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ESSAY

TRANSGENDER EQUALITY AND DIGNITY UNDER THE MONTANA CONSTITUTION

Caitlin E. Borgmann*

I. INTRODUCTION

The United States is seeing a wave of explicit anti-transgender animus, expressed in the form of legislation banishing transgender individuals from full participation in public life.¹ In Montana, such a measure was defeated in the Legislature in the 2017 session.² HB 609 would have discriminated against transgender individuals by prohibiting them from using the restroom, locker room, or changing facility in a government building or under public control that corresponds with their gender identity.³ Following the House Judiciary Committee's rejection of HB 609, the Montana Family Foundation began collecting signatures on ballot initiative I-183, a nearly

* Executive Director, ACLU of Montana. A version of this essay was delivered as the University of Montana Constitution Day Lecture on September 19, 2017. The author thanks Justice James C. Nelson, S.K. Rossi, and Professor Anthony Johnstone for helpful conversations on the topic of this essay.

1. *See, e.g.*, H.R. 2, General Assembly of 2015–2016, 2d Spec. Sess. (N.C. 2016) (partially repealed by H.R. 142, General Assembly of 2017–2018, Reg. Sess. (N.C. 2017)). President Trump also issued a Presidential Memorandum on August 25, 2017, banning transgender individuals from serving in the United States military. Military Service by Transgender Individuals, 82 Fed. Reg. 41319 (Aug. 25, 2017). The President's action was challenged in multiple lawsuits and is currently preliminarily enjoined. *Doe v. Trump*, Civil Action No. 17-1597 (CKK), ___ F. Supp. 3d. ___, 2017 WL 4873042 (D.D.C. Oct. 30, 2017). *See infra* note 130.

2. Generally Revise Privacy Laws Concerning Protected Facilities, H.R. 609, 65th Leg., Reg. Sess. (Mont. 2017).

3. *Id.* § 4.

identical measure to HB 609, with the intent of placing it on the ballot in 2018.⁴

What does the Montana Constitution say about the anti-transgender discrimination embodied in measures like HB 609 and I-183? Surely such legislation is unconstitutional because it classifies on the basis of sex.⁵ But that answer does not begin to do justice to the harms transgender discrimination inflicts. And the Montana Constitution does not limit the analysis to this answer. In fact, it compels a deeper analysis that is rooted in the principle of dignity that expressly undergirds Montana's constitutional protections against discrimination.⁶

II. BACKGROUND FACTS ABOUT TRANSGENDER STATUS

A transgender person (also referred to as a “trans person”), is an individual whose gender identity does not correspond to the sex they were assigned at birth.⁷ In contrast, a cisgender person is one whose gender identity corresponds to the sex they were assigned at birth.⁸ Many transgender persons seek to bring their appearance into alignment with their gender identity. This is commonly referred to as “transition.”⁹ Gender identity is different from sexual orientation. Sexual orientation describes a person's enduring physical, romantic, or emotional attraction to another person (e.g., straight, gay, lesbian, bisexual).¹⁰ Gender identity describes a person's internal, personal sense of being a man or a woman, or of being outside of the gender binary.¹¹

Discrimination against transgender persons is widespread and has devastating effects. Transgender individuals are subject to high rates of violence, including murder.¹² This is especially true of trans women of color.¹³ Studies have also repeatedly shown a higher risk of suicide among transgender persons. Forty percent of transgender adults reported having made a suicide attempt, compared with 4.6% of the general public.¹⁴ And often

4. See *Revised Ballot Language for Initiative No. 183 (I-183)*, MONT. SEC'Y OF STATE, <https://perma.cc/ZADN-VXHG> (last visited Jan. 13, 2016).

5. See *infra* notes 63–68, (discussion of transgender discrimination as sex discrimination).

6. See MONT. CONST. art. 2, § 4; see also *infra* note 95 (discussion of dignity analysis).

7. *Transgender Facts*, MAYO CLINIC, <https://perma.cc/Y4BJ-2LWY> (last visited Jan. 13, 2018).

8. *Id.*

9. *Glossary of Terms – Transgender*, GLAAD, <https://perma.cc/B2EW-WBSU> (last visited Jan. 13, 2018).

10. *Id.*

11. *Id.*

12. Maggie Astor, *Violence Against Transgender People Is on the Rise, Advocates Say*, THE NEW YORK TIMES (Nov. 9, 2017), <https://perma.cc/ZM74-FAGF>.

13. *Id.*

14. Sandy E. James et. al, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 10 (Dec. 2016), <https://perma.cc/RS43-7NCS>.

these suicide attempts occur at young ages. Ninety-two percent of transgender individuals reporting having attempted suicide reported having first done so before the age of twenty-five.¹⁵

Transgender suicide rates are influenced by outside stressors. Studies suggest that “negative experiences related to anti-transgender bias” contribute to the increased prevalence of suicide attempts among transgender people.¹⁶ Stressors that affect transgender people include: societal transphobia, internalized transphobia, family rejection, lack of social support, physical violence, and discrimination (for example in health care, employment, accommodations, and housing).¹⁷ The evidence suggests that elevated rates of self-harm among transgender people are not due solely to being transgender. For instance, research shows that each episode of victimization, such as physical or verbal harassment or abuse, increases the likelihood of self-harming behavior by two-and-a-half times on average.¹⁸ Further, being seen as transgender is a greater risk factor. Trans people report improved mental health-related quality of life when they have had access to surgery, such as facial feminization surgery, that allows them to “pass” in public as the gender they identify with, without being recognized as transgender.¹⁹

III. BATHROOM PANIC LEGISLATION

Legislative efforts to sanction discrimination against transgender people have proliferated in recent years. The most common form of such legislation at the state level is sometimes referred to as “bathroom panic legislation.” Bathroom panic legislation prohibits transgender people from using restrooms or other public facilities, such as locker rooms, in accordance with their gender identity.²⁰ Instead, they are forced to use the facility that corresponds to the sex they were assigned at birth (or, in some cases, to use a separate, unisex, single-person facility).

Montana HB 609, which was defeated in the Montana House Judiciary Committee in 2017, is a typical example. The bill mandated that individuals use the public facility (bathroom, locker room, or any “facility in which a person may be in a state of undress in the presence of others”) according to

15. *Id.* at 115.

16. Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, WILLIAMS INST. 12–13 (Jan. 2014), <https://perma.cc/J8SJ-CUKK>.

17. *Id.* at 11–13.

18. *Id.* at 2.

19. Tiffany A. Ainsworth & Jeffrey H. Spiegel, *Quality of Life of Individuals with and Without Facial Feminization Surgery or Gender Reassignment Surgery*, 19 QUALITY OF LIFE RESEARCH 1019 (Sep. 2010).

20. See Scott Shackford, *Transgender Bathroom Panic Legislation Comes to Texas*, HIT & RUN BLOG (Jan. 6, 2017), <https://perma.cc/26MV-MRE6>.

a person's "sex," defined as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth."²¹ "[S]tate of undress" was not defined.²² The bill allowed a person who encountered an individual perceived to be of the opposite sex in a public facility to bring a lawsuit for "compensatory damages for all emotional or mental distress" against the government entity or public school that controls the facility.²³ Ballot measure I-183, which the Montana Family Foundation aims to put on the ballot in November 2018, is virtually identical to HB 609.²⁴

Campaigns for bathroom panic legislation or opposing local non-discrimination ordinances that protect transgender people from discrimination have been full of vitriol and grave misunderstandings of what it means to be transgender. For example, an advertisement in a campaign against Houston's non-discrimination ordinance ("NDO") claimed, "This ordinance will allow men to freely go into women's bathrooms, locker rooms, and showers. That is filthy, that is disgusting, and that is unsafe."²⁵ Campaign talking points asserted that the NDO would allow "more perverted men to become bold in acting out their perversion" and "sex offenders to roam around public bathrooms."²⁶ Hysterical claims that NDOs would permit men to enter women's restrooms stigmatizes transgender women by denying their identity and perpetuating the belief that they are not women.

Bathroom panic did not originate with the recent anti-transgender campaigns and legislation. As one commentator puts it, "For more than 100 years, Americans have projected their most profound fears about social change onto public restrooms."²⁷ Bathroom panic has historically been used to oppress and shame, and to keep certain groups locked out of full participation in society. Bathrooms were among the racially segregated public ac-

21. Mont. H.R. 609, § 3.

22. *Id.* § 3.

23. *Id.* § 5.

24. See *Revised Ballot Language for Initiative No. 183 (I-183)*, *supra* note 4. The ACLU of Montana successfully challenged the legal sufficiency of the Attorney General's original ballot statement for I-183. *ACLU of Mont. Found., Inc. v. State*, 403 P.2d 1244 (Mont. 2017). The statement was revised, and the Montana Family Foundation began collecting signatures anew. On October 17, 2017, the ACLU of Montana, on behalf of ten individual plaintiffs as well as the cities of Missoula and Bozeman, filed a complaint challenging the constitutionality of I-183. *Compl. for Declaratory and Injunctive Relief, Hobaugh, et al. v. State* (Mont. 8th Jud. Dist. Ct. Oct. 17, 2017) (No. CDV-17-0673), available at <https://perma.cc/35EZ-XV3A>.

25. Zack Ford, *Opponents of Houston's LGBT Protections Call Trans Women 'Filthy, Disgusting, and Unsafe'*, THINKPROGRESS (Aug. 24, 2015), <https://perma.cc/6Z99-CVPC>.

26. Zack Ford, *How Conservatives are Trying to Derail Houston's LGBT Nondiscrimination Ordinance*, THINKPROGRESS (May 15, 2014), <https://perma.cc/A4AJ-BYNN>.

27. Neil J. Young, *How the Bathroom Wars Shaped America*, POLITICO MAGAZINE (May 18, 2016), <https://perma.cc/Q6CA-XKED>.

commodations enforced by the Jim Crow laws.²⁸ Phyllis Schlafly, the John Birch Society, and others stoked panic about the supposedly frightening specter of unisex bathrooms in a successful battle against the Equal Rights Amendment.²⁹

One transgender teenager's struggle against bathroom panic has made him a national hero. Gavin Grimm transitioned to being male while in high school in Virginia.³⁰ He consulted with and received the support of school officials, who eventually allowed him to use the boys' restroom.³¹ Gavin used the boys' restroom without incident for almost two months.³² At this point, certain members of the community became aware of Gavin's use of the boys' restroom and complained to the school board.³³ In November and December 2014, the school board met to consider a resolution that would prevent Gavin from continuing to use the boys' restroom.³⁴ Gavin spoke to the school board to plead for respect. "All I want to do is be a normal child and use the restroom in peace," Gavin explained, "and I have had no problems from students to do that—only from adults."³⁵ He reminded the school board members that he "did not ask to be this way, and it's one of the most difficult things anyone can face. . . . I am just a human. I am just a boy."³⁶ The teenager's courageous testimony was met by a hostile audience of detractors eager to condemn him, some calling him a "young lady," a "freak," or likening him to a person who seeks to urinate on fire hydrants because he thinks he is a dog.³⁷ The board then adopted the policy by a vote of 6-1.³⁸

In 2016, the United States Department of Education and United States Department of Justice jointly issued a guidance letter to public schools on how to treat transgender students under Title IX. In the letter, the departments explained that schools must "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently

28. Raina Lipsitz, *What Jim Crow Laws Teach Us About North Carolina's Bathroom Legislation*, BUSTLE (May 24, 2016), <https://perma.cc/USSY-EPVF>.

29. Young, *supra* note 27; Amanda Terkel, *Bathroom Panic Has Long Stood in the Way of Equal Rights: The Woman's Movement and Now the LGBT Movement Have Run up Against Restroom Fears*, HUFFINGTON POST (Mar. 24, 2016), <https://perma.cc/HHV5-DXWN>.

30. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715–16 (4th Cir. 2016).

31. *Id.* 715–16.

32. *Id.* 715–16.

33. *Id.* at 716.

34. *Id.*

35. Br. in Opp'n at 7, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 2016 WL 4938270 at *7 (U.S. Sep. 13, 2016) (No. 16-273).

36. *Id.* at *7–8.

37. G.G. *ex rel.* Grimm, 822 F.3d at 716.

38. *Id.*

from the way it treats other students of the same gender identity.”³⁹ Gavin Grimm challenged his treatment by the school board in federal court, relying on the 2016 guidance. The district court dismissed Gavin’s Title IX claim and denied his request for a preliminary injunction.⁴⁰ The Fourth Circuit Court of Appeals sided with Gavin, deferring to the federal government’s interpretation that Title IX’s prohibition on sex discrimination includes discrimination against transgender students.⁴¹

The school board then appealed to the United States Supreme Court, which granted certiorari.⁴² On February 22, 2017, while Gavin’s case was pending before the Supreme Court, the Trump administration rescinded the guidance.⁴³ The Court then sent the case back to the Fourth Circuit.⁴⁴ Senior Judge Andre Davis, joined by Judge Henry Floyd, issued a concurrence to the Fourth Circuit’s order granting an unopposed motion to vacate the district court’s preliminary injunction.⁴⁵ In his opinion, Judge Davis placed Gavin alongside “brave individuals . . . who refused to accept quietly the injustices that were perpetuated against them.”⁴⁶ He likened Gavin to Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell.⁴⁷

What do these individuals have in common? What is it about their courageous battles that aligns them with Gavin Grimm and others like him? Judge Davis saw that the common thread in discrimination based on race, sexual orientation, and gender identity is an affront to human dignity. “G.G. takes his place among other modern-day human rights leaders who strive to ensure that, one day, equality will prevail, and that the *core dignity* of every one of our brothers and sisters is respected by lawmakers and others who wield power over their lives.”⁴⁸ Moreover, Judge Davis recognized that dignity is not implicated every time a person is treated unequally. He wrote, “G.G.’s case is about much more than bathrooms. It’s about a boy asking his school to treat him just like any other boy. It’s about protecting the rights of transgender people in public spaces and *not forcing them to exist on the margins*.”⁴⁹

39. Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEPT. OF EDUC., 3 (May 13, 2016), <https://perma.cc/L7SM-DJPV>.

40. *G.G. ex rel. Grimm*, 822 F.3d at 747.

41. *Id.* at 723.

42. Gloucester Cty. Sch. Bd. v. *G.G. ex rel. Grimm*, ___ U.S. ___, 136 S. Ct. 2442 (2016).

43. Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEPT. OF EDUC. 2 (Feb. 22, 2017), <https://perma.cc/RQ64-TEH3>.

44. Gloucester Cty. Sch. Bd. v. *G.G. ex rel. Grimm*, ___ U.S. ___, 137 S. Ct. 1239 (2017).

45. *G.G. ex rel. Grimm*, 853 F.3d at 730 (4th Cir. 2017) (Davis, J., concurring).

46. *Id.*

47. *Id.*

48. *Id.* at 731 (emphasis added).

49. *Id.* at 730 (emphasis added).

IV. EQUAL PROTECTION ANALYSIS AND TRANSGENDER DISCRIMINATION

Judge Davis' insights identify the core of the harm transgender discrimination causes in a way that federal court decisions on discrimination, as well as Montana Supreme Court decisions applying the Montana Constitution's Equal Protection Clause, typically have not. Equal protection jurisprudence has had a hard time articulating the distinct harms that discrimination causes when directed against a group that has historically suffered oppression. Federal and Montana court opinions have held that discriminatory laws are subject to strict scrutiny when their classifications are "arbitrary"⁵⁰ or "suspect," or when they reflect a "bare . . . desire to harm a politically unpopular group."⁵¹ Whether a particular classification qualifies as suspect or arbitrary has not always been intuitive. Classes that the Supreme Court has expressly held to be suspect, or to warrant at least heightened scrutiny, include: race, sex, national origin, alienage, and being born out of wedlock.⁵² At the same time, the Supreme Court has failed to acknowledge the suspect status of other subordinate classes, such as the poor, the elderly, or persons with disabilities.⁵³

The courts have sometimes relied on a set of factors to determine whether a classification is suspect or arbitrary. These factors include whether the class has historically been subjected to discrimination; whether the group lacks political power; and whether the group's distinguishing characteristic is immutable or beyond members' control.⁵⁴ However, the courts have not offered much explanation for these factors, and they have not always worked well in practice.⁵⁵ One problem lies with the courts' tendency to shift the analysis from "class" to "classifications" once a class has been identified as suspect.⁵⁶ Thus, once the Supreme Court held that people of color were a suspect class (a class that meets the above factors), it shifted to declaring that *any classification* based on race merits strict scrutiny.

50. *Godfrey v. Montana State Fish & Game Comm'n*, 631 P.2d 1265, 1267 (Mont. 1981).

51. *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985).

52. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 *YALE L.J.* 485, 489 (1998) (citations omitted).

53. Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 *FLA. L. REV.* 1, 18 (2017).

54. Yoshino, *supra* note 52, at 489; *Donaldson v. State*, 292 P. 3d 364, 401–02 (Mont. 2012) (Nelson, J., dissenting) (citing *In re C.H.*, 683 P.2d 931, 938 (Mont. 1984)).

55. See, e.g., Hutchinson, *supra* note 53, at 19 (discussing problems with the political vulnerability factor); Yoshino, *supra* note 52, at 494–95 (raising concerns about the immutability factor).

56. Hutchinson, *supra* note 53, at 19.

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tiny,⁵⁷ even though, as a class, white people do not meet the factors of historical discrimination or political vulnerability.⁵⁸

This shift from class to classifications means that equal protection case law too often relies mechanically on tiers of scrutiny without attention to the human suffering that certain kinds of discrimination can cause. The Montana Supreme Court's 2004 decision in *Snetsinger v. Montana University System*⁵⁹ is an example of this. In *Snetsinger*, the Court held unconstitutional the Montana University System's policy prohibiting gay employees from receiving insurance coverage for their same-sex domestic partners.⁶⁰ While the outcome of the case was an important and significant step forward for the rights of same-sex couples in Montana, the court's opinion was sterile, its conclusions pat. The court decided the policy was unconstitutional under rational basis review, thus avoiding the question of what classification was appropriate.⁶¹ One can certainly imagine reasons why the Court may have skirted that question. But from another perspective, it was a missed opportunity to apply an interpretation of the Montana Equal Protection Clause more consistent with its location within the dignity provision of the Montana Constitution.⁶²

Federal cases specifically addressing transgender discrimination have likewise often failed to give due attention to the way in which such discrimination is an affront to dignity. Some federal courts have interpreted transgender discrimination to be a form of sex discrimination, relying on case law interpreting sex discrimination to include sex stereotyping. Since *Price Waterhouse v. Hopkins*,⁶³ discrimination on the basis of transgender identity has been recognized as discrimination "because of sex" under either the equal protection clause, Title VII of the Civil Rights Act, or the Gender

57. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–24 (1995) (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”).

58. *Hutchinson*, *supra* note 53, at 19. The same is true of sex classifications. *See infra* notes 69–71

59. 104 P.3d 445 (Mont. 2004).

60. *Id.* at 453.

61. *Id.* at 452. The Court decided that the University's policy was not rationally related to its purported grounding in Montana's marriage laws because it allowed heterosexual unmarried couples to receive benefits merely by signing an affidavit. *Id.* at 451. The Court was arguably stretching to reach this conclusion, so as to avoid the question whether sexual orientation constitutes sex discrimination (or is independently a suspect classification). *See Id.* at 457 (Nelson, J., concurring) (arguing that Montana Constitution “should provide more protection against discrimination based on sexual orientation than the Court's Opinion in this case reflects.”); *Snetsinger*, 104 P.3d at 470 (Rice, J., dissenting) (questioning the court's factual premise that “any of the couples who signed the Affidavit ‘may choose not to marry’”).

62. *See id.* 457 (Nelson, J., concurring).

63. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding that acting on the basis of a sex stereotype is acting on the basis of sex under Title VII).

Motivated Violence Act⁶⁴ in the Sixth, Seventh, Ninth, and Eleventh Circuits and by the Equal Employment Opportunity Commission.⁶⁵ In *Glenn v. Brumby*, the Eleventh Circuit held:

[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination

All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . Because these protections are afforded to everyone, they cannot be denied to a transgender individual. The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.⁶⁶

Courts interpreting Title IX may feel constrained by the fact that only sex, not gender identity, is expressly mentioned in the statute.⁶⁷ But even in cases addressing discrimination against a transgender individual under the Equal Protection Clause, courts have typically chosen to analyze the discrimination as sex discrimination through sex stereotyping.⁶⁸

The logic of these opinions is sound. But they do not go far enough. Merely identifying transgender discrimination as sex discrimination based on sex stereotyping—which may affect cisgender individuals as well—does not highlight the unique way in which transgender discrimination violates human dignity. As the court in *Glenn* recognized, sex stereotyping can go both ways. Males can be denied jobs as nurses, for example.⁶⁹ Ruth Bader

64. The GMVA was enacted as subtitle C of the Violence Against Women Act of 1994. *See* 34 U.S.C.A. 12361 (West 2017).

65. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, (E.E.O.C. Apr. 20, 2012); *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *see also* *Fabian v. Hospital of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016) (agreeing that transgender discrimination is sex discrimination).

66. *Glenn*, 663 F.3d at 1317–19.

67. *See, e.g.,* *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984) (suggesting that history of Title VII indicates that “the phrase . . . prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals). *But see* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (declaring that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

68. *See, e.g., Glenn*, 663 F.3d at 1316–17; *see also* *Whitaker ex rel. Whitaker*, 858 F.3d at 1051 (“[T]his case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny. It is enough to stay that, just as in *Price Waterhouse*, the record . . . shows sex stereotyping.”).

69. *See* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (state-supported university’s policy of denying otherwise qualified males right to enroll for credit in its nursing school violated Equal Protection Clause); *see also* *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18 “invidiously discriminate[d] against males 18–20 years of age.”).

Ginsburg famously relied on the strategy of using men as plaintiffs in early sex discrimination cases.⁷⁰ A mere classification is not sufficient to qualify as an affront to *dignity*, however. A classification suffered by women—who since time immemorial have suffered male oppression and rejection of their intelligence, strength, and sanity as reasons to deny them equal participation in society—is not qualitatively the same as a male being denied a stereotypically female job.⁷¹ Similarly, in the case of transgender discrimination, it is not simply the fact of being subjected to a classification based on sex, or even sex stereotyping, that is the problem. It is the way that society has chosen to ridicule, humiliate, and vilify transgender people in order ultimately to justify isolating and ostracizing them.

In *Glenn*, the court’s analysis was simple and straightforward. The uncomfortable facts underlying the discrimination that Vandiver Elizabeth Glenn endured were merely taken as evidence of gender stereotyping, something that could happen to cisgender and transgender people, and men and women, alike. In *Glenn*, those facts, however, included Sewell Brumby, the head of the Georgia General Assembly’s Office of Legislative Counsel where Glenn worked, telling Glenn that her appearing at work in women’s clothing was not appropriate and asking her to leave the office.⁷²

Brumby deemed her appearance inappropriate “[b]ecause [Glenn] was a man dressed as a woman and made up as a woman.”⁷³ Brumby further stated that “it’s unsettling to think of someone dressed in women’s clothing with male sexual organs inside that clothing,” and that “a male in women’s clothing is ‘unnatural.’”⁷⁴ This crude and degrading denial of Glenn’s very identity as a woman is not remotely comparable to the stereotyping underlying a nursing school’s refusal to admit a man.⁷⁵ Indeed, in *Mississippi University for Women v. Hogan*,⁷⁶ the Court did not even attempt to justify its invalidation of the nursing school’s women-only admission policy as undermining male dignity. Even though the plaintiff was a man, the Court based its reasoning in part on the notion that the policy was demeaning to *women*, because it “tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”⁷⁷

Federal equal protection law seemed poised to link discrimination against oppressed groups with violations of human dignity when the United

70. See, e.g., David Cole, *Strategies of Difference: Litigating for Women’s Rights in a Man’s World*, 2 LAW. & INEQ. 33, 54–57 (1984).

71. *Id.* at 58.

72. *Glenn*, 663 F.3d at 1314.

73. *Id.*

74. *Id.*

75. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982).

76. *Id.* at 731.

77. *Id.* at 729–30.

States Supreme Court decided *Brown v. Board of Education*.⁷⁸ In *Brown*, the Court recognized that segregated schools were a stark, official symbol and reminder of Black children's subordinate social status.⁷⁹ The Court saw that segregation was an official badge of inferiority imposed by society, not merely a figment of Black persons' imagination, as the Court suggested in *Plessy v. Ferguson*.⁸⁰ Bruce Ackerman describes this badge of inferiority as "institutionalized humiliation."⁸¹ In *Brown*, the Court saw how such institutionalized humiliation could harm children, potentially "affect[ing] their hearts and minds in a way unlikely ever to be undone."⁸²

Ackerman describes the "institutionalized humiliation" recognized in the Court's opinion as *Brown*'s "lost logic."⁸³ Not long after *Brown*, the Court moved toward the more formalistic anti-classification approach to discrimination that has come to characterize equal protection analysis even today.⁸⁴ Ackerman traces this approach to the Court's decision in *Loving v. Virginia*.⁸⁵ In *Loving*, the Court applied strict scrutiny to Virginia's ban on marriages between white persons and persons of color, holding that, "At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny.'"⁸⁶ The Virginia statute did not ban interracial marriages across the board, but rather was addressed specifically to marriages involving a white person: "It shall hereafter be unlawful for any white person in this State to marry any save a white person."⁸⁷ The Court recognized the racist motivation for the statute, but aside from an unexplored reference to white

78. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

79. *Id.* at 494 ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").

80. 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

81. BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 129 (2014).

82. *Brown*, 347 U.S. at 494.

83. ACKERMAN, *supra* note 81, at 129, 131.

84. *Id.* at 15.

85. *Id.* at 289 ("*Loving v. Virginia* . . . shifted legal attention away from the evil of institutionalized humiliation.").

86. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

87. *Id.* at 5 n.4. The statute made an exception to allow white persons to marry "persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood." *Id.* at 5 n.4. Such individuals were "deemed to be white persons." This exception was said to have been accounted for by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas." *Id.* at 5 n.4. (quoting Plecker, *The New Family and Race Improvement*, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925)).

supremacy, its opinion does not discuss the institutional humiliation of anti-miscegenation laws.⁸⁸

Ackerman contends that the opinion would have benefitted from a deeper dive into the humiliations faced by couples like Mildred and Richard Loving:

Warren could simply have appealed to his fellow Americans' common sense, describing how the marriage ban forced interracial couples to present their relationship to the larger community as if it were diseased, disreputable, criminal. A commonsense discussion of the countless humiliations of everyday life would have yielded a far more compelling vindication of *Brown's* concerns with real-world stigma⁸⁹

In addition to sidestepping the humiliation foisted upon the Lovings as a couple, the Court mechanically applied strict scrutiny without discussing or acknowledging the special humiliation that Mildred, as distinct from her husband Richard, endured. Painful as the law must have been to Richard, it was, after all, Mildred's Blackness that in the State's eyes deemed her unworthy of marrying a white man, that deemed their union an abomination. Equal protection analysis continues today to embody a strict anti-classification approach that, like in *Loving*, fails to deal directly and fully with the impacts of institutionalized humiliation.⁹⁰

Kenji Yoshino applauds Bruce Ackerman's focus on institutional humiliation and expands upon its tie to human dignity, pointing out that "[t]he closest the Supreme Court has come to embracing the anti-humiliation principle is through its use of the term 'dignity.'"⁹¹ The Court has not always used this term in a meaningful way, however. The strict anti-classification approach, which rejects a focus on anti-subordination, invokes a hollow concept of "dignity" that reviews it as automatically implicated by a particular classification, regardless of the reason for it or whom it benefits.⁹² For example, Justice Kennedy stated, in concurring with a decision rejecting voluntary school integration efforts in Seattle, "[T]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."⁹³ Justice Kennedy did not elaborate on how white chil-

88. *Id.* at 11–12. Ackerman claims that this "swerve[] away from a strong reaffirmation of *Brown's* anti-humiliation principle" reflected Chief Justice Earl Warren's desire to avoid imperiling fragile yet real progress toward racial equality by "linking [the Court's] decision too tightly *Brown's* emphatic condemnation" of school segregation. ACKERMAN, *supra* note 81, at 301.

89. ACKERMAN, *supra* note 81, at 302.

90. *Id.* at 289; Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076 (2014); *see also supra* note 53 (discussion of Hutchinson)

91. Yoshino, *supra* note 52, at 3082.

92. *See* Hutchinson, *supra* note 53, at 27–33.

93. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring); *see also* *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (striking down eligibility requirement limiting voters for trustees for Office of Hawaiian Affairs to "Hawaiians" or "native Hawaiians")

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dren's dignity is violated by measures aimed at racial integration in schools. Indeed, he recognized that those measures were aimed at remedying the indignity caused by racial isolation. "A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. But to this the replication must be: Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted."⁹⁴ The Court has even prioritized the dignity of states over that of the right of persons of color to be free from race discrimination.⁹⁵

While the Court's race discrimination jurisprudence embraces an impoverished sense of "dignity," the Court has robustly incorporated dignity into its analyses in cases addressing the rights of gay, lesbian, and bisexual persons. The Court has tended to define "dignity" more meaningfully in these decisions, although it has done so without formally recognizing sexual orientation as a suspect class and not always in the context of equal protection. In *United States v. Windsor*,⁹⁶ for example, the Court held that restricting the federal interpretation of "marriage" and "spouse" in the Defense of Marriage Act to apply only to opposite-sex unions violated the Due Process Clause. Justice Kennedy's majority opinion in *Windsor* mentions dignity nearly a dozen times.⁹⁷ Dignity also played a central role in the Court's decision in *Obergefell v. Hodges*,⁹⁸ which held that bans on same-sex marriage violate the due process and equal protection clauses. Justice Kennedy recognized that exclusion from full participation in society and social institutions demeans a person's humanity:

The[] hope [of same-sex couples who wish to marry] is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.⁹⁹

Montana's Constitution expressly invites considerations of dignity when analyzing an equal protection claim, since its equal protection clause is located within a general section entitled "Individual Dignity."¹⁰⁰ Article II, Section 4, of the Montana Constitution reads:

and noting that "it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities.").

94. *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring).

95. Hutchinson, *supra* note 53, at 36–37 (discussing *Shelby County v. Holder*'s reliance on the "equal" "dignity" of states to invalidate Section 4(b) of the Voting Rights Act, 133 S. Ct. 2612, 2630–31 (2013)).

96. *United States v. Windsor*, ___ U.S. ___, ___, 133 S. Ct. 2675, 2695–96 (2013); *see also* Yoshino, *supra* note 90, at 3084–86 (discussing *Windsor*'s extensive references to "dignity").

97. Yoshino, *supra* note 90, at 3084.

98. *Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S. Ct. 2584, 2604–05 (2015).

99. *Id.* at ___, 135 S. Ct. at 2608.

100. This article does not discuss whether there is a free-standing right to dignity under the Montana Constitution, although such an argument is defensible and could well apply to bathroom panic laws as an independent claim. *Cf. Baxter v. State*, 224 P.3d 1211, 1227–33 (Mont. 2009) (Nelson, J., concur-

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Individual Dignity. The dignity of the human being is inviolable. No person shall be denied equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.¹⁰¹

The Montana Supreme Court has repeatedly held that Montana’s equal protection clause provides broader coverage of the right to equal treatment than under the United States Constitution.¹⁰² But it has not explained how, and its equal protection decisions so far have not incorporated dignity into the analysis.¹⁰³ The Court may be reluctant to apply the Montana dignity clause because of the potentially open-ended or subjective nature of that term. Matthew Clifford and Thomas Huff have offered a careful analysis of the meaning and scope of the Montana dignity clause, including how it may inform equal protection analysis.¹⁰⁴ They point out that “the dignity right could help us identify the suspect class” by focusing on the “degrading, undignified treatment . . . the class receives.”¹⁰⁵ Clifford and Huff recognize that enforced social isolation based in animus toward a group is inherently “degrading, because [such isolation] says the rest of the community does not want to share its life with” the targeted group.¹⁰⁶ The idea of isolation as “degrading” echoes Ackerman’s identification of “institutionalized humiliation” as the chief harm caused by racial segregation.¹⁰⁷

Neomi Rao provides a useful taxonomy of dignity in American law that helps illustrate how social isolation fits into a particular conception of dignity. Rao identifies three forms of dignity: inherent dignity, substantive

ring) (arguing that the right to dignity is “a stand-alone, fundamental constitutional right”); Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution’s “Dignity” Clause with Possible Applications*, 61 MONT. L. REV. 301, 305–07 (2000) (same).

101. MONT. CONST. art. 2, § 4.

102. *See, e.g.,* Farrier v. Teacher’s Ret. Bd., 120 P.3d 390, 394 (Mont. 2005); Snetsinger v. Montana Univ. Sys., 104 P.3d 445, 449 (Mont. 2003); Cottrill v. Cottrill Sodding Serv., 744 P.2d 895, 897 (Mont. 1987).

103. During his time on the Montana Supreme Court, Justice Jim Nelson repeatedly and eloquently, in concurrences and dissents, argued for a free-standing right to dignity, as well as for an interpretation of the equal protection clause that is grounded in Montana’s constitutional recognition of the inviolable right to human dignity. *See, e.g.,* Donaldson v. State, 292 P.3d 364, 376–77, 407 (Mont. 2012) (Nelson, J., dissenting) (arguing for application of free-standing right to dignity); *Baxter*, 224 P.3d at 1227–33 (Nelson, J., concurring) (arguing for a free-standing right to dignity); *Snetsinger*, 104 P.3d at 459–60 (Nelson, J., concurring) (arguing for a conception of equal protection grounded in the right to dignity).

104. Clifford & Huff, *supra* note 100, at 332–35.

105. *Id.* at 332.

106. *Id.* (discussing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that city’s refusal to grant a zoning permit to allow a home for the intellectually disabled in a residential neighborhood violated equal protection) and *Romer v. Evans*, 517 U.S. 620 (1996) (holding that Colorado constitutional amendment, which precluded any state action directed to protecting persons of “homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships” violated equal protection)).

107. ACKERMAN, *supra* note 81, at 289.

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dignity, and dignity as recognition.¹⁰⁸ Inherent dignity “exists merely by virtue of a person’s humanity and does not depend on intelligence, morality, or social status,” nor does it “establish an external measure for what counts as being dignified or worthy of respect.”¹⁰⁹ This concept of dignity in United States constitutional law is most often found in decisions addressing freedom from government interference, including in speech, privacy, and sexual relationships.¹¹⁰

Substantive dignity “serve[s] as the grounds for enforcing various substantive values.”¹¹¹ It thus stands in contrast to intrinsic dignity in that it requires living in a certain way (e.g., forbidding burqas to be worn in public in France) and because, unlike inherent dignity, it can be lost if a person does not adhere to the substantive norms. Substantive dignity is also associated with social-welfare rights or state protection against poverty and violence.¹¹²

Dignity as recognition “is rooted in a conception of the self as constituted by the broader community—a person’s identity and worth depend on his relationship to society.”¹¹³ Dignity as recognition “requires protection against the symbolic, expressive harms of policies that fail to respect the worth of each individual and group.”¹¹⁴ This form of dignity is about being received and accepted as a full participant in society, rather than being marginalized and ostracized.

Inherent dignity and dignity as recognition are often conflated, especially in state and federal case law in the United States.¹¹⁵ Although both forms of dignity may be implicated in a single case they are, however, distinct. Inherent dignity is possessed by every person and is not contingent on outside factors; a person cannot lose inherent dignity.¹¹⁶ Because of inherent dignity, the government is prohibited from denying all persons certain rights, such as the right to free speech. The right to inherent dignity was at issue in *Lawrence v. Texas*,¹¹⁷ where the Court held that the State could not criminalize private, consensual sexual intimacy between two adults of the same sex. The *Lawrence* Court’s use of “dignity” as tied to personal liberty and freedom clearly invoked inherent dignity: “adults may choose to enter

108. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187–88 (2011).

109. *Id.* at 187.

110. *Id.*

111. *Id.*

112. *Id.* at 187–88.

113. *Id.* at 188.

114. *Id.* at 189, 267.

115. *Id.* at 267.

116. *Id.* at 187.

117. *Lawrence v. Texas*, 539 U.S. 558, 510 (2003).

upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”¹¹⁸ Similarly, in *Planned Parenthood v. Casey*,¹¹⁹ the Court invoked inherent dignity in its decision upholding the constitutional right of a woman to terminate her pregnancy: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” In other words, because individuals possess inherent dignity, the State cannot deny their freedom to make decisions regarding sexual partners or childbearing.

The third form of dignity, dignity as recognition, relies on a person’s being welcomed as a participant in public life and accepted as a member of society.¹²⁰ This form of dignity is contingent on such public recognition; a person’s dignity can be taken from them by certain government actions. This form of dignity was indirectly at issue in *Lawrence* as well, because the State singling out same-sex intimacy for criminal prohibition represented a public condemnation of gay people’s identities.¹²¹ The Court recognized the State’s action as part of a long history of subordination, based in animus toward gay persons.¹²² Moreover, the Texas law symbolically ostracized gay, lesbian, and bisexual persons by branding them with a criminal record: “The stigma this criminal statute imposes . . . is not trivial. The offense, to be sure, is but . . . a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.”¹²³

The right to dignity as recognition was more directly at issue in *Windsor* and *Obergefell*, both of which addressed the right to public acceptance of same-sex marriages.¹²⁴ In *Windsor*, Justice Kennedy’s majority opinion reflects the qualitative shift from inherent dignity in *Lawrence* to recognitional dignity in *Windsor*. After noting *Lawrence*’s protection of private,

118. *Id.* at 567.

119. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

120. Rao, *supra* note 108, at 243.

121. *Lawrence*, 539 U.S. at 571 (“for centuries there have been powerful voices to condemn homosexual conduct as immoral”).

122. *Id.*; *see also* Rao, *supra* note 108, at 257 (“The harm identified by the Court concerned both state and private discrimination and connected the legal prohibition on sodomy with a lack of acceptance and tolerance by the community.”).

123. *Lawrence*, 539 U.S. at 575.

124. *Windsor v. United States*, ___ U.S. ___, ___, 133 S. Ct. 2884, 2675, 2683, 2693 (2013) (addressing definition of “marriage” under Defense of Marriage Act); *Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S. Ct. 2584, 2602 (2015) (addressing constitutional right of same-sex couples to marry). Rao describes the right to marry as one implicating inherent dignity. Rao, *supra* note 108, at 267. However, insofar as *Loving*, *Windsor*, and *Obergefell* address the right to marriage as a legal status (as opposed to the right to choose a committed same-sex relationship without requiring public recognition), they seem rather to be concerned with recognitional dignity.

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intimate sex between adults of the same sex, the Court noted that New York’s decision to recognize same-sex marriages as valid

sought to *give further protection and dignity* to that bond. For same-sex couples who wished to be married, the State acted to give their . . . conduct a . . . far-reaching legal acknowledgment of . . . a relationship deemed by the State worthy of *dignity in the community* equal with all other marriages.¹²⁵

In other words, same-sex couples were granted recognitional dignity, a dignity they did not previously possess, when New York decided to legally recognize their marriages.

Unless substantive dignity or dignity as recognition are implicated, the *constitutional* right to dignity should not be at issue. Where there is no history of subordination, ostracizing, stigma, or systematic denial of the basic conditions of human flourishing, there are no grounds for recognizing a right to dignity independent of the freedom infringed by government action. We would not say, for example, that a neo-Nazi’s constitutional right to dignity is violated or implicated if a state infringes his constitutional right to free speech. The reason it made sense for the Court in *Lawrence* to speak of dignity in connection with the criminalization of same-sex intimacy was because that denial of freedom was so closely linked to institutional humiliation, or the denial of recognitional dignity.

Dignity as recognition and the anti-humiliation principle are fully at play in anti-transgender bathroom panic legislation. Denial of public accommodations to historically oppressed and marginalized groups is a refusal to recognize and welcome members of such groups as full participants in society. Kenji Yoshino notes that “gay rights have always been plagued by a politics of shame.”¹²⁶ This is equally true of transgender rights. Discrimination against transgender individuals predominantly seeks to stigmatize and exclude them from being visible or even present in public. Bathroom panic laws do exactly that. As James Essex points out, “When transgender individuals are barred from using restrooms that match who they are, they are essentially closed off from participating in public life.”¹²⁷ A person cannot use public buildings, parks, and other facilities if they are unable to use the restrooms in those facilities. Indeed, transgender children and adults prohibited from using the restroom consistent with their gender identity commonly deny themselves nutrition and hydration in order to avoid the need to go to the bathroom.¹²⁸ Thus, bathroom panic laws are a

125. *Windsor*, ___ U.S. at ___, 133 S. Ct. at 2692 (emphasis added).

126. Yoshino, *supra* note 90, at 3087.

127. James Essex, *Transgender People and Single-Sex Places*, ACLU, (June 2, 2016, 6:15 p.m.), <https://perma.cc/F4X8-GXPE>.

128. Herman, *supra* note 14, at 229; *see also* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1040–41 (7th Cir. 2017) (describing harms resulting from transgender teenager’s restricted water intake and attempts to avoid using any restroom at school).

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remarkably effective tool for undermining transgender persons' status as equal members of society. Judge Davis's opinion in Gavin Grimm's case recognized this by referencing the violation of transgender individuals' "core dignity" and the way in which bathroom panic laws and policies force transgender people to "exist on the margins."¹²⁹ President Trump's August 25, 2017, Presidential Memorandum banning transgender individuals from serving in the United States military is another stark instance of excluding transgender people from full participation in society.¹³⁰

Montana equal protection law should identify when dignity as recognition is implicated by government actions like bathroom panic legislation. When it is, strict scrutiny should apply. Because the Montana Supreme Court has so far applied the tiers of scrutiny in a formalistic way, it has not yet made explicit the connection between equal protection and the right to dignity within which the equal protection right is located. This is somewhat surprising, since the Court has infused a dignity analysis into its interpretation of fundamental rights in the Montana Constitution not located within Article II, Section 4 (the dignity provision). For example, in *Walker v. State*,¹³¹ the Montana Supreme Court interpreted the Montana Constitution's protections against cruel and unusual punishment to be broader than under the federal constitution because it read that provision in conjunction with the Montana Constitution's dignity provision.

The factors that federal courts and the Montana Supreme Court have used to determine whether discrimination targets a suspect class do indirectly point to dignity as recognition by looking to any history of discrimination against the targeted class.¹³² In her opinion granting a preliminary injunction against President Trump's ban on military service by transgender individuals, United States District Judge Colleen Kollar-Kotelly acknowledged that, "[a]s a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination."¹³³ Because of this

129. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 853 F.3d 729, 730–31 (4th Cir. 2017) (Davis, J., concurring).

130. Military Service by Transgender Individuals, 82 Fed. Reg. 41319 (Aug. 25, 2017). The ban is currently preliminarily enjoined. Doe v. Trump, Civil Action No. 17-1597 (CKK), ___ F. Supp. 3d. ___, 2017 WL 4873042 (D.D.C. Oct. 30, 2017); Dave Phillips, *Second Judge Blocks Trump's Transgender Ban in the Military*, THE NEW YORK TIMES (Nov. 21, 2017), <https://perma.cc/9FZN-GP4L>. On December 30, 2017, the Justice Department announced that the ban is on hold (although it will apparently continue to defend the ban in court). *Transgender People Cleared to Join Military, For Now*, NBC NEWS (Dec. 30, 2017 6:15 PM ET), <https://perma.cc/79QM-VRNS>; see *supra* note at 127 (discussing court's ruling).

131. *Walker v. State*, 68 P.3d 872, 883 (Mont. 2003).

132. See *supra* note 54 and accompanying text (discussing these factors). Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 489 (1998).

133. *Doe*, ___ F. Supp. 3d. at ___, 2017 WL at *27.

history, Judge Kollar-Kotelly found that transgender discrimination triggers heightened scrutiny.¹³⁴ Arguably, the political vulnerability factor is also tied to recognitional dignity in that it reflects a group's isolation or exclusion from full participation in public life. The Montana Supreme Court's equal protection analysis and its decisions whether to apply strict scrutiny would benefit from more extensive and express attention to "the countless humiliations of everyday life" that a history of discrimination and exclusion from political life imposes, including social isolation, stigma, harassment, and violence.¹³⁵

Thus, in Montana, subjecting discrimination against oppressed and marginalized groups to strict scrutiny is expressly justified, if not dictated, by the placement of Montana's Equal Protection Clause within the framework of dignity. Other potential consequences of relying on dignity to inform equal protection analysis could explain why bare assertions of discrimination based on a given classification, such as race, should not always merit strict scrutiny. Affirmative action is one such example. When a white person claims that an affirmative action program has discriminated against her based on race, dignity as recognition is not implicated.¹³⁶ White people have not historically suffered exclusions from full participation in public life.¹³⁷ But that is beyond the scope of this Essay. In the case of transgender discrimination in public accommodations, dignity as recognition is clearly implicated, and the case for applying strict scrutiny is at its strongest.

V. CONCLUSION

Case outcomes are important. But where discrimination involves public shunning, stigma, and banishment from participation in public life, a court's infusion of the right to dignity into its analysis can itself serve to recognize and say to transgender people: this court sees you and recognizes you as a full member of society—and our Constitution demands that the public recognize you as well. Judge Andre Davis saw how important it was to recognize, through the formal means of a judicial opinion, a Virginia school board's attack on a transgender teenager's dignity, to recognize the way that it forced him to exist at the margins of public life.¹³⁸ Applying a

134. *Id.* at ___, 2017 WL at *27–28; see also *Whitaker ex rel. Whitaker*, 858 F.3d at 1051 (acknowledging that "transgender individuals face discrimination, harassment, and violence because of their gender identity" but declining to answer whether "transgender status should be entitled to heightened scrutiny in its own right").

135. Yoshino, *supra* note 90, at 3080.

136. See Rao, *supra* note 108, at 262.

137. See *supra* note 92 and accompanying text (discussion of hollow concept of dignity in the Supreme Court's race discrimination cases); Hutchinson, *supra* note 53 at 27–33.

138. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (emphasis added).

dignity-infused approach to equal protection in the context of transgender discrimination might yield this adaptation of the U.S. Supreme Court’s famous statement in *Brown*: “To separate transgender persons from others in public accommodations solely because they are transgender conveys a message of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹³⁹ Such an approach would allow courts to focus on the human cost of discrimination against transgender persons. The Montana Constitution not only allows for this infusion of dignity into equal protection analysis but it demands it.

139. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).