸ Lower courts have interpreted the Equal Protection Clause to bar government employers from engaging in sex stereotyping.¹⁹ They have also held that educational institutions violate Title IX by engaging in sex stereotyping.²⁰ The application of the sex stereotyping doctrine to sex discrimination claims arising under different statutes, as well as the Constitution, is fairly settled.²¹

to gender norms. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 835 F.3d 339, 346 (7th Cir. 2017) (noting that a lesbian employee “represents the ultimate case of failure to conform to the female stereotype ... she is not heterosexual”); Cody Perkins, Comment, *Sex & Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427, 442 (2013) (“[A] gay woman who is discriminated against for being a woman who acts masculinely by having the traditionally male trait of being attracted to women is being discriminated against on the basis of a sex stereotype.”). The EEOC currently endorses this interpretation of Title VII. *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015).

18. Indeed, district and appeals courts have typically declined to differentiate *at all* between sex discrimination in different statutory contexts, applying the same rules to Title VII, Title IX, and analogous legislation. *See, e.g.*, *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (interpreting the Equal Credit Opportunity Act in line with Title VII and noting that anti-transgender discrimination may qualify as unlawful sex stereotyping); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 n.12 (9th Cir. 2000) (applying Title VII principles to the Gender Motivated Violence Act and concluding that the law would bar discrimination against transgender individuals for failing to “conform to socially-constructed gender expectations”); *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200-1201 (D. Colo. 2017) (applying Title VII principles to the Fair Housing Act); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1158-60 (C.D. Cal. 2015) (applying Title VII sex discrimination principles to Title IX sexual orientation discrimination claim and holding that “claims of sexual orientation discrimination are gender stereotype or sex discrimination claims”).

19. In some ways, sex discrimination analysis in the constitutional context differs from such analysis in the statutory context. For example, the Supreme Court currently asks whether a state-sponsored gender classification has an “exceedingly persuasive justification,” *United States v. Virginia*, 518 U.S. 515, 531 (1996), an inquiry absent from Title VII analysis. However, specific *doctrines* of sex discrimination have traveled seamlessly from the statutory to the constitutional context. Specifically, courts have applied the sex stereotyping doctrine to constitutional claims, even though it originated in a Title VII case. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (holding that sex stereotyping against a transgender government employee qualified as unlawful sex-based discrimination under the Equal Protection Clause). And while the Supreme Court first *articulated* the sex stereotyping doctrine in the Title VII context, the idea itself first arose in constitutional cases. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (“A[n] . . . ‘archaic and overbroad’ generalization” about gender roles is “not . . . tolerated under the Constitution” (citation omitted)).

20. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-48 (7th Cir. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017) (noting that a transgender student plaintiff had “demonstrated a reasonable likelihood of showing that Title IX’s prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity”).

21. David B. Cruz, *Acknowledging the Gender in Anti-Transgender Discrimination*, 32 L. & INEQ. 257, 257 (2014) (noting the widespread acceptance of the sex stereotyping theory and noting that arguments to the contrary are “facilely sophistic”); Cary Franklin, *The*

The *scope* of the sex stereotyping doctrine, on the other hand, remains unresolved by the Supreme Court, and thus disputed in the lower courts. Should stereotyping pertain exclusively to an individual's mannerisms? Or to immutable features of her identity as well?²² In the lower courts, however, at least one consensus seems to be emerging: Discrimination against an individual for being transgender qualifies as unlawful sex stereotyping.²³ Any adverse actions against transgender people that are rooted in this stereotypical understanding of gender qualify as unlawful sex discrimination under broadly accepted sex stereotyping doctrine. As one district court explained, "discrimination based on transgender status" is "essentially the epitome of discrimination based on gender nonconformity."²⁴ When a school administrator discriminates against a transgender person, she punishes him for failing to conform to stereotypes pertaining to the sex he was assigned at birth. In the

Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, 85 N.Y.U. L. REV. 83, 83 (2010) (noting that even early sex discrimination cases such as *Reed v. Reed* focus on "limitations on the state's power to enforce sex-role stereotypes"); Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243, 265 (2008) (explaining why *Price Waterhouse's* sex stereotyping reasoning applies with equal force to Title VII sex discrimination claims).

22. See *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1260, 1268 (11th Cir. 2017) (Pryor, J., concurring) (asserting that sex stereotyping is an exclusively "behavior-based claim"); (Rosenbaum, J., concurring in part and dissenting in part) (asserting that sex stereotyping doctrine recognizes no "distinction between behavior and being").

23. See, e.g., *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 884 (11th Cir. 2016) ("Sex discrimination includes discrimination against a transgender person for gender nonconformity." (citation omitted)); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004); *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1198 (D. Colo. 2017); *Ge v. Dun & Bradstreet, Inc.*, No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582 (M.D. Fla. Jan. 24, 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296-97 (W.D. Pa. 2017); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Parris v. Keystone Foods, LLC*, 959 F. Supp. 2d 1291 (N.D. Ala. 2013); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Creed v. Family Express Corp.*, 101 Fair Empl. Prac. Cas. (BNA) 609, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 7, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

24. *Evancho*, 237 F. Supp. 3d at 285. This school district implemented a restroom policy that targeted transgender students and their right to use the bathroom that aligned with their gender identity. *Id.* at 273. The complaint claimed that the school district's new policy violated the Equal Protection Clause of the Fourteenth Amendment on the basis of sex and gender identity, and also violated Title IX of the Education Amendments of 1972 by discriminating on the basis of sex. *Id.* The district court issued a preliminary injunction against the policy, finding plaintiffs demonstrated a likelihood of prevailing on their Equal Protection claim, though not on their Title IX claim. *Id.* at 295, 301.

administrator's view, the individual should not have changed genders; instead, he should conform to the gender listed on his birth certificate.

A handful of federal courts have applied this principle to transgender schoolchildren, concluding that when a school forbids transgender students from accessing the bathroom that corresponds to their gender identity, it engages in sex stereotyping.²⁵ The schools, these courts have held,²⁶ effectively compel transgender students to conform to the sex assigned to them at birth—a requirement that violates Title IX, the Equal Protection Clause, or both.²⁷

The Obama Administration adopted this rationale in a guidance letter sent by the Department of Education (DOE) Office for Civil Rights (OCR) on January 7, 2015, interpreting Title IX and the regulations implementing its ban

25. In *Evancho*, the court explained that “discrimination based on transgender status . . . is essentially the epitome of discrimination based on gender nonconformity, making differentiation based on transgender status akin to discrimination based on sex.” 237 F. Supp. 3d at 285-86 (footnote omitted) (citations omitted). As a sex-based classification, the court wrote, anti-trans discrimination must, therefore, be subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 288. Applying heightened scrutiny to a school district policy barring transgender students from using their preferred school bathroom, the court found that the policy did not have an “exceedingly persuasive justification” and thus likely ran afoul of the Constitution. *Id.* at 289. However, the court did not rule in favor of the students on their Title IX claim, citing the uncertainty surrounding *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017), and reiterating that the Equal Protection analysis was sufficient to resolve the case. *Id.* at 301. In *Whitaker*, the court held that a school district engages in sex discrimination when it treats transgender students differently because they “fail to conform to the sex-based stereotypes associated with their assigned sex at birth.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). The court thus applied heightened scrutiny analysis and found that a policy barring transgender students from their preferred bathroom lacked an “exceedingly persuasive” justification, rendering it unlawful under the Equal Protection Clause. *Id.* at 1051-52. The *Whitaker* court also ruled that the policy violated Title IX, explaining: “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Id.* at 1049.

26. Federal courts confronting this issue have not uniformly favored transgender students. *See, e.g.*, *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 672-73 (W.D. Pa. 2015) (upholding school policy barring transgender students from using the facilities that correspond with their gender identity).

27. *G.G. ex rel. Grimm v. Gloucester County School Board* was decided solely on Title IX grounds. *See* 822 F.3d at 709. The *Evancho* and *Whitaker* courts held that both Title IX and the Equal Protection Clause guarantee transgender students access to bathrooms that correspond to their gender identity. *Whitaker*, 858 F.3d at 1050, 1052 (affirming the plaintiff's motion for preliminary injunction under Title IX and the Equal Protection Clause); *Evancho*, 237 F. Supp. 3d at 294-95 (granting the plaintiff's motion for preliminary injunction against a school board's policy of requiring students use the bathroom of their biological sex on Equal Protection grounds). In *Gloucester County School Board*, the court held that because Title IX and its implementing regulations were ambiguous, the court should defer to the Department of Education's reasonable interpretation of its regulation. 822 F.3d at 720-21. That interpretation, in turn, relied largely upon the sex stereotyping theory. *Id.* at 718 n.5, 719.

on sex discrimination in education.²⁸ The OCR letter declared that “[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”²⁹

This guidance lay at the heart of *G.G. v. Gloucester County School Board*,³⁰ which involved the transgender student Gavin Grimm. After Grimm—who was designated a female at birth—requested permission to use the boys’ bathroom, the Gloucester County School Board voted to require all students to use the school bathroom that corresponded with the gender indicated on their birth certificates.³¹ Grimm, represented by the American Civil Liberties Union, filed suit, alleging violations of both Title IX (as interpreted in the OCR guidance) and the Equal Protection Clause.³²

The U.S. District Court for the Eastern District of Virginia ruled against Grimm,³³ but a three-judge panel of the United States Court of Appeals for the Fourth Circuit reversed.³⁴ Relying upon *Auer* deference to the DOE’s interpretation of its own regulation,³⁵ the Fourth Circuit agreed that the school board’s rule violated Title IX. The court found that 34 C.F.R. § 106.33, a DOE rule that allows for sex-segregated facilities under Title IX,³⁶ is genuinely ambiguous.³⁷ Moreover, the court determined that the DOE’s current interpretation of § 106.33 was reasonable.³⁸ Therefore, the court deferred to that interpretation and ruled in favor of Grimm.³⁹ Judge Niemeyer dissented, concluding that “Title IX and its implementing regulations authorize schools to

28. Letter from Catherine E. Lhamon, Assistant Sec’y, U.S. Dep’t of Educ. Office for Civil Rights, & Vanita Gupta, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to Colleague (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

29. Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec’y for Policy, U.S. Dep’t of Educ. Office for Civil Rights, to Emily T. Prince, Esq. (Jan. 7, 2015) (footnotes omitted), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf.

30. 822 F.3d 709.

31. *Id.* at 716.

32. *Id.* at 713, 715; Compl. ¶¶ 59, 65.

33. *Gloucester Cty. Sch. Bd.*, 822 F.3d at 710.

34. *Id.* at 727.

35. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that courts should defer to an agency’s interpretation of its own ambiguous rule unless that interpretation is “plainly erroneous” (citations omitted)).

36. 34 C.F.R. § 106.33 (2012).

37. *Gloucester Cty. Sch. Bd.*, 822 F.3d at 720-21.

38. *Id.* at 721-22.

39. *Id.* at 723. The court remanded the case to the district court with a strong suggestion that the district court issue an injunction in favor of Grimm. *Id.* at 726. Subsequently, the district court issued the injunction. *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2016 WL 3581852 (E.D. Va. June 23, 2016).

separate” bathrooms and similar facilities “on the basis of sex.”⁴⁰ Niemeyer also stated that Grimm’s school must provide “all students with physiological privacy and safety in restrooms and locker rooms,”⁴¹ seeming to imply that granting Grimm access to the boys’ bathroom would jeopardize this “privacy and safety.”

The school board appealed to the Fourth Circuit en banc, but the full court declined to vacate the panel opinion and rehear the case. Writing in dissent from the denial of the petition for rehearing, Niemeyer elaborated upon his earlier concerns:

Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom. Have we not universally condemned as inhumane such forced exposure throughout history as it occurred in various contexts, such as in prisons? And do parents not universally find it offensive to think of having their children’s bodies exposed to persons of the opposite biological sex?⁴²

The panel’s decision, Niemeyer continued, denies “all affected persons the dignity and freedom of bodily privacy. Virtually every civilization’s norms on this issue stand in protest.”⁴³

Over the next eleven months, a series of events altered the course of the *G.G.* litigation. First, in August, the United States Supreme Court stayed the Fourth Circuit’s injunction.⁴⁴ Then, in February, the Trump Administration reversed the Obama Administration’s guidance regarding transgender bathroom access in federally funded schools.⁴⁵ That action removed the basis of the Fourth Circuit’s decision, leading the Supreme Court to vacate its ruling and remand the case for further proceedings.⁴⁶ In response, the Fourth Circuit then vacated the district court’s preliminary injunction.⁴⁷

Judge Davis, joined by Judge Floyd, concurred in the Fourth Circuit’s new decision.⁴⁸ His opinion praised Grimm as a “modern-day human rights

40. *Gloucester Cty. Sch. Bd.*, 822 F.3d at 738 (Niemeyer, J., concurring in part, dissenting in part) (emphasis omitted).

41. *Id.* at 739.

42. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 824 F.3d 450, 452 (4th Cir. 2016).

43. *Id.*

44. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442, 2442 (2016); see also Mark Joseph Stern, *Supreme Court Blocks Ruling Allowing Trans Student to Use Public School Bathroom*, SLATE: OUTWARD (Aug. 3, 2016, 5:11 PM), http://www.slate.com/blogs/outward/2016/08/03/scotus_blocks_ruling_allowing_trans_student_to_use_school_bathroom.html.

45. Jeremy W. Peters et. al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES: POLITICS (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>.

46. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017) (mem.).

47. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 729 (4th Cir. 2017).

48. *Id.* at 730 (Davis, J., concurring). Judge Floyd and Judge Davis comprised the two-judge majority of the initial panel decision.

leader[]” who persisted in the face of “hatred, intolerance, and discrimination.”⁴⁹ Grimm, Judge Davis continued, was “worthy of dignity and privacy” and found it “humiliating to be segregated from the general population.”⁵⁰ Grimm’s “adolescent peers,” Judge Davis noted, already understood that he was “not a predator, but a boy, despite the fact that he did not conform to some people’s idea about who is a boy.”⁵¹ To Judge Davis’s mind, the school board’s policy rejecting this fact constituted “unjust” and “invidious discrimination.”⁵²

Judge Davis’s discussion of “dignity and privacy” clearly—and perhaps intentionally—echoed Niemeyer’s own dissent from the denial of rehearing en banc. Yet each judge deployed these principles for very different purposes. Judge Davis dwelt upon Grimm’s “dignity and privacy,” asserting that his “adolescent peers” took no issue with his use of the boys’ restroom facilities.⁵³ Niemeyer, on the other hand, wrote that *other students’ exposure* to Grimm in such facilities threatened their “human dignity and individual freedom.”⁵⁴ Both judges’ analysis of *G.G.* involved an inquiry into other students’ perceptions of their transgender peers. Indeed, this inquiry lay at the heart of the intra-circuit debate: Whose privacy required judicial protection? The transgender students’ or their classmates’?⁵⁵

49. *Id.* at 731.

50. *Id.* at 730.

51. *Id.* (footnote omitted).

52. *Id.* at 731.

53. *Id.* at 730.

54. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 824 F.3d 450, 452 (4th Cir. 2016). Notably, Judge Niemeyer’s discussion of the case—which draws from the school board’s defense of its policy—echoes arguments made in favor of *race*-segregated bathrooms during the civil rights era. In an amicus brief filed in support of Grimm, the NAACP Legal Defense Fund explained: “Not so long ago, bathrooms nationwide were designated ‘Colored Only’ and ‘Whites Only.’ . . . [S]tate officials often justified physical separation in restroom facilities, swimming pools, and marriage by invoking unfounded fears about sexual contact and exploitation.” Mark Joseph Stern, *The NAACP Legal Defense Fund’s Transgender Rights Brief Is a Trenchant History Lesson*, SLATE: OUTWARD (Mar. 3, 2017, 4:07 PM), http://www.slate.com/blogs/outward/2017/03/03/naacp_ldf_s_trans_rights_brief_is_a_trenchant_history_lesson.html.

55. Once again, this clash of interests has parallels to earlier debates over racial integration. The most clearly articulated government interest in opposition to transgender bathroom access is a concern for the many students who share these bathrooms. That is unsurprising, as the integration of a minority into intimate spaces is often controversial. In 1959, Herbert Wechsler wrote in the *Harvard Law Review* that racial desegregation “forces an association upon those for whom it is unpleasant or repugnant,” fretting that “the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it.” Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). Yet few today would argue that an individual’s racial animus justifies the mistreatment, at the hands of the state, of the minority whom he dislikes. Law and society long ago rejected the notion that racial equality in public spaces could be thwarted by claims of association rights.

II. HIGH SCHOOL CONVERSATIONS ABOUT TRANSGENDER ISSUES

I want children, transgender or not, to understand that who they are is nothing to be ashamed of. I'd want them to know that no one — not even the government — has the right to tell them what their gender is. I want children not to be fearful of the people around them who only want to use the bathroom without the threat of harassment or violence.⁵⁶

Recent studies indicate that beliefs about gender identity minorities are shifting rapidly among young people, both in the United States and in other developed countries.⁵⁷ According to a 2016 Harris poll, an increasing percentage of Americans—and 72 percent of Americans between the ages of 18 and 34 surveyed—support a federal law that bans discrimination in employment, public accommodations, housing, or credit based on whether a person is gay or transgender.⁵⁸ Generation Z, though, has been shown to be the most accepting of gender identity minorities compared to its members' older

56. *SNO High School Newspaper Dataset*, INST. FOR FAM. VIOLENCE STUD.: LGBTQ FAM. LIFE PROJECT line 7637, <http://familyvio.csw.fsu.edu/lgbtq/dataset> (last visited Aug. 1, 2017) [hereinafter *Data Set*] (Texas).

57. Susan Goldberg, *Why We Put a Transgender Girl on the Cover of National Geographic*, NAT'L GEOGRAPHIC: GENDER REVOLUTION (Jan. 2017), <http://www.nationalgeographic.com/magazine/2017/01/editors-note-gender>; see also ANDREW R. FLORES, ET AL., WILLIAMS INST. UCLA SCH. L., PUBLIC SUPPORT FOR TRANSGENDER RIGHTS: A TWENTY-THREE COUNTRY SURVEY (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/23-Country-Survey.pdf> (finding a majority of respondents in all 23 countries surveyed supported transgender rights and that younger people, women, those with higher levels of formal education, and people with higher incomes are more supportive of transgender rights); Holger B. Elischberger, Jessica J. Glazier, Eric D. Hill, Lynn Verduzco-Baker, *Attitudes Toward and Beliefs About Transgender Youth: A Cross-Cultural Comparison Between the United States and India*, SEX ROLES (May 2, 2017), <https://link.springer.com/content/pdf/10.1007%2Fs11199-017-0778-3.pdf> (explaining Americans have generally positive attitudes toward transgender people); Holger B. Elischberger et. al., "Boys Don't Cry"—or Do They? *Adult Attitudes and Beliefs About Transgender Youth*, 75 SEX ROLES 197, 197 (2016) (finding through online survey that U.S. adults held generally favorable attitudes toward transgender minors); Martha Langmiur, *Improving School Climate for LGBT Youth: How You Can Make Change Now!*, 1 QED: J. GLBTQ WORLDMAKING 37, 37-38 (2013) (finding a decrease between 1999 and 2011 in negative indicators of school climate such as homophobic remarks and victimization in U.S. middle and high schools); Kelly Strader et. al., *An Assessment of the Law School Climate for GLBT Students*, 58 J. LEGAL EDU. 214, 214 (2008) (finding that attitudes toward transgender people have improved at U.S. law schools).

58. Andrew R. Flores, *Attitudes Toward Transgender Rights: Perceived Knowledge and Secondary Interpersonal Contact*, in 3 POL., GROUPS & IDENTITIES 400 (2015) (respondents who are informed about transgender issues are more likely to support transgender rights); Lara A. Barbir et. al., *Friendship, Attitudes, and Behavioral Intentions of Cisgender Heterosexuals Toward Transgender Individuals*, 21 J. OF GAY & LESBIAN MENTAL HEALTH 154 (2017) (college students with at least one transgender friend have more positive attitudes toward transgender people); *Growing U.S. Majority Agrees: Transgender Americans Deserve Equal Treatment on the Job and in Public Accommodations*, HARRIS POLL (Oct. 11, 2016), <http://www.theharrispoll.com/business/2016-Out--Equal-Workplace-Survey.html>.

peers,⁵⁹ and is overall more likely to believe that people should be able to use the bathroom that corresponds to their gender identity.⁶⁰ Indeed, even the terminology of the binary (male, female, transgender) is considered for Generation Z to be too narrow to capture what some writers call the “spectrum” of gender.⁶¹ Writers have described many members of Generation Z as “profoundly tolerant of each other’s freedom to explore whatever combination of male and female traits they feel comfortable expressing.”⁶² These young people reject notions that it is morally wrong to be transgender.⁶³ In one survey, 56 percent of Generation Z respondents between the ages of 13 and 20 stated in 2016 that they knew someone who went by gender-neutral pronouns such as “they” and “them.”⁶⁴ This gender fluidity⁶⁵ has already had an

59. Shepherd Laughlin, *Gen Z Goes Beyond Gender Binaries in New Innovation Group Data*, J. WALTER THOMPSON INTELLIGENCE (Mar. 11, 2016), <https://www.jwtintelligence.com/2016/03/gen-z-goes-beyond-gender-binaries-in-new-innovation-group-data> (stating that the survey specifically polled the opinions of Generation Z compared to millennials and that members of Generation Z are more supportive of transgender individuals or people who do not identify with traditional binary notions of gender, and that Generation Z is also more accepting of a person using a bathroom that corresponds to his/her gender identity).

60. Alia Beard Rau, *Poll: Education, Age Influence Stance on Transgender Bathroom Issue*, AZCENTRAL (Oct. 23, 2016, 6:03 AM), <http://www.azcentral.com/story/news/politics/arizona/2016/10/23/poll-arizona-bathroom-access-transgender/92483910> (stating that in a poll conducted using Arizona state voters, younger voters—aged 18-35—and those who are more educated tend to believe people should be allowed to use whichever bathroom corresponds to their gender identity; as a whole, the voters were split on the issue).

61. The concept of a spectrum of gender has been discussed in the literature for well over a decade. See, e.g., Robin Marantz Henig, *How Science Is Helping Us Understand Gender*, NAT’L GEOGRAPHIC: GENDER REVOLUTION (Jan. 2017), <http://www.nationalgeographic.com/magazine/2017/01/how-science-helps-us-understand-gender-identity>; Surya Monro, *Towards a Sociology of Gender Diversity: The Indian and UK Cases*, in *TRANSGENER IDENTITIES: TOWARDS A SOCIAL ANALYSIS OF GENDER DIVERSITY* 242, 247 (Sally Hines & Tam Sanger, eds., Routledge 2010) (“There was support for gender pluralism amongst some of the research contributors who discussed the way that they would prefer to identify as something other than female or male if this was socially possible. Sex and gender as a continuum or as a spectrum . . .”).

62. Randi Gunther, *Rigid Gender Roles — Enemies of the New Intimacy*, HUFFINGTON POST: THE BLOG (Sept. 23, 2015, 3:26 PM), http://www.huffingtonpost.com/randi-gunther/rigid-gender-roles-enemie_b_8184256.html.

63. Peter Moore, *One Third Think it is Morally Wrong to be Transgender*, YOUGOV: LIFE (June 5, 2015, 9:18 AM), <https://today.yougov.com/news/2015/06/05/transgender>. A majority of those polled between the ages of 18-29 believed there is no moral issue with being transgender or that it is morally acceptable. Only 18 percent in this age group found sexual identification as transgender to be “morally wrong.” By comparison, 29 percent of 30-44 year olds thought it was morally wrong to be transgender; 38 percent of 45-64 found it morally wrong; and 35 percent of those over 65 found it morally wrong. *Id.*

64. Curtis M. Wong, *Study Sheds Insight Into Teen Sexuality, and It May Surprise You*, HUFFINGTON POST: QUEER VOICES (Mar. 17, 2016), http://www.huffingtonpost.com/entry/teen-sexuality-survey_us_56e827f4e4b0860f99da5ef0.

65. *Id.*

enormous impact on millennials⁶⁶ as well. In 2016, half of the millennials surveyed by Fusion Media stated that gender is not confined to male/female.⁶⁷ As they become parents, millennials have exhibited a greater tendency than previous generations to give their children less distinctly gendered names,⁶⁸ decorate fewer nurseries with pink or blue, dress babies in non-gendered clothing,⁶⁹ and insist on toys that are not specifically for girls or boys.⁷⁰

Our new set of data based on high school newspapers illuminates the conversations that high school students are having on the issue. Our study, called “The LGBTQ Family Life Project,” recently analyzed a large, digitized collection of high school student newspapers from Students Newspapers Online (SNO).⁷¹ SNO is a publishing platform used by public and private schools in all 50 states and Washington, D.C.⁷² Student newspapers can be searched online individually but not through typical content analysis channels such as Lexis Nexis or EBSCO. This study searched SNO high school newspapers using publication date parameters of January 1, 2014, through January 1, 2017. The website contained—and we searched—a total of 1,883 high school newspapers on the SNO. This is the first content analysis that has been conducted on the issue of LGBTQ concerns. Other studies using student newspapers have involved issues of sports and gender,⁷³ and advertising.⁷⁴ The dataset resulting from this research is limited by the fact that nearly 40 percent of the newspapers on the SNO site do not mention LGBTQ terms. Moreover, the articles compiled in the dataset from those 60 percent of student newspapers that do use the terms represent a secondary data set, as opposed to primary data collected from interviews of students themselves on site at schools. It does not account for every school newspaper in the United States because some papers are not digitized. Additionally, self-selection bias may be present: student affluence, fear of speaking openly against peers, or other factors may have

66. Sharon Jayson, *Gender Loses its Impact with the Young*, USA TODAY (July 2, 2014, 1:36 PM), <https://www.usatoday.com/story/news/nation/2014/06/21/gender-millennial-s-dormitories-sex/10573099>.

67. Sarah Marsh, *The Gender-Fluid Generation: Young People on Being Male, Female or Non-Binary*, GUARDIAN: OPINION (Mar. 23, 2016, 7:18 AM), <https://www.theguardian.com/commentisfree/2016/mar/23/gender-fluid-generation-young-people-male-female-trans>.

68. Jayson, *supra* note 66 (stating that WhitePages.com, a provider of contact information for people and businesses, declared 2013 the Year of Unisex Names, noting a rise in such names and an almost even split between males and females with the names Riley, Peyton, and Rowan).

69. Marsh, *supra* note 67.

70. Marsh, *supra* note 67.

71. *Data Set*, *supra* note 56.

72. *See* SNO, <https://snosites.com> (last visited Aug. 7, 2017).

73. *See, e.g.*, Paul Mark Pedersen, *Investigating Interscholastic Equity on the Sports Page: A Content Analysis of High School Athletics Newspaper Articles*, 19 SOC. OF SPORT J. 419 (2002).

74. *See, e.g.*, Scott Freeman et al., *UV Tanning Advertisements in High School Newspapers*, 142 ARCHIVES DERMATOLOGY 460 (2006).

skewed the data. Regardless of those limitations, the dataset is the first of its kind, and provides a unique perspective for analyzing high school student attitudes and beliefs about sexual and gender minorities. It can be viewed in context with other cultural markers to obtain a snapshot of Generation Z. Such markers can also include polling, the existence of new transgender characters in comics like *Bat Girl*, who was revealed to be a transgender woman,⁷⁵ or the popularity of TV shows like *Orange is the New Black*, which features a transgender woman and was called one of the best shows of 2017 by *Teen Vogue*.⁷⁶

All 1,883 SNO online high school newspapers were searched using the individual website native search functions for the following terms: “LGBT” (including variations using +, Q, IA), “transgender” (and variations including trans, transgenders, and transgendered), “GSA” (for student groups of Gay-Straight Alliances), “HB2” (a 2016 North Carolina law concerning bathroom usage of transgender individuals, commonly mentioned when laws concerning transgender bathroom usage were discussed),⁷⁷ “homosexual,” and “gay.” The terms were chosen based on most popular terms used for the umbrella community of gender and sexual minorities. The dataset created in this process is, to our knowledge, the largest existing data set of high school statements about LGBTQ issues, containing 1,124 newspapers and 8,328 individual newspaper article references.⁷⁸ The names of all student-authors and students quoted have been removed in the online data base because they may be minors.⁷⁹

The new dataset reveals a variety of topics discussed by high school students in their school newspapers. Overall, more than 202 newspapers in 38 states reference federal, state, and local laws involving LGBTQ issues. Forty-five student newspapers across the nation discussed Leelah Alcorn, a

75. Laura Hudson, *DC Introduces First Transgender Character in Mainstream Comics*, WIRED (Apr. 10, 2013, 9:40 AM), <https://www.wired.com/2013/04/transgender-dc-comics-batgirl>.

76. De Elizabeth, *Best TV Shows of 2017*, TEEN VOGUE, <https://www.teenvogue.com/gallery/best-tv-shows-2017> (last visited Dec. 10, 2017).

77. Public Facilities Privacy & Security Act, N.C. GEN. STAT. § 115C-47 (2016).

78. *Data Set*, *supra* note 56.

79. A team of university researchers analyzed selected individual quotations and remarks specifically about high school students’ attitudes toward transgender and non-binary students. Once data was collected in a spreadsheet, one researcher read through the dataset and tagged the statements in an iterative, grounded theory approach to identify salient themes. Following the original read-through by the first researcher, a second researcher reviewed and individually coded the data set. The two researchers then worked together to develop consensus among codes that had been identified, and found multiple repeated themes and overarching concepts and categories related to students’ reporting and perceptions of LGBTQ issues. The researchers then reviewed the dataset again, grouping, sorting, and analyzing these themes. This study provides a first look into recent high school newspapers’ treatment of LGBTQ issues and paves the way for additional, more in-depth analysis.

transgender teenager in Ohio who died by suicide in 2014.⁸⁰ School newspapers in 8 states referenced the Transgender Day of Remembrance.⁸¹ More than 100 school newspapers in 29 states discussed the National Day of Silence.⁸² National Coming Out Day⁸³ was referenced in 23 newspapers from 15 states.⁸⁴ 427 student newspapers, with 479 articles in 38 states, mentioned the issue of students using the restroom of their gender identity.⁸⁵ Student groups that focus on support of LGBTQ students—typically called “Gay-Straight Alliances”⁸⁶ or similar names such as “Gender-Sexuality Alliances”⁸⁷—were mentioned most frequently in 422 student newspapers, with 1,224 articles in 41 states.⁸⁸

TABLE 1

LGBT Theme	<i>Number of Articles</i>	<i>Number of Papers</i>	<i>Number of States</i>
Any Transgender Issue	616	339	44
National Coming Out Day	29	23	15
Bathrooms/HB2/Restrooms	479	427	38
Gay-Straight Alliances (campus inclusion groups)	1224	442	41
Transgender Day of Remembrance	11	9	8
Leelah Alcorn	47	45	27

80. N.Y. Times Editorial Bd., Editorial, *The Quest for Transgender Equality*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html>; see, e.g., *Data Set*, *supra* note 56, line 169 (Arizona); *id.* line 4309 (Maryland).

81. *Transgender Day of Remembrance*, GLAAD, <https://www.glaad.org/tdor> (last visited Aug. 7, 2017); see, e.g., *Data Set*, *supra* note 56, line 3044 (Illinois); *id.* line 7639 (Texas).

82. *Day of Silence*, GLSEN, <https://www.glsen.org/day-of-silence> (last visited Aug. 7, 2017). The National Day of Silence was created to acknowledge how homophobia and transphobia keep LGBT individuals from coming out; see, e.g., *Data Set*, *supra* note 56, line 563 (California); *id.* line 1915 (Delaware).

83. *National Coming Out Day*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/national-coming-out-day> (last visited Aug. 7, 2017).

84. See, e.g., *Data Set*, *supra* note 56, line 4344 (Maryland); *id.* line 4362 (Massachusetts).

85. See, e.g., *id.* line 4577 (Massachusetts); *id.* line 5191 (Missouri); *id.* line 5647 (Nevada).

86. See, e.g., *id.* line 5814 (New Jersey); *id.* line 6737 (Ohio); *id.* line 338 (California).

87. GENDERS AND SEXUALITIES ALLIANCE NETWORK, <https://gsanetwork.org/about-us/faq> (last visited Aug. 2, 2017).

88. See, e.g., *Data Set*, *supra* note 56, line 110 (Arizona); *id.* line 8321 (Virginia); *id.* line 5384 (Missouri).

We analyzed and categorized all newspaper articles that mentioned LGBTQ issues. Three overarching themes were apparent. First, high school students are aware of transgender individuals and their safety needs. Second, many students and schools are making efforts to improve the environment for transgender students. Third, and most specifically, bathroom controversies regarding transgender students are part of the conversations taking place at many high schools. The majority of student publications strayed from traditional journalistic categories of news articles or editorials, instead blurring factual news coverage with opinion and subjective input. Rather than basing classification on these fixed categories, we view these hybrid communications as worthy of study. These themes are discussed below.

A. *Student Awareness of Transgender Individuals and Issues*

A total of 616 articles, out of 8,328 articles in the full data set, discussed transgender issues. The first main theme we recognized suggests that many high school students learn about the existence of the transgender population and the struggles of transgender people from the media. For example, Facebook's efforts to allow users to identify as a gender outside the male-female binary on their individual "pages" was a topic of discussion.⁸⁹ Our research indicates that 95 student articles in 87 newspapers discussed Caitlyn Jenner's transition from male to female.⁹⁰ Other articles recounted media stories of performances by Jeffrey Tambor, who portrays a transgender woman on the television show *Transparent*; Laverne Cox, a transgender actress from the television series *Orange is the New Black*; and the movie *The Danish Girl* about a transgender woman.⁹¹ Some student writers described and reviewed the shows without personal comment, but others offered analysis. For example, a student wrote: "I enjoyed 'The Danish Girl' as I'd never read such an intimate account of transgender transformation and was intrigued to learn more because of the increasing number of people in the world who are undergoing similar transitions."⁹²

Dozens of student newspaper articles in the data set reveal that students understand the dire circumstances of many LGBTQ and non-binary youth. These articles often cited statewide data and national media reports, as well as information provided by advocacy groups such as Lambda Legal, PFLAG, Gay, Lesbian & Straight Education Network (GLSEN), RAINN, GLAAD, and

89. See, e.g., *id.* line 558 (California); *id.* line 683 (California); *id.* line 2774 (Illinois).

90. See, e.g., *id.* line 3272 (Indiana); *id.* line 4941 (Minnesota); *id.* line 6501 (North Carolina).

91. See, e.g., *id.* line 8372 (Virginia); *id.* line 1275 (California); *id.* line 2007 (Florida).

92. *Id.* line 1445 (California).

the Trevor Project.⁹³ For example, a student writer in Florida observed: Florida is ranked 8th in teen homelessness, and “[a]bout 40% of homeless teens are lesbian, gay or transgender, with a majority of them running away because their parents ostracized them.”⁹⁴ In Utah, a student reported: “A survey by GLSEN has found that 75% of transgender youth feel unsafe at school and are more likely to miss school because they are concerned for their safety.”⁹⁵ Similarly, a student in North Carolina wrote: “Too many LGBT . . . students face discrimination and harassment on a daily basis. In fact, 84% of LGBT youth report being harassed at school . . . 28% of these teens drop out of school due to this harassment”⁹⁶ A Kentucky high school student was quoted as saying: “I am tired of holding my transgender friend as she cries because she doesn’t feel safe in school, because she is afraid of being ‘outed,’ and because the lack of compassion trans people receive has stolen all optimism she once had.”⁹⁷

Student newspapers also demonstrated knowledge of existing or proposed laws that affect LGBTQ individuals. For example, a student in South Carolina lamented: “At this point, we’ve all heard of the South Carolina transgender discrimination laws in all their ridiculous glory, but this is only one of the issues that transgender people face every single day of their lives. Those who identify as transgender face discrimination in every aspect of their lives.”⁹⁸ A Nebraska student commented: “It’s rather unfortunate that Nebraska has very few laws protecting transgender citizens . . . [E]mployment discrimination against the LGBTQ populace has little to no regulation in Nebraska, literally meaning that companies can get away with it.”⁹⁹

Many students and student opinion writers expressed frustration about the plight of their transgender peers. A student in Ohio regretted that “[t]ransgender people are among the most persecuted minorities around the world, and discriminatory policies only add to the cruel obstacles they face every day.”¹⁰⁰ A Colorado paper quoted a student as saying, “It’s scary for [transgender individuals] when they look and act the way they do in a place with the opposite gender. They get beat up.”¹⁰¹ Other newspapers report crime statistics; in Georgia, for example, a school newspaper reported that “[t]hree trans women of color were murdered in Virginia, Texas and California in January 2015. Four were murdered in San Francisco, New Orleans, Akron and Miami in February.”¹⁰² Local personal accounts of violence and the fear of violence

93. *Id.* line 1886 (Connecticut); *see also id.* at 1801 (Connecticut); *id.* line 310 (California); *id.* line 2796 (Illinois).

94. *Id.* line 2037 (Florida).

95. *Id.* line 8197 (Utah).

96. *Id.* line 6317 (North Carolina).

97. *Id.* line 3864 (Kentucky).

98. *Id.* line 8180 (Nebraska).

99. *Id.* line 5562 (South Carolina).

100. *Id.* line 6629 (Ohio).

101. *Id.* line 1674 (Colorado).

102. *Id.* line 2492 (Georgia).

abound in newspaper articles as well. In California, a writer said, “I interviewed a transgender student . . . and [he] told me about the negative experiences he had in the bathrooms both physically and verbally.”¹⁰³ A Maryland student was quoted as saying: “Because I’m transgender, I feel like I’m walking around with a target on my back. This is just part of being LGBT, but it shouldn’t be.”¹⁰⁴ A student in Texas wished for “a world where I can exist without fear of punishment strictly for expressing who I am.”¹⁰⁵

Suicide was also commonly discussed as a risk for transgender or non-binary students. Several student newspapers (4 percent) covered stories about Leelah Alcorn, a transgender teenager in Ohio who committed suicide in 2014.¹⁰⁶ The tragedy of young people committing suicide because they were not allowed to express their gender identities deeply affected some student writers—one of whom, in Delaware, declared: “It’s up to us to stop this madness.”¹⁰⁷

B. *Student Allies and School Support for Transgender Youth*

The second salient theme of the data set is that many schools and students have incorporated ways that their schools can support transgender youth, including the Transgender Day of Remembrance.¹⁰⁸ The day was started to memorialize the murders of transgender people who were killed because of hate, and some school papers use the day as an opportunity to discuss gender nonconformity.¹⁰⁹ As a student in Texas reminded readers, “we can remember that the world still has a lot of growing to do in terms of social justice and therefore work to improve societal conditions in honor of those who were and are victims.”¹¹⁰

In some newspapers, students discussed the National Day of Silence. On this day, students vow to remain silent in recognition of the silencing effects of anti-LGBTQ bullying and harassment that so many of their peers face.¹¹¹ As a student writer in Iowa explained: “If there is even just one person participating [in the Day of Silence], showing that they care about the cause, that action can

103. *Id.* line 1561 (California).

104. *Id.* line 4025 (Maryland).

105. *Id.* line 7637 (Texas).

106. *Id.* line 1944 (Delaware); *see also id.* line 5977 (New Jersey); *id.* line 6095 (New York).

107. *Id.* line 1943 (Delaware).

108. *Id.* line 7636 (Texas); *see also id.* line 4425 (Massachusetts); *id.* line 3044 (Illinois).

109. *See* Alex Schmider, *GLAAD observes Transgender Day of Remembrance*, GLAAD (Nov. 20, 2016), <https://www.glaad.org/blog/glaad-observes-transgender-day-remembrance> (describing an annual observance on November 20, begun by a transgender advocate to honor the memory of Rita Hester, a transgender woman who was killed in 1998).

110. *Data Set*, *supra* note 56, line 7636 (Texas).

111. *4 Facts About Day of Silence*, GLSEN, <https://www.glsen.org/day-of-silence/4-facts-about-glsen-day-silence> (last visited Aug. 7, 2017).

make a big difference and help others understand how difficult it is to have to withstand threats, assault, and other forms of bullying”¹¹²

One of the most common ways that schools condemn homophobia and transphobia, and support LGBTQ youth, is to support student-run groups that offer opportunities for students to meet and talk about issues related to sexual orientation and gender identity. Typically, these groups are called the “Gay-Straight Alliance” or the “Gender-Sexuality Alliance,”¹¹³ but the dataset includes references to other groups, including the “Pride Club” (Illinois) and the “Equal Club” (Virginia).¹¹⁴ Students frequently refer to these clubs as a “safe place to be yourself.”¹¹⁵ “It’s a place where everyone is accepted. When you learn to accept yourself and you learn to be yourself, it completely changes you,” a student in New Jersey commented.¹¹⁶ In Arkansas, a student described the club’s benefits: “My favorite part about the GSA is that there is a club that celebrates who I am . . . and that there are other teenagers who know what I go through.”¹¹⁷ Although there are about thirteen states that do not have a GSA network,¹¹⁸ these groups are so well known that some students in schools that do not have such a group call their absence “disheartening.”¹¹⁹ A transgender student in Oklahoma said, “I would love a GSA . . . club because I don’t actually feel like I’m part of a ‘community’ [at my school].”¹²⁰

Three hundred and ninety high school newspapers discussed National Coming Out Day, on which students openly identify as a member of the LGBTQ community or as an ally of the community.¹²¹ Still other activities include “The Laramie Project,” which raises awareness about the murder of Matthew Shepard;¹²² school-wide anti-bullying essay contests (Texas);¹²³ Spirit Day to show support for LGBTQ students by wearing purple shirts (e.g., Colorado, Illinois, Maryland, Kansas, Connecticut); and Ally Week (Missouri,

112. *Data Set*, *supra* note 56, line 3489 (Iowa).

113. *Id.* line 118 (often called the GSA in school papers).

114. *Id.* line 2844 (Illinois); *see also id.* line 8321 (Virginia).

115. *Id.* line 413 (California).

116. *Id.* line 5787 (New Jersey).

117. *Id.* line 198 (Arkansas).

118. *Change the Nation*, GSA NETWORK, <https://gsanetwork.org/get-involved/change-nation> (last visited Aug. 8, 2017) (stating, “Today, 37 states have a GSA network! Our goal? 50 states by 2020!”).

119. *See, e.g., Data Set*, *supra* note 56, line 7698 (Texas).

120. *Id.* line 6961 (Oklahoma).

121. *Id.* line 723 (California); *see also id.* line 1858 (Connecticut); *id.* line 4303 (Maryland).

122. James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES (Oct. 13, 1998), <http://www.nytimes.com/1998/10/13/us/gay-man-dies-from-attack-fanning-outrage-and-debate.html> (Matthew Shepard was a 21-year-old, gay college student in Wyoming who was kidnapped, tied to a fence, and tortured by his attackers because he was gay. While he was rescued after 18 hours in near freezing temperatures, he died five days later from severe head injuries). *See also Data Set*, *supra* note 56, line 4919 (Minnesota).

123. *Data Set*, *supra* note 56, line 7863 (Texas).

Mississippi, New York, Michigan, Iowa, Kansas).¹²⁴ Even in schools that made efforts to support transgender students, student writers expressed a desire for more. A Virginia student wrote, “I’m pleased that gender identity has been added to the nondiscrimination policy, but I don’t want the school board and the [school] district as a whole to feel like they’re done This is just the first step in a seemingly endless road.”¹²⁵

Some newspapers also described student activism to change traditional school activities deemed outdated and non-inclusive because of gender specificity. For example, multiple writers objected to and tried to abolish Sadie Hawkins dances,¹²⁶ gender-specific dress codes,¹²⁷ dress-up days that were tied to the gender binary (e.g., “girls’ dress up days”),¹²⁸ and requirements that girls and boys wear different color graduation robes.¹²⁹ One student in Oregon wrote: “Since the idea of the Sadie Hawkins dance is so gender oriented, this leaves the gay, transsexual, or just non-binary community out of the tradition.”¹³⁰ Several students also complained in newspaper articles that the sex-education classes of the high school focused on heterosexual cis-gender sexual issues, excluding same-sex and transgender issues.¹³¹ A Florida student reflected that stereotypes and jokes added to discrimination against transgender individuals:

All the little ‘unimportant’ things you never paid much attention to, the ‘man in a dress’ joke, harassing kids who want or try to do things that aren’t ‘for their gender,’ . . . everything that builds or enforces gender roles or stereotypes is part of the attitude of violence and discrimination towards transgender individuals.¹³²

C. Bathroom Use

The third major theme that emerged in the data on high school articles that discuss transgender issues was bathroom use, discussed in 479 articles in 427 papers in 39 states.¹³³ A student in North Carolina described that state’s House Bill Two as “North Carolina’s discriminatory HB2 Law [which] forbids transgender people from using public bathrooms that match their gender identity and eliminates local protections for transgender people and the LGBT

124. *Id.* line 1677 (Colorado); *see also id.* line 3033 (Illinois); *id.* line 3482 (Iowa); *id.* line 4928 (Minnesota).

125. *Id.* line 8254 (Virginia).

126. *Id.* line 7059 (Oregon); *see also id.* line 1724 (Colorado); *id.* line 8359 (Virginia).

127. *Id.* line 8443 (Virginia); *see also id.* line 4368 (Massachusetts); *id.* line 3410 (Iowa).

128. *Id.* line 421 (California).

129. *Id.* line 8243 (Virginia); *see also id.* line 8665 (Washington); *id.* line 65 (Arizona).

130. *Id.* line 7058 (Oregon).

131. *Id.* line 3332 (Indiana); *see also id.* line 3672 (Kansas); *id.* line 2042 (Florida).

132. *Id.* line 2244 (Florida).

133. *Id.* line 2066 (Florida); *see also id.* line 2384 (Georgia); *id.* line 4548 (Massachusetts).

community.”¹³⁴ Students around the country discussed HB2 and other similar state efforts. One student in Wisconsin argued: “In addition, the misinformed notion that allowing trans people to use the bathroom they most closely identify with will increase cases of sexual assault, both by trans people and cis people using protection laws for their own benefit, is potentially the most dangerous idea surrounding this controversy.”¹³⁵ A Kansas student complained that “to spend time at the government level arguing about where public school kids go to the bathroom seems like a real waste of time.”¹³⁶

Other articles described the transgender experience of using restrooms in schools and in public. For example, a student in Texas described a fellow student’s experience of “standing in front of the wooden door, weighing his options of whether to get beat up or get disgusted looks.”¹³⁷ In California, a transgender student said that having to use the women’s bathroom was “invalidating of his gender.”¹³⁸ This lament was echoed by a transgender student in Illinois who stated that “going into the girl’s bathroom is very stress-inducing [and] anxiety-inducing” and “makes me feel like I’m not who I think I am. It forces me to confine myself to be what everyone around me sees, which is a girl, even though that’s not who I am.”¹³⁹ Several student writers commented on the negative effects of rigid bathroom laws. A Maryland student said “Forcing [transgender students] to use wrong or segregated restrooms can negatively impact their mental health and can subject them to bullying or violence from peers.”¹⁴⁰ In Minnesota, a student shared a similar sentiment, explaining that “violence has occurred against transgender people when they [use the restroom of their choice].”¹⁴¹ A transgender girl in Massachusetts, describing the risk transgender students take when using the restroom, said “I have started using the correct bathroom when I feel brave enough.”¹⁴²

Numerous high school writers expressed the need for bathroom policies that accommodate transgender and non-binary students. In Washington, one student wrote: “All cis gendered students have multiple bathrooms all over the school where they can use the restroom peacefully Trans students should be offered this same option”¹⁴³ In Maryland, a student advocating for change in policy emphasized that “studies show that it does not increase the risk of sexual or physical violence” and “trans people are more at risk of being attacked or harassed in the bathroom of their assigned sex.”¹⁴⁴ Students also

134. *Id.* line 6299 (North Carolina).

135. *Id.* line 8792 (Wisconsin).

136. *Id.* line 3855 (Kansas).

137. *Id.* line 7534 (Texas).

138. *Id.* line 358 (California).

139. *Id.* line 3016 (Illinois).

140. *Id.* line 4006 (Maryland).

141. *Id.* line 5006 (Minnesota).

142. *Id.* line 4426 (Massachusetts).

143. *Id.* line 8552 (Washington).

144. *Id.* line 4006 (Maryland).

held their school administration responsible for the importance of bathroom access in Minnesota: “What will the consequences be for people who can’t use a gendered bathroom without facing violence? If anyone gets hurt, that’s the administration’s fault.”¹⁴⁵

Some students also believed that the bathroom debate is “symbolic”¹⁴⁶ of a larger discussion about transphobia. In Ohio, a student said scare tactics of violence “should not be used as artillery against trans people’s ability to use the bathroom.”¹⁴⁷ A California student offered a broader perspective: “[T]he bathroom’s important, but it’s symbolic A bathroom isn’t going to change people’s attitudes. It’s a recognition that that’s important but we have a lot more other stuff to do to actually make a difference to kids.”¹⁴⁸ A Texas student described his vision for the future:

I want children, transgender or not, to understand that who they are is nothing to be ashamed of. I’d want them to know that no one — not even the government — has the right to tell them what their gender is. I want children not to be fearful of the people around them who only want to use the bathroom without the threat of harassment or violence.¹⁴⁹

D. *Other Voices*

The great majority of papers that mentioned the search terms discussed transgender issues neutrally (e.g., in news stories) or positively (endorsing equal treatment). We considered sensitive reporting of pop culture and news articles about transgender individuals significant. Opponents of transgender rights frequently describe transgender individuals using insulting language, intentionally misgendering them and demeaning their transition.¹⁵⁰ Student journalists who avoid this framing, and instead discuss transgender issues without disgust or condescension, demonstrate professional respect for the transgender identity. As one journalist has explained: “Sensitive reporting about transgender people and those who identify outside the gender binary is the first step toward removing the stigma associated with these groups.”¹⁵¹ Still, there were in the dataset 66 articles that contained negative comments that were also reported. In examining negative statements by students, we noted that

145. *Id.* line 4863 (Minnesota).

146. *Id.* line 361 (California); *see also id.* line 5326 (Missouri); *id.* line 7406 (South Carolina).

147. *Id.* at line 6739 (Ohio).

148. *Id.* at line 361 (California).

149. *Id.* at line 7637 (Texas).

150. *See, e.g.,* Stella Morabito, *Trouble In Transtopia: Murmurs Of Sex Change Regret*, THE FEDERALIST, Nov. 11, 2014 (describing gender confirmation surgery as “elective bodily mutilation”); Ed Whelan, *Enforced Gender Conformity*, NAT’L REV., Oct. 31, 2016 (mislabeled Gavin Grimm and criticizing journalists who do not).

151. Lori McCue, *Say My Name: Why Can’t Journalism Acknowledge the Transgender Community*, AWOL (Dec. 12, 2013), <https://awolau.org/855/uncategorized/say-my-name-why-cant-journalism-acknowledge-the-transgender-community>.

even when school newspapers include negative statements about transgender students, these are in a context of peer conversations about gender identity issues.¹⁵² Student criticism focused on two main themes: adherence to the gender binary/rejection of trans identities, and a sense of fear. Several students expressed support for the traditional gender binary. For example, a Kansas student stated, “The only genders that exist are the binary ones. This only includes male and female.”¹⁵³ Another Kansas student questioned the motivation for a person to transition to a different gender: “Whether you’re happy or sad about your life, changing your gender is not the correct response.”¹⁵⁴ In Texas, a student rejected the need to support transgender individuals, saying “I believe this was a choice transgenders made and [they] should not expect everyone to support their choice.”¹⁵⁵

A few students also expressed safety concerns, believing that supporting transgender students puts others at risk. As a Kentucky student said: “My school’s policy places the rights of one transgender student over the rights of many girls.”¹⁵⁶ Two students in Alabama expressed safety concerns of transgender-inclusive bathroom policies. For them, “[t]he problem isn’t the transgenders; it’s the pedophiles” who would be allowed in bathrooms.¹⁵⁷

Even though the search was limited to online high school newspapers, which excludes paper-only and private email newspapers, the content analysis study suggested that high school students are aware of issues concerning LGBTQ individuals. Nevertheless, nearly 40 percent of the newspapers analyzed in the study included no references to LGBTQ individuals during the three-year period. This discrepancy may be at least partly due to “no promo homo” laws that exist in eight states, limiting how public-school teachers can discuss LGBTQ issues.¹⁵⁸ These restrictions exist in Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina Texas, and Utah.¹⁵⁹ For example, newspapers in Louisiana included no references to transgender individuals in any of the eleven school newspapers on the SNO site.¹⁶⁰ In Alabama, out of the state’s fifteen online student newspapers, just eight articles mentioned transgender individuals in the three-year period.¹⁶¹ In Mississippi,

152. *See, e.g., Data Set, supra* note 56, line 3597 (Kansas); *id.* line 5988 (New Mexico); *id.* line 8006 (Texas).

153. *Id.* line 3586 (Kansas).

154. *Id.* line 3597 (Kansas).

155. *Id.* line 8006 (Texas).

156. *Id.* line 3833 (Kentucky).

157. *Id.* line 22 (Alabama).

158. *United States: LGBT Students Face Discrimination*, HUMAN RIGHTS WATCH (Dec. 7, 2016, 11:01 AM), <https://www.hrw.org/news/2016/12/07/united-states-lgbt-students-face-discrimination>.

159. *Data Set, supra* note 56, line 4119 (Maryland).

160. *Id.* lines 3901-12.

161. *Id.* lines 6, 7, 17, 20, 22, 30, 32, and 36 (Alabama).

only one article mentioned the word transgender, even though Mississippi has twelve newspapers on the SNO site.¹⁶²

CONCLUSION

The Supreme Court recently affirmed that in order to survive constitutional scrutiny, sex-based classifications must “substantially serve an important governmental interest *today*,” in a manner that draws upon “new insights and societal understandings” and rejects “unjustified inequality . . . that once passed unnoticed and unchallenged.”¹⁶³ This principle alone does not resolve the conflict between transgender students and government policies that affect their well-being. However, it does suggest that any constitutional inquiry into the rights of transgender students must acknowledge the attitudes of these students’ own classmates.¹⁶⁴ A review of those attitudes indicates that Judge Davis’s defense of transgender students’ right to “dignity and privacy” finds more purchase with many young people today than Judge Niemeyer’s assertion that transgender bathroom use is “offensive” and “inhumane” to other students. The equal treatment that Judge Niemeyer perceives to be inhumane may soon be seen as a fundamental component of human dignity for all.

162. *Id.* line 5140 (Mississippi).

163. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015)).

164. Challenges under Title IX do not require this precise analysis, though transgender public-school students typically bring overlapping Title IX and equal protection claims. Moreover, as previously noted, there is extensive synergy between sex discrimination analysis in the statutory and constitutional contexts. *See supra* note 18.