Rethinking Sex as Biology Under Equal Protection

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The Equal Protection Clause requires that heightened scrutiny apply to sex classifications. The standard account of the Supreme Court's sex equality jurisprudence assumes that sex is a matter of biology. Sex as biology has long served as a roadblock to sex equality, with reasoning about the body shielding sex discrimination from scrutiny by covering for stereotypes and masking the social sources of inequality. More recently, the biological understanding of sex has featured prominently in decisions rejecting claims brought by transgender plaintiffs excluded from sex-segregated spaces like athletics and bathrooms. With a circuit split in these cases, it is only a matter of time before the meaning of sex under equal protection reaches the Court. Transgender rights — and sex equality itself — hang in the balance.

This Article shows that the standard account of sex as biology is wrong. It reveals how the role of biology in the Supreme Court's sex equality jurisprudence has been far more contested, partial, and, ultimately, fleeting than the standard account acknowledges. The key decision at the doctrine's inception explained why heightened scrutiny should apply to sex classifications without referencing biology and by relying on factors — immutability,

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visibility, history of discrimination, and political power — that do not rest on any biological aspect of sex. Subsequent cases that have been viewed as the height of biological reasoning were never controlling on this question. Biology has only served as the basis for the Court's holding one lone time, with the support of a bare majority, and in a decision that is now seriously in doubt.

With sex no longer bound to the body, this Article recovers an alternative conception of sex running through the jurisprudence: sex as a social class. This idea recognizes that sex, like race, is a product of social forces. On this view, sex discrimination can no longer seek refuge in the body, and would instead face exacting scrutiny for a legitimate justification related to the social function that sex serves. The social conception of sex not only avoids the harms of sex as biology, but can unite transgender and cisgender women as a class for equal protection purposes (so too transgender and cisgender men), showing a way forward in highly contested transgender rights cases. This new account of sex equality law provides the tools to achieve the Constitution's promise for a more equal world for transgender persons — and for us all.

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INTRODUCTION

> *"One is not born, but rather becomes, a woman."*
>
> — Simone de Beauvoir[1]

> *"I don't know why women and men being socially defined groups is coming as a revelation to anyone. It was obvious to all of us in the early women's movement that what we live as 'woman' is a social construction of male supremacy, and that the notion that it is based in nature is its most pernicious delusion."*
>
> — Catharine A. MacKinnon[2]

It is only a matter of time before the Supreme Court confronts the meaning of sex under the Equal Protection Clause. Lawsuits by transgender plaintiffs challenging restrictive biological definitions of sex have been bubbling up in the lower courts for years, with a circuit split in the context of bathrooms[3] and a divide among the courts in the context of sports.[4] The Fourth and Seventh Circuits have held that

[1] SIMONE DE BEAUVOIR, THE SECOND SEX 273 (H.M. Parshley ed. & trans., Vintage 1989) (1949).

[2] Cristan Williams, *Sex, Gender, And Sexuality: The TransAdvocate Interviews Catharine A. MacKinnon*, TRANSADVOCATE, https://www.transadvocate.com/sex-gender-and-sexuality-the-transadvocate-interviews-catharine-a-mackinnon_n_15037.htm (last visited Sept. 5, 2024) [https://perma.cc/PW3H-TX2K].

[3] *Compare* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593-94 (4th Cir. 2020) (holding that transgender boy's exclusion from the boys' bathroom violates equal protection), *and* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1055 (7th Cir. 2017) (same), *with* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796 (11th Cir. 2022) (en banc) (holding that transgender boy's exclusion from the boys' bathroom does not violate equal protection).

[4] *Compare* Hecox v. Little, 104 F.4th 1061, 1068 (9th Cir. 2024) (holding that transgender girl's exclusion from girls' athletics violates equal protection), *and* B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 550 (4th Cir. 2024) (denying summary judgment to school board on an equal protection claim challenging transgender girl's exclusion from girls' athletics), *with* D.N. v. DeSantis, 701 F. Supp. 3d 1244, 1252 (S.D. Fla. 2023)

under the Constitution's guarantee of sex equality, a state cannot bar a transgender boy from using the boys' bathroom on the basis of biological sex difference.[5] Contrary to the holdings of its sister circuits, the Eleventh Circuit, sitting en banc, rejected a transgender boy's equal protection challenge to his exclusion from the boys' bathroom on the basis of biological sex difference.[6] With the justices repeatedly called on to resolve this dispute and two of them ready to do so, this issue is sure to reach the Court "in the near future."[7] Transgender rights — and sex equality more broadly — hang in the balance.

Notwithstanding these divisions, the judges in these cases, whether they side for or against the cause of transgender rights, have one crucial thing in common: acceptance of sex as a matter of traditional biology under the Equal Protection Clause. The Eleventh Circuit's majority decision relied on the fact that "the Supreme Court has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences."[8] Yet the majority was not alone in adopting this view of sex as biology. Both the majority and the dissent cited approvingly this same language from a 2001 Supreme Court decision: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."[9] Other courts follow a

(holding that transgender girl's exclusion from girls' athletics did not violate equal protection).

[5] *See Grimm*, 972 F.3d at 593-94; *Whitaker*, 858 F.3d at 1039.

[6] *See Adams*, 57 F.4th at 801.

[7] *See* W. Va. v. B.P.J. *ex rel.* Jackson, 143 S. Ct. 889 (2023) (mem.) (Alito & Thomas, JJ., dissenting from denial of application to vacate injunction) ("This application concerns an important issue that this Court is likely to be required to address in the near future, namely, whether . . . the Fourteenth Amendment's Equal Protection Clause prohibits a State from restricting participation in women's or girls' sports based on genes or physiological or anatomical characteristics."); *Hecox*, 104 F.4th at 1061, *petition for cert. pending*, No. 24-38 (filed July 11, 2024); *B.P.J.*, 98 F.4th at 542, *petition for cert. pending*, No. 24-43 (filed July 16, 2024).

[8] *Adams*, 57 F.4th at 809-10.

[9] *Id.* at 803 n.6 (quoting Nguyen v. INS, 533 U.S. 53, 65 (2001)); *accord id.* at 843 (Rosenbaum, J., dissenting).

similar pattern, with judges of all stripes reifying this biological understanding of sex.[10]

The biological understanding of sex does damage both to transgender rights and to sex equality. Sex as biology has defeated transgender plaintiffs' claims to access sex-segregated spaces. If a sex classification is grounded in biological sex difference, the state may exclude transgender persons who do not share the required biological features.[11] Even transgender plaintiffs' victories are tainted by the stain of biology. Courts siding with transgender plaintiffs hold that transgender boys are "similarly situated" to cisgender boys and that transgender girls are "similarly situated" to cisgender girls.[12] But on a biological understanding of sex, courts struggle to identify why this is so, relying on reasoning that is at best ineffective and at worst dangerous.[13] Courts have sometimes looked to whether transgender plaintiffs "appear"[14] or "behav[e][15] in sufficiently boy- or girl-like ways, reinscribing the same sex stereotypes that the doctrine is supposed to eradicate.[16] This way of thinking also dismisses transgender persons who do not fit this neat narrative of gender identity[17] and encourages policing of gender nonconforming people of all stripes.[18] More generally, a biological understanding of sex facilitates harmful uses of sex-based regulation,

[10] *Compare Grimm*, 972 F.3d at 608 (granting transgender plaintiff's bathroom-access claim: "'[T]o fail to acknowledge even our most basic biological [sex] differences . . . risks making the guarantee of equal protection superficial, and so disserving it'" (quoting *Nguyen*, 533 U.S. at 73)), *with Grimm*, 972 F.3d at 635–36 (Niemeyer, J., dissenting) ("'[T]o fail to acknowledge even our most basic biological [sex] differences . . . risks making the guarantee of equal protection superficial, and so disserving it.'" (quoting *Nguyen*, 533 U.S. at 73)); *see infra* Part I.B.2.

[11] *See infra* notes 67–70 and accompanying text.

[12] *See, e.g.*, *Grimm*, 972 F.3d at 609-10 (reasoning that "[t]he overwhelming thrust of everything in the record . . . is that [transgender male plaintiff] Grimm was similarly situated to other boys").

[13] *See infra* notes 94–110 and accompanying text.

[14] *Grimm*, 972 F.3d at 621-22 (Wynn, J., concurring).

[15] Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 833 (11th Cir. 2022) (Rosenbaum, J., dissenting) (emphasizing that the plaintiff, a transgender boy, "always engaged in what he thinks of as 'masculine' behaviors").

[16] *See infra* notes 101–110 and accompanying text.

[17] *See infra* notes 106–107 and accompanying text.

[18] *See infra* notes 108–110 and accompanying text.

with biology covering for stereotypes and masking the social sources of gender inequality, with harmful impacts in cases related to marriage, reproduction, parenthood, and beyond.[19] One lower court even wrongly relied on biology to avoid heightened scrutiny of sex classifications altogether in a case that is now before the Court.[20]

This Article's core claim is that the standard account of sex as biology under equal protection is wrong. The Article shows how the role of biology in the Supreme Court's constitutional sex equality jurisprudence has been far more contested, partial, and, ultimately, fleeting than the standard account acknowledges. This re-reading of the sex equality jurisprudence removes a dangerous roadblock on the path to transgender rights and puts an end to an understanding of sex that has long been a thorn in the side of sex equality. This Article charts another way forward with a new account of sex equality jurisprudence based in a social understanding of sex that can advance both transgender rights and sex equality writ large.

Lower courts are hardly to blame for their easy embrace of a biological understanding of sex. This standard account of the Supreme Court's case law has been told, without exception, for decades.[21] Under equal protection law, courts subject sex classifications to intermediate scrutiny, which mandates that a sex-based law "serve important governmental objectives" by means that are "substantially related to achievement of those objects."[22] This test has often been understood to require sorting out illegitimate uses of sex — those based on stereotypes — from legitimate uses of sex — those based on "real differences."[23] In applying this test, courts and scholars alike have treated sex as a matter of biology by looking to cases like *Michael M. v. Superior Court*, which cited that "'it is the female exclusively who can become pregnant'" to

[19] *See infra* Part I.B.2.

[20] *See* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 481 (6th Cir. 2023) (addressing a sex-based equal protection challenge to a state ban on gender-affirming care for transgender minors), *cert. granted*, United States v. Skrmetti, 144 S. Ct. 2679 (2024); *infra* note 130 and accompanying text.

[21] *See infra* notes 145–165 and accompanying text.

[22] Craig v. Boren, 429 U.S. 190, 197 (1976).

[23] *See infra* notes 141–144 and accompanying text.

hold only males criminally liable for underage sex;[24] *United States v. Virginia*, which noted that "[p]hysical differences between men and women" remain "enduring"[25]; and *Nguyen v. INS*, which upheld a rule treating mothers and fathers differently in conferring citizenship because "the mother is always present at birth, but that the father need not be."[26]

A reconsideration of equal protection sex equality jurisprudence reveals that a biological conception of sex does not undergird the doctrine. A fresh look at the origins of heightened scrutiny for sex classifications shows that biology was not part of the doctrine's inception. In *Frontiero v. Richardson*, where a plurality of the Court explained why heightened scrutiny should apply to sex classifications, it did so without any reference to biology.[27] In fact, *Frontiero*'s analysis of factors like immutability, visibility, history of discrimination, and political power does not rest on any biological aspects of sex.[28] One of the key authors of the sex equality doctrine, Ruth Bader Ginsburg, treated biological sex difference as irrelevant. She advocated for pregnancy discrimination as a paradigmatic case of sex discrimination that was appropriately subject to strict scrutiny but could fall even under rational basis review.[29]

As the doctrine developed, it did not ever turn on the biology of sex difference in the way the standard account would have it. The Court never gave a free pass to sex classifications grounded in biological sex differences. Rather, in the early years of the doctrine, in cases like *Stanton v. Stanton*, the Court carefully reviewed sex classifications for stereotypes and struck down those that bore such markings, even when the classification was ostensibly tied to biology.[30] Scholars have treated the decision on statutory rape law in *Michael M.* as the apex of the

[24] 450 U.S. 464, 467 (1981) (plurality) (quoting Michael M. v. Superior Ct., 601 P.2d 572, 574 (Cal. 1979)).

[25] 518 U.S. 515, 533 (1996).

[26] 533 U.S. 53, 64 (2001).

[27] *See* 411 U.S. 677, 687-88 (1973) (plurality).

[28] *See infra* Part II.A.

[29] *See infra* notes 234–244 and accompanying text.

[30] *See* 421 U.S. 7, 13-17 (1975); *infra* Part I.B.I.

Court's biological reasoning.[31] Yet the plurality's reliance on biology there cannot be said to form the basis for the Court's decision.[32] Likewise, the dicta about "enduring" physical sex differences in *United States v. Virginia* means little.[33]

This Article's reexamination of sex equality jurisprudence reveals that biology did not serve as a basis for the Court's decision until decades later, and only upon the success of the doctrine's effort to combat sex stereotypes. With heightened scrutiny treating almost all rationales for relying on sex as impermissible "overbroad generalizations,"[34] the only place left to turn was biology. In the wake of these doctrinal developments, a bare majority of the Court relied on biology to uphold a sex classification one lone time in *Nguyen v. INS*, whose vitality is in serious doubt.[35] The Court's recent jurisprudence on gay and lesbian rights underscores that the biology of sex is no longer a source of lawful classification.[36] While "reasoning from the body" undoubtedly features in the jurisprudence,[37] this Article concludes that neither the Equal Protection Clause nor the Supreme Court decisions interpreting it require a biological understanding of sex.

With sex no longer bound to the body, this Article highlights another sort of reasoning running through the jurisprudence: sex as a social class. This idea recognizes sex not as a metaphysical reality, but as a social kind that, like race, is constructed by social, cultural, political, and legal forces.[38] This notion of sex, while overshadowed by the biological view within legal thought, is anything but novel.[39] On this view, what

[31] 450 U.S. 464 (1981) (plurality); *see infra* note 150.

[32] *See infra* notes 271–272 and accompanying text.

[33] United States v. Virginia, 518 U.S. 515, 533 (1996); *see infra* notes 310–315 and accompanying text.

[34] 518 U.S. at 533.

[35] 533 U.S. 53, 73 (2001); *see infra* notes 332–340 and accompanying text.

[36] *See* Pavan v. Smith, 582 U.S. 563 (2017) (per curiam); Obergefell v. Hodges, 576 U.S. 644 (2015); *infra* notes 327–342 and accompanying text.

[37] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265 (1992) [hereinafter Siegel, *Reasoning from the Body*].

[38] *See infra* Part III.A.

[39] *See, e.g.*, DE BEAUVOIR, *supra* note 1, at 267 ("One is not born, but rather becomes, a woman.").

women have in common is the social disadvantage of their sex.[40] We can see the social understanding of sex in constitutional sex equality law from its inception, when it was recognized that a history of discrimination against women "invidiously relegate[ed] the entire class of females to inferior legal status."[41] Later cases rely on the social subordination of women to justify upholding sex-based rules,[42] with the Court in *United States v. Virginia* stating that "[s]ex classifications may be used to compensate women for particular economic disabilities [they have] suffered," and "to promote equal employment opportunity," so as "to advance full development of the talent and capacities of our Nation's people."[43]

The social understanding of sex allows for the reconsideration of sex classifications. Sex-based regulations will be permissible only on a justification premised in a social understanding of the class of women (or men).[44] A state actor with a legitimate interest in regulating through the body should do so directly on the basis of the relevant physiological feature rather than indirectly through sex.[45] We can already see a shift in the law precisely in line with this proposal. Recently, the Ninth Circuit invalidated a state's reliance on traditional biological sex to segregate athletics when its interest was only in the physiological fact of circulating hormones.[46] The newly enacted Pregnant Workers Fairness

[40] *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY] ("Inequality because of sex defines and situates women as women.").

[41] Frontiero v. Richardson, 411 U.S. 677, 687 (1973) (plurality).

[42] *See infra* notes 393–406 and accompanying text.

[43] United States v. Virginia, 518 U.S. 515, 533 (1996) (alteration in original) (internal quotation marks omitted).

[44] *See, e.g.*, Hecox v. Little, 104 F.4th 1061, 1081 (9th Cir. 2024) (discussing "the important government interest of redressing past discrimination against women in athletics and promoting equality of opportunity between the sexes" (internal quotation marks omitted)).

[45] *See infra* Part III.B.1.

[46] *See Hecox*, 104 F.4th at 1084, 1088 (based on the "medical consensus" that sex differences in elite athletic performance are due to circulating testosterone rather than genetics, reproductive anatomy, or endogenous testosterone, "reject[ing] measure[] that classif[ies] unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn" (internal quotation marks omitted)).

Act requires accommodations for the physiological fact of pregnancy without any limitation on the basis of sex.[47]

The social understanding of sex this Article proposes also reveals a new way forward in highly contested transgender rights cases. A social understanding of sex can unite transgender and cisgender women as a class for equal protection purposes (so too transgender and cisgender men). Recognizing that sex is a social position rather than a feature of the body, and that transgender women suffer many of the same types of oppression as cisgender women, charts the way towards identifying a cohesive class of women (and men).[48] This thinking extends even to transgender women (or men) who do not outwardly present in accordance with their gender identity, because even they are subject to the regulatory force of gender norms that constitute female and male subjects.[49] This Article shows how potential objections to this conception of sex — for example, that trans women once experienced male privilege or that trans women reinforce harmful stereotypes of femininity — are misguided and based in verboten "overbroad generalizations."[50]

Before pressing forward, a few words on terminology and the nature of the inquiry are in order. Law and academic literature typically distinguish between sex, or "the anatomical and physiological distinctions between men and women," and gender, or "the cultural overlay on those anatomical and physiological distinctions."[51] This Article uses the term "biological sex" for this traditional understanding of sex, which typically refers to a sex binary in genes, genitals, gonads,

[47] Consolidated Appropriations Act of 2023, Pub. Law 117–328, Div. II, 136 Stat. 4459, 6084 (codified at 42 U.S.C. §§ 2000gg–2000gg-6).

[48] *See infra* Part III.C.

[49] *See infra* notes 557–564 and accompanying text.

[50] United States v. Virginia, 518 U.S. 515, 533 (1996); *see infra* notes 543–556 and accompanying text.

[51] Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10-11 (1995) [hereinafter Case, *Disaggregating Gender from Sex*].

and hormones.[52] Scholars have questioned the sex/gender distinction.[53] This Article's argument is independent of a substantive position in this debate. It does not seek to get to any fact of the matter about the meaning of sex, but rather to address the meaning of sex as a question of law under equal protection doctrine.[54]

This Article proceeds in three Parts. Part I shows how recent developments in transgender rights litigation leave the standard account of sex as biology untouched, catalogues the damage this standard account of sex does to transgender rights and to sex equality more generally, and explains how sex as biology became the conventional reading of the doctrine. Part II debunks the standard account by revealing how the Court's reliance on biology was always far more partial and contested than the standard account would have it, and how the Court's lone foray into reliance on biology is no longer good law. Part III articulates a new account of constitutional sex equality grounded in a social understanding of sex and shows how both

[52] *See* Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 866-68 (2020) [hereinafter Schoenbaum, *The New Law of Gender Nonconformity*] (collecting citations). This Article's use of the descriptor "traditional" with regard to "biological sex" is not meant to confer legal or scientific authority on a concept that has long been contested. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012); *infra* notes 166–170 and accompanying text. Many experts believe that there is a biological basis to gender identity, or the internal sense of whether one is a man or a woman, and thus that there is a biological basis to transgender identity.

[53] *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 7-9 (1990) (arguing that "perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender with the consequence that the distinction between sex and gender turns out to be no distinction at all").

[54] Scholars have considered the choice courts may make about treating a constitutional question as one of law or fact. *See* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 35 (2011) (identifying but disagreeing with the view that a court's decision "will provoke less conflict, or impose less insult on the losing side, if framed in the seemingly neutral idiom of fact as opposed to the morally evocative idiom of constitutional principle"). Given that sex is not defined stably across jurisdictions, or even within a single jurisdiction, it is hard not to view the status of sex as a creature of law. *See infra* notes 371–373 and accompanying text.

transgender rights and sex equality more generally can be brought onto firmer ground with this account.

I. SEX AS BIOLOGY UNDER EQUAL PROTECTION

This Part begins by discussing the set of cases addressing transgender plaintiffs' constitutional sex equality challenges to their exclusion from sex-segregated spaces. It catalogues how judges who come down on both sides of these cases agree on one thing: that sex is a matter of biology for equal protection purposes. After making this descriptive claim, this Part then spells out the harms of a doctrine that treats sex as a matter of biology, both to transgender rights and to the broader cause of sex equality. Part I concludes by explaining how the standard account came to unquestionably — and troublingly — assume biological sex as the core of the doctrine.

A. Sex as Biology in Transgender Rights Cases

In recent years, a body of caselaw has developed addressing the constitutional sex equality claims of transgender persons who have been excluded from sex-segregated spaces on the basis of biological sex.[55] Plaintiff victories in these cases might be thought to upend sex as biology under equal protection. Remarkably, though, these cases — even ones conferring rights on transgender plaintiffs — have continued to affirm the standard account of sex as biology under equal protection. This Part shows how these recent cases, whether they decide for or against the plaintiff, continue to accept sex as biology.

In each of these cases, a transgender plaintiff claims that they have been wrongfully excluded from a sex-segregated facility (bathroom) or institution (athletic team) on the basis of biology.[56] The plaintiffs allege

[55] *See* sources cited *infra* note 56.

[56] *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 798 (11th Cir. 2022) (en banc) (addressing transgender boy's exclusion from boys' bathroom); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020) (same); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017) (same); Hecox v. Little, 104 F.4th 1061, 1068 (9th Cir. 2024) (addressing transgender girl's exclusion from girls' athletics); B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 550 (4th Cir. 2024) (same); D.N. v. DeSantis, 701 F. Supp. 3d 1244, 1247 (S.D. Fla. 2023) (same). I focus my analysis here on bathrooms and sports. There have been

that their classification on the basis of biological sex violates constitutional sex equality law.[57] In these cases, the plaintiffs do not seek to invalidate the sex classification at issue.[58] They seek instead to gain access to the classification that accords with their gender identity (their internal sense of being male or female).[59]

In each of these cases, the state relies on biology to exclude transgender persons from the sex classification they seek to access.[60] While the state's asserted interest may vary across these cases — privacy

similar cases in other contexts. *See, e.g.*, Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 WL 6112790, at *2 (S.D. Ill. Dec. 27, 2021) (prison); Corbitt v. Sec'y of the Ala. Law Enforcement Agency, 115 F.4th 1335, 1340 (11th Cir. 2024) (identity document). For an excellent overview of the current state of transgender constitutional law, see generally Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405 (2023).

[57] *See* sources cited *supra* note 56.

[58] *See Adams*, 57 F.4th at 808 (describing the case as one that "involves an individual of one sex seeking access to the bathrooms reserved for those of the opposite sex"); *Whitaker*, 858 F.3d at 1055 (emphasizing that this case will not "result in the demise of gender-segregated facilities in schools"); *B.P.J.*, 98 F.4th at 555 ("B.P.J. has disavowed any challenge [to] sex separation in sports, insisting that she simply wants to play on the girls' team like other girls." (internal quotation marks omitted)).

[59] *See* sources cited *supra* note 56.

[60] *See Adams*, 57 F.4th at 851 ("The privacy interests hinge on using the bathroom away from the opposite sex and shielding one's body from the opposite sex."); *Grimm*, 972 F.3d at 593 (explaining that transgender boy was excluded from the boys' bathroom by a "policy under which students could only use restrooms matching their 'biological gender'"); *Whitaker*, 858 F.3d at 1052 ("The mere presence of a transgender student in the bathroom, the School District argues, infringes upon the privacy rights of other students with whom he or she does not share biological anatomy . . . ."); *Hecox*, 479 F. Supp. 3d at 948, 975 (reciting that the state relies on "the innate physiological advantages males generally have over females," and quoting challenged Idaho statute: "[I]nherent, physiological differences between males and females result in different athletic capabilities" (quoting IDAHO CODE ANN. § 33-6202)), *aff'd*, 104 F.4th 1061; *B.P.J.*, 98 F.4th at 551 (deciding challenge to state law "requir[ing] all public high school and college sports teams be 'expressly designated'" as male, female, or mixed "'based on biological sex'" (quoting W. VA. CODE § 18-2-25d(c)(1))); *D.N.*, 701 F. Supp. 3d at 1253 (deciding challenge to state law requiring all public high school and college sports teams "be expressly designated" as male, female, or mixed "based on the biological sex at birth" (quoting FLA. STAT. § 1006.205(3))).

in the case of bathrooms,[61] equality of opportunity in the case of sports[62] — the state links the furtherance of its interest to classifying on the basis of some biological sex difference in each of these cases.[63] In other words, for the state, it is biological difference that distinguishes the classes, and thus it is biological difference that justifies relying on sex.[64]

These cases have reached mixed results, with courts disagreeing about whether a transgender student can be excluded from the bathroom or team that comports with their gender identity on the basis of traditional biological sex difference.[65] The plaintiff victories here should be recognized for the enormous wins that they are. The right of transgender students to access the bathroom or athletic team that comports with their gender identity not only marks fundamental legal progress for transgender rights but can be life-changing for transgender children.[66] The losses too could not be more real in terms of their material and expressive effects.

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[61] *See Adams*, 57 F.4th at 804 ("The protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is obviously an important governmental objective."); *Grimm*, 972 F.3d at 613 (reciting how the school board grounds its sex-segregated bathroom policy in the "privacy interest" that students have "in their body when they go to bathroom"); *Whitaker*, 858 F.3d at 1052 (reciting how the school board grounds its sex-segregated bathroom policy in "privacy rights").

[62] *See Hecox*, 104 F.4th at 1081 ("We have previously held that furthering women's equality and promoting fairness in female athletic teams is an important state interest."); *B.P.J.*, 98 F.4th at 559 ("The central question" is whether transgender girl's exclusion from girls' team "is substantially related to the concededly important government interest in competitive fairness.").

[63] *See* sources cited *supra* note 56.

[64] For discussion of how the standard account understands biological sex, see *infra* Part I.C.

[65] *Compare Hecox*, 104 F.4th at 1068 (granting transgender student's athletic exclusion claim), *and Whitaker*, 858 F.3d at 1052 (granting transgender student's bathroom access claim), *and Grimm*, 972 F.3d at 613 (same), *and B.P.J.*, 98 F.4th at 559 (denying summary judgment to school board on transgender student's athletic exclusion claim), *with Adams*, 57 F.4th at 808 (denying transgender student's bathroom access claim), *and D.N.*, 701 F. Supp. 3d at 1248 (denying transgender student's athletic exclusion claim).

[66] *See, e.g.*, Myeshia Price-Feeney, Amy E. Green & Samual H. Dorison, *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. ADOLESCENT HEALTH 1142 (2021) (finding that bathroom discrimination significantly

Notwithstanding the different outcomes in these cases, there is one crucial legal principle on which judges on both sides of these cases have agreed: that biological sex difference is at the heart of Supreme Court sex equality doctrine. Consider the recent en banc decision in the Eleventh Circuit rejecting a transgender boy's claim to use the boys' bathroom at school.[67] The majority relied on its reading of Supreme Court precedent to justify the sex classification on biological sex difference: "[T]he Supreme Court has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences."[68] The Eleventh Circuit further cited the Court's reasoning that sex is "an immutable characteristic determined solely by accident of birth" in support of its view of sex as biology under the doctrine.[69] Relying on this reading of the Supreme Court's caselaw, the court upheld the school board's policy of sex segregation on the basis of biological sex difference.[70]

Perhaps it is not surprising that the judges who rejected the plaintiff's claim would adopt this viewpoint. But not one of the four dissents in this case take issue with this view of the doctrine.[71] Here is what one dissenting judge had to say: "The majority opinion invokes Supreme

increased the odds of transgender youth reporting depression and considering and attempting suicide).

[67] Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (en banc).

[68] *Id.* at 809 ("The difference between men and women in relation to the birth process is a real one." (quoting Nguyen v. INS, 533 U.S. 53, 73 (2001))); *see also id.* ("Physical differences between men and women, however, are enduring." (quoting United States v. Virginia, 518 U.S. 515, 533 (1996))); *id.* at 803 n.6 (stating that "biological sex also is the driving force behind the Supreme Court's sex-discrimination jurisprudence" and "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it" (quoting *Nguyen*, 533 U.S. at 73)).

[69] *Id.* at 809 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)).

[70] *See id.* at 805 ("The School Board's bathroom policy is clearly related to — indeed, is almost a mirror of — its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex and to shield their bodies from the opposite sex in the bathroom, which, like a locker room or shower facility, is one of the spaces in a school where such bodily exposure is most likely to occur.").

[71] *See id.* at 821 (Wilson, J., dissenting); *id.* at 824 (Jordan, J., dissenting); *id.* at 830 (Rosenbaum, J., dissenting); *id.* at 832 (Pryor, J., dissenting).

Court sex-discrimination cases that generally recognize 'biological' differences between men and women. None of the principles in the cases the majority opinion cites is at issue, though."[72] This dissent even includes the same key Supreme Court language recognizing biological sex difference that the *Adams* majority relies on: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."[73]

This dissent does not challenge the notion of sex as biology as a matter of equal protection law. In fact, it takes the question before the court to be "what it means to be *biologically* male or female."[74] To the extent the dissent takes issue with the majority's position on sex as biology, it relies on expert evidence to argue about the meaning of biological sex as a matter of fact.[75] It does not respond to the majority's position that Supreme Court precedent requires a biological understanding of sex as a matter of law.

We can find a similar pattern in the Fourth Circuit's bathroom decision where the transgender plaintiff prevailed.[76] There, the dissent, which would have rejected the plaintiff's claim on the basis of biological sex, took the expected position on the constitutional law of sex equality,

[72] *Id.* at 843 (Rosenbaum, J., dissenting) (citations omitted) (noting without disagreement the majority's "invok[ing] Supreme Court sex-discrimination cases that generally recognize 'biological' differences between men and women").

[73] *Id.* (quoting *Nguyen*, 533 U.S. at 73).

[74] *Adams* ex rel. *Kasper*, 57 F.4th at 843 (Rosenbaum, J., dissenting) (emphasis added).

[75] *Id.* at 832 (arguing that the majority "disregard[s] . . . record evidence — evidence the majority does not contest — which demonstrates that gender identity is an immutable, biological component of a person's sex").

[76] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619-20 (4th Cir. 2020). A third federal appellate decision on transgender student bathroom access from the Seventh Circuit holds for the plaintiff without expressly addressing the law of biological sex difference. *See* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017) ("This policy does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door."). But the Court makes clear that the state has a "legitimate interest in ensuring bathroom privacy rights are protected" — an interest the state ties to biological sex difference. *Id.* at 1051-52 (describing the state's policy as one "requiring students to use facilities corresponding to their birth sex to protect the privacy of all students").

quoting familiar language from the Court about "our most basic biological [sex] differences."[77] What is less expected is that the majority, which validated the transgender boy's right to access the boys' bathroom, quoted this exact same language, agreeing with the dissent that the doctrine embraces this proposition of biological sex difference.[78]

When it comes to sports cases, courts have reached different results on whether transgender girls can be excluded from girls' athletics. Even though they diverge on transgender rights, they agree that constitutional sex equality law is premised on biological sex. One district court rejecting a transgender plaintiff's claim predictably accepted what it called the "'real differences' doctrine" governing the Court's sex equality jurisprudence, which "acknowledges that, generally speaking, males and females are constructed differently (biologically)," and thus "does not make sex a proscribed classification."[79]

In another case, the Ninth Circuit reached the opposite conclusion, but it took no issue with the state's reading of sex as biology. It affirmed the district court's grant of a preliminary injunction that cited one Supreme Court decision for the point that "[t]he Equal Protection Clause does not require courts to disregard the physiological differences between men and women" without comment on this proposition.[80] The Ninth Circuit cited its own earlier precedent's acceptance of sex as biology without any suggestion of disavowing it: "[T]he Supreme Court is willing to take into account actual differences between the sexes,

[77] *Grimm*, 972 F.3d at 635 (Niemeyer, J., dissenting) (quoting *Nguyen*, 533 U.S. at 73).

[78] *Id.* at 608 ("To fail to acknowledge even our most basic biological differences — such as the fact that a mother must be present at birth but the father need not be — risks making the guarantee of equal protection superficial, and so disserving it." (quoting *Nguyen*, 533 U.S. at 73)). A concurring opinion dissects the state's reliance on the notion of biological sex based in a neat binary of physical characteristics because both intersex and transgender individuals "often defy binary categorization on the basis of physical characteristics alone," but does not contest the biological understanding of sex as a matter of law in cases like *Nguyen*. *Id.* at 621 (Wynn, J., concurring).

[79] D.N. v. DeSantis, 701 F. Supp. 3d 1244, 1257-58 (S.D. Fla. 2023) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[80] *See* Hecox v. Little, 479 F. Supp. 3d 930, 976 (D. Idaho 2020), *aff'd*, 104 F.4th 1061 (9th Cir. 2024).

including physical ones."[81] And it distinguished its ruling from the Eleventh Circuit in *Adams* without any comment on that decision's heavy emphasis on sex as biology.[82]

When it comes to transgender plaintiffs' cases challenging access to sex-segregated spaces, losses are built on a foundation of sex as biology as a matter of equal protection law. But even victories in these cases have not unsettled the standard account of the Equal Protection Clause as grounded in biological sex difference. This body of decisions has reified this account, with judges of all stripes — both those that would deny transgender rights *and* those that would vindicate them — reaffirming the relevance of sex as biology under equal protection.

B. The Harms of Sex as Biology

Leaving the standard account of biological sex difference undisturbed is harmful both to transgender rights and to sex equality. As I will show in the next Parts, the standard account is wrong and misses an alternative understanding of sex as a social class running through the jurisprudence. Here, I catalogue the substantial dangers that the conventional account of sex as biology sows.

1. Undermining Transgender Rights

The conventional account of sex as biology stands as a roadblock to transgender rights. First and most simply, transgender plaintiffs have sometimes lost their cases challenging access to sex-segregated spaces because of a reading of the doctrine premised in a biological understanding of sex. Return to *Adams*, the Eleventh Circuit's en banc decision on transgender bathroom access.[83] That court's decision was premised in its reading of Supreme Court jurisprudence along conventional lines: "[T]he Supreme Court has repeatedly recognized

[81] *Hecox*, 104 F.4th at 1081 (quoting Clark *ex rel.* Clark v. Az. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982), and noting that decision's citation to Michael M. v. Superior Ct., 450 U.S. 464, 468-69 (1981), but without indicating this as a plurality opinion).

[82] *Hecox*, 104 F.4th. at 1078.

[83] Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (en banc).

the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences."[84] The court emphasized "the Supreme Court's reliance on physiological and biological differences between men and women in its sex-discrimination decisions."[85] On this view, if Supreme Court case law distinguishes valid from invalid sex classifications on the basis of whether they are legitimately grounded in biological sex difference, the state's sex classification here (recall it has not been challenged) may permissibly track these same biological criteria to exclude transgender persons on the basis of biology.

One might try to avoid this result without challenging sex as biology with an argument about the scope of the precedent on sex as biology. This is the move of the principal dissent in *Adams*, which accepts that "Supreme Court sex-discrimination cases . . . generally recognize 'biological' differences between men and women," but questions whether these cases are controlling on *which* "biological [sex] differences" matter for equal protection purposes.[86] The dissent concludes that the *Adams* case "deals with a preliminary issue" that the Supreme Court has not addressed: "[W]hat it means to be biologically male or female."[87]

Some of the dispute here is a technical matter of what the Supreme Court case law holds — if anything — on precisely this question of "what it means to be biologically male or female."[88] There is no clear answer. Consider the 2001 case *Nguyen v. INS*, where the Court upheld a sex classification on the basis of what it viewed as a key "biological difference" between men and women: that "[t]he mother

[84] *Id.* at 809 ("[T]he Supreme Court has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences.").

[85] *Id.* at 803 n.6.

[86] *Id.* at 843 (Pryor, J., dissenting); *see also* Laura Lane-Steele, *Sex-Defining Laws and Equal Protection*, 112 CALIF. L. REV. 259, 264 (2024) (assuming that these cases do not address the question of who counts as male or female without considering the question of holding).

[87] *Adams,* 57 F.4th at 843 (Pryor, J., dissenting).

[88] *Id.*

is always present at birth, but that the father need not be."[89] Is a reproductive biological difference between men and women a holding of that case? On one view, no, because this point was not argued to or considered by the Court.[90] On another view, yes, because this point was necessary to the decision.[91] Leaving the biological account in place and relying on arguments about holding and dicta is quite a slim reed on which to rest transgender rights.[92]

The failure to challenge the conventional account of sex leaves the plaintiff victories here at risk for still other reasons. Consider Judge Neimeyer's dissent from the Fourth Circuit's decision granting the transgender plaintiff a right to bathroom access:

> [The majority] blithely orders that the High School allow both transgender males and biological males to use the same restrooms, thus abolishing any separation of restrooms on the basis of biological sex. Indeed, its ruling that male includes transgender males and likewise that female includes transgender females renders on a larger scale any separation on the basis of sex nonsensical.[93]

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[89] Nguyen v. INS, 533 U.S. 53, 64 (2001) ("[T]he use of gender specific terms takes into account a biological difference between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.").

[90] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (stating that "a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument"); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 435 (1989) ("Although holdings are given more weight than dicta partly because they are usually supported by full argument and full consideration, categorization as 'holding' does not depend on full argument and full consideration.").

[91] *See* Greenawalt, *supra* note 90, at 435 ("[W]hat the court says or determines that is necessary to its decision is holding."); *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 572 (Souter, J., concurring in part and concurring in the judgment) (referencing "necessity" as a factor in distinguishing holdings from dicta).

[92] *See Adams*, 57 F.4th at 807 (concluding that "[D]espite the dissent's suggestion, the district court did not make a finding equating gender identity as akin to biological sex[,] [n]or could the district court have made such a finding that would have legal significance." (internal quotation marks omitted)).

[93] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 628 (4th Cir. 2020) (Niemeyer, J., dissenting).

According to Judge Neimeyer, if the state's asserted justification for relying on biological sex difference (i.e., in privacy for bathrooms or equality of athletic opportunity for sports) is not undermined by admitting to the class of women or the class of men those who do not share the biological features traditionally associated with their sex, then the classification no longer has a reason for being.

Several judges have strenuously objected to the type of conclusion Neimeyer reaches, emphasizing that altering the basis of sex sorting (i.e., who can count as male or female) does not weaken the validity of the sex classification.[94] Yet the failure to counter the traditional biological understanding of sex and replace it with something else that would unite transgender and cisgender persons by sex makes these arguments hard to sustain. Without unsettling the conventional account of biological sex difference, courts seeking to explain why the transgender plaintiff and their cisgender counterparts were similarly situated did so in ways that were at best ineffective and at worst risk serious harm, both for transgender rights and for sex equality more generally.

Accepting the biological understanding of sex means that courts are without a theoretical account that would join transgender and cisgender women or men as a class. This can leave even decisions siding with transgender plaintiffs on weak ground. In *Hecox v. Little*, for example, the Ninth Circuit granted a victory to a transgender girl's equal protection challenge to her exclusion from the girls' track team under state law.[95] The court held that the inclusion of a transgender girl did not undermine the state's interest in segregating by sex to achieve the

[94] *See, e.g.*, *Adams*, 57 F.4th at 842 (Pryor, J., dissenting) ("The School District's practice of separating bathrooms by sex has never been at issue. To the contrary, Adams's claim depends on the existence of sex-separated bathrooms."); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1055 (7th Cir. 2017) ("Although the School District argues that implementing an inclusive policy will result in the demise of gender-segregated facilities in schools," in fact "allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls.").

[95] Hecox v. Little, 104 F.4th 1061, 1068 (9th Cir. 2024).

purpose of remedying a history of discrimination against women in sports.[96]

But the court's argument here was far from convincing. The court was general, noting that "transgender women, like women generally . . . have historically been discriminated against, not favored."[97] In support of this contention, the court cites discrimination faced by all "transgender students."[98] Yet many social groups have been discriminated against, and this alone would not render them similarly situated in terms of the need to "redress[] past discrimination against women in athletics."[99] Leaving the biological understanding of sex unsettled gives the court little opportunity to theorize how sex can unite trans and cis women without a shared biology, as this Article does.[100]

In an effort to show why a transgender plaintiff should be grouped with their cisgender counterparts, judges siding with the transgender plaintiffs have sometimes emphasized the facts of a particular case that made a transgender boy seem "boy-like" or a transgender girl seem "girl-like."[101] In one case, a concurring judge noted that the transgender boy

[96] *Id.* at 1082-88. I discuss later how the court addressed the issue of claimed physiological advantage. *See infra* notes 447–451 and accompanying text.

[97] *Id.* at 1082 (internal quotation marks omitted).

[98] *Id.* (internal quotation marks omitted).

[99] *Id.* at 1081 (quoting Clark *ex rel.* Clark v. Az. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982)). The Ninth Circuit notes how the law before it discriminates against transgender and cisgender women alike but says nothing more about the shared social fates of transgender and cisgender women. *See id.* at 1083 ("The Act perpetuates historic discrimination against both cisgender and transgender women by categorically excluding transgender women from athletic competition and subjecting all participants in women's athletics to an invasive sex dispute verification process.").

[100] *See infra* Part III.C.

[101] *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 833 (11th Cir. 2022) (Pryor, J., dissenting) (emphasizing that the plaintiff, a transgender boy, "has 'liv[ed] basically as a boy,'" "always engaged in what he thinks of as 'masculine' behaviors," "played with race cars, airplanes, and dinosaurs," and "refused to wear skirts and dresses," and citing his parents' testimony that he "just always wasn't acting like a girl" and "never clicked with any of the female things, the standard female stereotype things"); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597-98 (4th Cir. 2020) (recounting evidence about transgender male plaintiff that "when given the choice, he would opt to wear boys' clothing," and "how uncomfortable he was when made to wear a dress").

"*appear*[*ed*] wholly male except for his genitals,"[102] including noting that the plaintiff "presented as male through his haircut."[103] Consider that the complaint in one of the transgender athlete cases included a photograph of the transgender female plaintiff.[104] The picture showed only her head and shoulders, so it could not have been included to indicate anything about plaintiff's lack of physical advantage over cisgender female athletes. This leaves the conclusion that the photograph was provided to show the court that the plaintiff *looked like* a girl, so should be treated like one.

Arguments that boys look or act a certain way and that girls look or act another way are based in the very same harmful stereotypes of masculinity and femininity that sex equality law is supposed to eradicate.[105] This type of reasoning about sex undermines the claims of future transgender plaintiffs who do not fit this stereotypical narrative of gender identity and how it manifests[106] and steers transgender persons into a narrow box of acceptable gender presentation based on impermissible and damaging sex stereotypes.[107] The same harms of gender policing that are visited on transgender persons can be visited on cisgender persons, with cisgender women who present in a more masculine manner being misgendered out of bathrooms and sports.[108]

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[102] *Grimm*, 972 F.3d at 622 (Wynn, J., concurring) (emphasis added).

[103] *Id.* at 621.

[104] *See* Complaint for Declaratory and Injunctive Relief at 12, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184-CWD).

[105] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 235, 251 (1989) (plurality) (where a woman was expected to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," stating that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

[106] *See* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 260 (2005) ("[S]ome male-to-female transgender people are butch lesbians. Some female-to-male transgender people like to cook and bake.").

[107] *See* Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 795 (2013) (arguing that case law encourages transgender plaintiffs to engage in stereotypical gender performance).

[108] *See* Catharine A. MacKinnon, *Exploring Transgender Law and Politics*, SIGNS J. (2022), https://signsjournal.org/exploring-transgender-law-and-politics/ [https://perma.cc/FDD9-ZG5C] [hereinafter MacKinnon, *Exploring Transgender Law*] ("Meantime, largely

One Idaho law that creates a "sex verification" process to "dispute" a student's sex[109] has already been challenged by a cisgender female athlete who "feared that her sex would be 'disputed' under the Act due to her masculine presentation."[110] Because the idea of sex as biology struggles to cohere cisgender and transgender women as a class of women (and cisgender and transgender men as a class of men), it ends up resorting to and reinforcing impermissible and damaging sex stereotypes.

2. Undermining Sex Equality

Leaving in place the conventional account of biology in the law of constitutional sex equality is dangerous not only for cases involving transgender rights, but in other sex equality cases as well. Stereotypical judgments about the sexes can be disguised by grounding them in biological difference.[111] Engaging in what Professor Reva Siegel calls "reasoning from the body," the Supreme Court "typically reasons about reproductive regulation in physiological paradigms," relying on these physiological "differences between the sexes [to] justif[y] their differential regulatory treatment. This mode of reasoning about

as a result of the anti-trans bathroom panic, butch lesbians (a term of pride among women I know, maybe this is generational) and other women on the masculinity spectrum . . . are being even more intensively misgendered in bathrooms and elsewhere, despite being female-bodied, assigned female at birth, and woman-identified.").

[109] IDAHO CODE § 33-6203(3) (2020) ("A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex" by "relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.").

[110] Hecox v. Little, 104 F.4th 1061, 1072 (9th Cir. 2024).

[111] The use of biology to disguise sex stereotypes is a phenomenon that invades not only law but biology. *See* SARAH S. RICHARDSON, SEX ITSELF: THE SEARCH FOR MALE AND FEMALE IN THE HUMAN GENOME 120 (2013) (collecting and extending research on the "circular process of gendering objects of biological research in which stereotypical conceptions of masculinity and femininity" are relied on to understand objects like eggs and sperm, testosterone and estrogen, and X and Y chromosomes "from which theories of sex differences are then derived").

reproductive regulation obscures the possibility that such regulation may be animated by constitutionally illicit judgments about women."[112]

We can see the Court relying on biology to enforce sex stereotypes across various domains. Consider *Michael M.*, where the Court upheld a statutory rape law that criminalized underage sex for boys and not girls.[113] The plurality decision relies on biological sex difference — the capacity for pregnancy — to justify the sex classification.[114] Two dissents and numerous scholars have argued that the law and the Court's reasoning were premised not in biological difference but in multiple sex stereotypes[115]: views about the value of chastity among young women;[116] the assumption that young men but not young women could consent to sex;[117] the assumption that "the decision to engage in risk creating conduct is always — or at least typically — a male decision";[118] and "stereotypical notions of female passivity and male activity in sex."[119]

So too with the Court's decision in *Nguyen*, where the Court upheld a rule that made it easier for mothers than fathers to confer citizenship to children born abroad to unmarried parents.[120] A similarly lengthy list of stereotypes driving the law and the majority decision have been cited.[121]

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[112] Siegel, *Reasoning from the Body*, *supra* note 37, at 264.

[113] Michael M. v. Superior Ct., 450 U.S. 464, 467 (1981) (plurality).

[114] *Id.* at 471 (citing "the immutable physiological fact that it is the female exclusively who can become pregnant") (internal quotation marks omitted).

[115] Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 988 (1984) (arguing that "the analysis . . . suffers from a failure to distinguish between biological differences and social stereotypes").

[116] *See Michael M.*, 450 U.S. at 495-96 (Brennan, J., dissenting) (explaining that the law at issue was "initially designed to further . . . outmoded sexual stereotypes" about the value of chastity among young women and the assumption that young men but not young women could consent to sex).

[117] *See Id.* at 494-96 (Brennan, J., dissenting).

[118] *Id.* at 501 (Stevens, J., dissenting).

[119] Mary Anne Case, "*The Very Stereotype the Law Condemns*": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1458 (2000) [hereinafter Case, *Quest for Perfect Proxies*] (highlighting "the archaic nature of Justice Rehnquist's foray into reproductive biology").

[120] Nguyen v. INS, 533 U.S. 53, 73 (2001).

[121] *See, e.g.*, Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1220-21 (2016) (explaining that the Court allows unwed biological fathers to be treated differently than biological mothers because of "the alleged naturalness of the biological

Consider the dissent in *Nguyen*: "[T]he idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization" both because "[a] mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war" and because "[t]here is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms."[122]

There is no shortage of contexts where stereotypes masquerade as biology, reinforcing sex stereotypes and undermining sex equality in the process. Consider pregnancy and breastfeeding, both of which are fundamentally tied to the biological phenomena of gestation and lactation. But that is not all they are. Instead, pregnancy and breastfeeding are both social experiences that entail substantial investments in capital and labor that have nothing to do with the body and need not be limited to cisgender women.[123] Yet a law premised in biological sex difference will continue to drive regulations of pregnancy and breastfeeding towards traditional sex classifications, which unnecessarily and problematically exclude cisgender men, transgender men, and gay and lesbian parents from these experiences.[124]

relationship of mother and child versus the social construction of the father-child relationship"); Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 173 (2017) (noting the "gender-traditional conceptions of the parent-child relationship" at work and collecting citations to this effect); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2283-84 (2017) [hereinafter NeJaime, *The Nature of Parenthood*] (articulating how "the Court translated differences in the biological dimensions of parenthood into differences in the social dimensions").

[122] *Nguyen*, 533 U.S. at 86-87 (O'Connor, J., dissenting).

[123] *See generally* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019) [hereinafter Fontana & Schoenbaum, *Unsexing Pregnancy*] (arguing for this reason that many sex classifications related to pregnancy are invalid); Naomi Schoenbaum, *Unsexing Breastfeeding*, 107 MINN. L. REV. 139 (2022) [hereinafter Schoenbaum, *Unsexing Breastfeeding*] (arguing for this reason that many sex classifications related to breastfeeding are invalid).

[124] *See* sources cited *supra* note 123.

If a key goal of constitutional sex equality law is to combat sex stereotypes,[125] failing to counter one of the primary vehicles through which these stereotypes are propagated is a major failing. And even though the Supreme Court hasn't said much about the biology of sex difference,[126] what little it has said has made a big difference. As Professor Siegel sees it, the impact of this conventional account of constitutional sex equality law is "significant" in shaping courts' views about sex classifications based in biology as untroubled by stereotypes.[127] Professor Courtney Cahill has catalogued a range of cases where lower courts have relied on biology to uphold sex-based laws that are grounded in harmful sex stereotypes.[128] And as Professor Douglas NeJaime has argued, the impact of the conventional account extends beyond law to "social life," where the belief about biological sex difference "insulat[es] gender hierarchy and gender stereotypes from charges of bigotry," and "structure[s] views about marriage, reproduction, and parenthood."[129]

One lower court has recently ventured even further in its reliance on biology to avoid scrutinizing sex-based laws. In *Williams v. Skrmetti*, a case now before the Supreme Court, the Sixth Circuit went so far as to hold that a classification related to biological sex difference avoids

[125] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 90 (2010) [hereinafter Franklin, *The Anti-Stereotyping Principle*].

[126] *See infra* notes 149–159 and accompanying text.

[127] Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 201 (2020) [hereinafter, Siegel, *The Pregnant Citizen*] (articulating that there exists "a belief that is playing some significant but not adequately explained role in shaping equal protection law — the belief that laws based on reproductive differences between the sexes do not rest on constitutionally suspect stereotypes in the way that laws based on generalizations about social differences between the sexes do").

[128] *See* Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1076-77 n.50, 1084-97 (2023) [hereinafter Cahill, *Irreconcilable Differences*] (noting that "[s]ince *Nguyen* was decided in 2001, dozens of lower and state courts have relied on it — and on real-differences' justifications more generally — to uphold sex distinctions" and collecting cases); sources cited *supra* note 82.

[129] Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651, 2668-69 (2021) [hereinafter NeJaime, *Bigotry in Time*].

heightened scrutiny altogether.[130] So a biological understanding of sex may not only limit courts' recognition of sex stereotypes when it scrutinizes sex classifications, but it may keep courts from scrutinizing these classifications at all.

Beyond upholding sex classifications based in sex stereotypes, the notion of biological sex difference in our constitutional law of sex equality remains the backdrop of a number of *other* legal arguments that could harm the causes of sex equality, gay and lesbian equality, and transgender equality. Consider the constitutional right to gay marriage, which has recently been called into question by the Court's willingness to unsettle precedent and fundamental rights in *Dobbs*.[131] Arguments against gay marriage continue to rely on views about the "unique complementarity and fundamental differences between men and women."[132] Professor NeJaime argues that even though "the gender-hierarchal view of marriage" has been rejected by the Court, it is still invoked in part because of a reading of sex equality jurisprudence based in biological sex difference.[133] So too, the Court's failure to appreciate regulations of pregnancy, including abortion restrictions, as premised in harmful sex stereotypes about the proper role of women can likewise be

[130] L.W. by & through Williams v. Skrmetti, 83 F.4th 460, 484 (6th Cir. 2023) (in a case involving a challenge to a ban on gender-affirming care for transgender minors as a violation of constitutional sex equality, indicating that sex classifications that make "necessary references to 'enduring' differences between men and women do not trigger heightened review" (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)), *cert. granted*, United States v. Skrmetti, 144 S. Ct. 2679 (2024)).

[131] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

[132] NeJaime, *Bigotry in Time*, *supra* note 129, at 2668 (quoting Transcript of Proceedings at 53, Bostic v. Rainey, 970 F. Supp. 2d 460 (E.D. Va. 2014) (No. 2:13-cv-00395)); *see also* LINDA C. MCCLAIN, WHO'S THE BIGOT: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 144 (2020) (positing that this argument "recasts the common law system of coverture that the colonies inherited from England — with married women's loss of legal identity and acquisition of various legal disabilities — as a policy 'celebrating' sex difference").

[133] *See* NeJaime, *Bigotry in Time*, *supra* note 129, at 2668-69.

blamed on biological thinking about sex and affords these regulations a layer of insulation from scrutiny.[134]

Finally, as I develop more fully in Part III, the focus on biology overlooks women as a subordinated social class and the possibility for a jurisprudence centered on correcting injustices to women on the basis of membership in the class. Feminists have long recognized the harms of "biological determinism," denouncing biological hierarchy as "the world's most dangerous and deadly idea."[135] A biological understanding of sex naturalizes sex inequality, making it easier to justify and harder to combat. Under a biological understanding of sex, sex difference — and the inequality that flows from it — is made inevitable, rather than the product of social forces that are subject to challenge and change.[136] While judicial "reasoning from the body" is only one part of this dangerous ideology, it continues to play a role in upholding sex inequality.[137]

C. The Conventional Account of Sex as Biology

Before re-reading the jurisprudence to unsettle the conventional account of sex as biology, it is important first to lay the groundwork by pausing here to spell out in a bit more detail the conventional account of sex under equal protection. This Section traces the development of the standard account of constitutional sex equality jurisprudence, showing how it became dominated by a biological conception of sex,

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[134] *See* Siegel, *Reasoning from the Body*, *supra* note 37, at 265 ("When abortion-restrictive regulation is analyzed in physiological paradigms, as past cases have shown, the inquiry focuses on questions concerning gestation. By contrast, if restrictions on abortion are analyzed in a social framework, they present questions concerning the regulation of motherhood, and, thus, value judgments concerning women's roles."); *infra* notes 422–425 and accompanying text.

[135] ANDREA DWORKIN, LETTERS FROM A WAR ZONE 110 (1993).

[136] MacKinnon, *Exploring Transgender Law*, *supra* note 108 ("If women's oppression is defined by what defines women, and that is our sexed biology as this group defines it, the very most we can change is the excesses of male power. Never male power itself."); *cf.* DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY, at xii (2011) ("[B]iological theories of race have always . . . ma[de] racial inequality, as well as the punitive apparatus that maintains it, seem perfectly natural.").

[137] *See* Siegel, *Reasoning from the Body*, *supra* note 37, at 267-68.

with scholars and lower courts alike unquestionably accepting this view. The standard account assumes sex as biology in two ways: first, that the origin of the sex equality doctrine arose out of a biological conception of sex, and second, that the sex equality doctrine as it has developed has been driven by biological sex difference.

For much of the history of the nation, pervasive sex-based regulation created and enforced separate spheres for men and women.[138] In the 1970s, the constitutional sex equality revolution dismantled the legal edifice of these separate spheres pursuant to the Fourteenth Amendment's guarantee of equal protection. In one of the earliest cases, *Frontiero v. Richardson*, the Court struck down a law granting spousal benefits to wives of military servicemembers automatically but to husbands only on a showing of actual dependence.[139] A plurality of the Court explained the need for strict scrutiny of sex classifications by analogy to race, emphasizing how sex, like race, is "immutable," a mere "accident of birth"; how sex, like race, "frequently bears no relation to ability to perform or contribute to society"; and how sex, like race, has been the basis for "a long and unfortunate history of . . . discrimination."[140] While this reasoning failed to secure majority support, it laid a foundation for the Supreme Court's sex equality jurisprudence by making the case for exacting scrutiny of the state's use of sex.

In the wake of *Frontiero*, the blackletter law of constitutional sex equality that developed was "intermediate scrutiny," which invalidates sex-based classifications unless they "serve important governmental objectives" by means that are "substantially related to achievement of

[138] *See, e.g.*, Sessions v. Morales-Santana, 582 U.S. 47, 57 (2017) (referring to "an era when the Nation's lawbooks were rife with overbroad generalizations about the way men and women are"); Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

[139] Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (plurality opinion).

[140] *Id.* at 684, 686.

those objects."[141] This jurisprudence has come to be understood in terms of stereotypes, not scrutiny.[142] "Overbroad generalizations" about the sexes run afoul of equal protection, even if these generalizations are true in "many" situations.[143] This equal protection doctrine largely undid the law of separate spheres by invalidating laws that treated men and women differently on the basis of "gross stereotyped distinctions."[144]

[141] *See* Craig v. Boren, 429 U.S. 190, 197 (1976). The Court has alternatively described intermediate scrutiny as demanding an "exceedingly persuasive" justification. United States v. Virginia, 518 U.S. 515, 533 (1996) (internal quotation marks omitted).

[142] *See* Case, *Quest for Perfect Proxies*, *supra* note 119, at 1449 (arguing that "the components of the intermediate scrutiny standard . . . have rarely been the moving parts in a Supreme Court sex discrimination decision" and that "the bulk of the work in these decisions . . . [is] the proposition that there are constitutional objections to 'gross, stereotyped distinctions between the sexes'" (quoting *Frontiero*, 411 U.S. at 685)); Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 89-90.

[143] *See Morales-Santana*, 582 U.S. at 63 ("Overbroad generalizations . . . have a constraining impact, descriptive though they may be of the way many people still order their lives."); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994) ("[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."); *Craig*, 429 U.S. at 198, 201-02 (striking down a sex classification despite evidence showing that sex as a proxy was "not trivial in a statistical sense," noting that prior cases both "have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this" and have "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications"); Case, *Quest for Perfect Proxies*, *supra* note 119, at 1449-50 (reading the doctrine to require a "perfect proxy" — that "the assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men" — and noting that "virtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate").

[144] *Frontiero*, 411 U.S. at 685; *see also, e.g.*, *Morales-Santana*, 582 U.S. at 50 (invalidating a sex-based rule for determining citizenship); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152 (1980) (invalidating a law affording workers' compensation benefits automatically to widows but not to widowers); Califano v. Westcott, 443 U.S. 76, 89 (1979) (invalidating a law that granted benefits to children of unemployed fathers but not unemployed mothers); Caban v. Mohammed, 441 U.S. 380, 394 (1979) (invalidating a law that permitted unwed mothers but not unwed fathers to block the adoption of a child by denying consent); Orr v. Orr, 440 U.S. 268, 283 (1979) (invalidating a law that granted alimony to women only); Califano v. Goldfarb, 430 U.S. 199, 216-17 (1977) (invalidating a law that afforded Social Security benefits to widows automatically but required widowers to show dependence); Stanton v. Stanton, 421 U.S. 7, 15-17 (1975) (invalidating a law affording boys more years of parental support on the assumption that

Under the conventional account, equal protection sex equality law is both premised in and driven by biological sex differences. On this account, the very existence of heightened scrutiny as applied to sex classifications under the Equal Protection Clause owes much to an understanding of sex as biological. Scholars have framed the position taken by then advocate Ruth Bader Ginsburg and the ACLU Women's Rights Project challenging the law at issue in *Frontiero* as one that made the biology of sex central to their position — and to winning the case.[145] On this view, Ginsburg's focus on "the biological basis of the distinction, and the consequent powerlessness of individuals to control which class they fall into, made the classification all the more invidious and unconstitutional."[146] And it is oft-cited that the Court's rejection of strict scrutiny for sex classifications and its adoption of intermediate scrutiny instead is because sex, unlike race, is premised in real biological differences.[147]

girls would marry); Weinberger v. Wiesenfeld, 420 U.S. 636, 642-45, 653 (1975) (invalidating a law granting Social Security survivors' benefits to widows, but not widowers, with minor children); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (invalidating a legal presumption that unwed fathers would be unfit parents).

[145] *See* Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1453 (1999) (assuming that her argument that sex is an "unalterable trait of birth" means that sex is a matter of biology).

[146] *Id.* (explaining that in so doing, Ginsburg was "effectively tak[ing] what had previously been the greatest weakness of equal protection arguments against sex-based classifications and mak[ing] it the center of the case").

[147] *See, e.g.*, Michael M. v. Superior Ct., 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) (explaining that "[r]acial classifications, which are subjected to 'strict scrutiny,' are presumptively invalid because there is seldom, if ever, any legitimate reason for treating citizens differently because of their race," whereas "[i]n cases involving discrimination between men and women, the natural differences between the sexes are sometimes relevant and sometimes wholly irrelevant"); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022) (en banc) (explaining that "biological differences between males and females are the reasons intermediate scrutiny applies in sex-discrimination cases in the first place"); Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 169-70 [hereinafter Franklin, *Biological Warfare*] (explaining that the "most significant" of the distinctions between race and sex discrimination under equal protection is "the Supreme Court's attitude toward biological difference," and thus "the law may be more receptive to sex-based state action predicated on 'inherent differences' than it is toward race-based state action predicated on those grounds"); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 744-45 (2002)

Beyond the origins of the doctrine, the standard account also takes biological sex differences to power the doctrine's analysis. While there are multiple grounds on which the Court has upheld sex classifications,[148] the canonical account treats biological sex difference as driving the doctrine. Scholars posit that the doctrine contrasts real biological sex differences with mere sex stereotypes and allows laws premised in biological difference to withstand equal protection scrutiny.[149]

(explaining levels of scrutiny for race and sex: "[W]hile race has been deemed more a social than a biological construct, women alone can gestate and bear children," and "[t]his irreducible biological difference between men and women has no analogue for race"); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 914-15 (2002) (explaining that "[t]he Court's grant of intermediate, rather than strict, scrutiny to sex is sometimes justified on the ground that there are 'real differences' between the sexes," and "unlike any two racial groups, men and women are deemed to be biologically different in ways that could justify their differential treatment").

[148] Two other circumstances aside from physical differences have been understood to justify sex classifications: (1) when sex classifications are "used to compensate women for particular economic disabilities [they have] suffered," and (2) when another sex-respecting classification not before the Court results in a perfect proxy between sex and the challenged classification. Case, *Quest for Perfect Proxies*, *supra* note 119, at 1457-58 (internal quotation marks omitted). The compensatory use of sex is discussed *infra* Part III.B.2.

[149] *See, e.g.*, Cahill, *Irreconcilable Differences*, *supra* note 128, at 1072 (discussing the anti-stereotyping principle and explaining that "[i]f a law treats women and men differently because of [inherent differences], it is usually upheld on the ground that biology is real, as opposed to being a stereotype or a manifestation of bigotry"); Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2256 (2020) [hereinafter Cahill, *The New Maternity*] (explaining that "constitutional law's 'antistereotyping principle' draws a distinction between unconstitutional sex stereotyping and 'real' biological difference, the latter of which operates as a constitutionally adequate justification for sex discrimination"); Case, *Quest for Perfect Proxies*, *supra* note 119, at 1457-58 (identifying three categories of permissible sex classifications, including regulations justified by "physical differences between men and women" (internal quotation marks omitted)); Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 90 (indicating that the Court "declined to apply the anti-stereotyping principle in domains where it had identified 'real' differences between the sexes" and that "[i]f the law regulated in the context of a physical difference, this would justify reliance on sex"); Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 760-61 (2002) (explaining that "the Court has struck down a wide variety of sex-based legal classifications under heightened scrutiny, with the exceptions generally tending to

The standard account often treats *Michael M. v. Superior Court* as a key case. There, the Court considered a statutory rape law making it a crime for a male to have sexual intercourse with a female under the age of eighteen.[150] The Court validated the sex classification, with a plurality

cluster around sex-specific rules that the Court understands to be inseparably tied to the gestational capacity that all women (presumptively) possess"); Law, *supra* note 115, at 988 (stating that constitutional equality doctrine "condemn[s] explicit sex based classifications based on inaccurate stereotypical views of men and women" but "collapses when applied to explicit sex-based classifications that are arguably related to real biological differences"); Sullivan, *supra* note 147, at 745 (explaining that "[i]n applying the Equal Protection Clause to sex discrimination, the Court has used a threshold 'real differences' test": "Where the Court finds a law predicated upon 'real differences' between men and women, it requires only minimum rationality").

While the scholarly view of the Court's acceptance of biological sex difference mostly goes unstated, sometimes it is express. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) ("[S]exual equality jurisprudence has uncritically accepted the validity of biological sexual differences."); Franklin, *Biological Warfare, supra* note 147, at 169-70 (explaining that "the Supreme Court's attitude toward biological difference" between the sexes means that it is "receptive to sex-based state action predicated on 'inherent differences'"). With regard to pregnancy, Professor Reva Siegel stands out as treating the Court's reliance on biology as "rare" and present only in "scattered passages." *See* Siegel, *The Pregnant Citizen, supra* note 127, at 201. She recognizes that other scholars have not so understood the doctrine. *Id.* at 171 (stating that "[t]he dominant view" among "leading scholars" is that "the regulation of pregnancy [is insulated] from equal protection oversight").

[150] *Michael M.*, 450 U.S. at 466 (plurality). Scholars regularly cite *Michael M.* for the proposition that the Court looks to biological sex difference to uphold a sex classification. *See, e.g.*, Case, *Quest for Perfect Proxies*, *supra* note 119, at 1458 (citing *Michael M.* as relying on the "immutable physiological fact that it is the female exclusively who can become pregnant" to uphold a sex classification (quoting *Michael M.*, 450 U.S. at 467)); Franklin, *The Anti-Stereotyping Principle, supra* note 125, at 128, 155-56 ("[I]n *Michael M.*, the Court had upheld a sex-specific statutory rape law . . . on the ground that it reflected physical differences between men and women."); Hasday, *supra* note 149, at 761, 761 n.26 (citing *Michael M.* for the point that the Court upholds sex classifications it "understands to be inseparably tied to the gestational capacity that all women (presumptively) possess"); Law, *supra* note 115, at 998-1002 (citing *Michael M.* as a case upholding "a sex-based classification justified in relation to biological difference" and that these "perceived differences between men and women were crucial to the opinion"); Sullivan, *supra* note 147, at 745-46, 746 n.73 (explaining that "[w]here the Court finds a law predicated upon 'real differences' between men and women, it requires only minimum rationality," and citing *Michael M.* as a case where "a statutory rape law protecting underage girls but not boys was held to reflect merely a natural

opinion that explained the decision in terms of biological sex difference: "'[T]he immutable physiological fact that it is the female exclusively who can become pregnant,'" and that "males alone can 'physiologically cause the result which the law properly seeks to avoid.'"[151] Therefore, "the gender classification was readily justified as a means of identifying offender and victim."[152]

Under the standard account, later cases, like *United States v. Virginia*[153] and *Nguyen v. INS*,[154] have been read similarly.[155] In *Virginia*, the Court considered a challenge to the male-only admissions policy at Virginia Military Institute ("VMI"), a state-run military academy.[156] Even though men could, on average, more easily attain the academy's required "[p]hysical rigor" than women, the Court struck down the policy.[157] Because some women could pass this bar, the Court deemed VMI's process unconstitutional.[158] In so concluding, the Court nonetheless

asymmetry: the heavy burdens of possible pregnancy would deter girls from underage sex, but boys needed the added disincentive of the criminal law"). This does not mean in this case or any other that scholars agree that biological sex difference in fact supports the classification, but merely that scholars agree that this is the Court's rationale.

[151] *Michael M.*, 450 U.S. at 467 (quoting Michael M. v. Superior Ct., 601 P.2d 572, 574-75 (Cal. 1979)).

[152] *Id.*

[153] 518 U.S. 515 (1996).

[154] 533 U.S. 53 (2001).

[155] Scholars cite to *Virginia* and *Nguyen* for the proposition that sex classifications premised in physical sex differences continue to be permitted. *See, e.g.*, Case, *Quest for Perfect Proxies*, *supra* note 119, at 1458 & n.51 (noting that the Court has upheld sex classifications based on "[p]hysical differences between men and women" (quoting *Virginia*, 518 U.S. at 533)); Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 145-49 (explaining that *Nguyen* validated a sex classification because it treated the classification as justified by the "[p]hysical differences between men and women" recognized in *Virginia* (quoting *Nguyen*, 533 U.S. at 68)); Hasday, *supra* note 149, at 761 & n.26 (citing *Nguyen* as a "prominent recent example" of the Court upholding a sex classification it "understands to be inseparably tied to the gestational capacity that all women (presumptively) possess"); Sullivan, *supra* note 147, at 744 (noting that "irreducible biological difference between men and women"— that "women alone can gestate and bear children"—"has no analogue for race" and that "the *Virginia* decision left room to take account of such differences").

[156] 518 U.S. at 523.

[157] *Id.* at 522 (internal quotation marks omitted).

[158] *See id.* at 523, 534, 540-41.

suggested that in appropriate circumstances, biological sex difference could justify a sex-based rule, citing "[p]hysical differences between men and women" that remain "enduring."[159]

Five years later, in *Nguyen*, the Court relied on biological difference to uphold a law distinguishing between mothers and fathers when it came to conferring citizenship on children born abroad to unmarried parents, stating that "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."[160] As Courtney Cahill has well catalogued, lower federal courts and state courts have rejected equal protection challenges to sex classifications by relying on *Nguyen* and the real-differences reasoning it reflected.[161]

Professor Cary Franklin has argued that *Virginia* brought an important revision to the doctrine.[162] Before *Virginia*, if the law regulated in the context of a physical difference, this would justify reliance on sex; there was no need to turn to a stereotyping analysis.[163]

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[159] *See id.* at 533.

[160] *Nguyen*, 533 U.S. at 64-65, 73 (explaining that because "the mother is always present at birth, but that the father need not be," there will be "at least an opportunity for mother and child to develop a real, meaningful relationship").

[161] Cahill, *Irreconcilable Differences*, *supra* note 128, at 1077 n.50, 1084-97 (collecting cases to reach this conclusion); *see, e.g.*, People v. Carranza, No. B240799, 2013 WL 3866506, at *8 (Cal. Ct. App. July 24, 2013) (rejecting equal protection challenge to statute criminalizing forcible touching of female breasts only because of "physiological distinctions between male and female breasts continue to exist"); *In re* Doe, 517 P.3d 830, 835-38 (Idaho 2022) (rejecting equal protection challenge to sex distinctions in parental termination and adoption statutes because of real difference of pregnancy and its connection to the parent-child relationship); State v. Wright, 563 S.E.2d 311, 312-15 (S.C. 2002) (rejecting equal protection challenge to considering a "difference in the sexes" in a criminal domestic violence law because "[i]t is a matter of common knowledge, and a proper subject for judicial notice, that women, as a general rule, are of smaller physical stature and strength than are men" (quotation and citation omitted)); Tagami v. City of Chicago, 875 F.3d 375, 379-80 (7th Cir. 2017) (rejecting equal protection challenge to female-only topless ban because of "physiological differences" between male and female breasts).

[162] *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 145-46 (explaining that "the [*Virginia*] Court's treatment of the issue of 'real' differences marked a new departure for constitutional sex discrimination doctrine").

[163] *See id.* (stating that "[h]istorically, the Court granted lawmakers broad leeway to discriminate on the basis of 'real' differences" without subjecting it to anti-stereotyping

In *Virginia*, however, even though physical differences between the sexes were relevant to the school's physical training program, this did not end the inquiry. Rather, the Court evaluated whether the law's reliance on sex was based in an "overbroad generalization[]."[164] Physical sex differences are not irrelevant, but there was a switch: whereas "'real' differences [once] served as a check on the reach of anti-stereotyping doctrine," after the decision, "anti-stereotyping doctrine serves as a check on the state's regulation of 'real' differences."[165] *Virginia* ushered in a new approach of careful scrutiny even for those sex classifications that are grounded in biology. But it did not bring an end to juxtaposing real biological differences as compared with stereotypes. On this view, even after *Virginia*, legitimate reliance on biology remains a valid justification for sex classifications.

If this standard account is right, a biological conception of sex is central to constitutional sex equality jurisprudence. *Which* biological features — that is, genes, genitals, gonads, or hormones — distinguish the sexes under the doctrine is not usually identified.[166] The standard account has tended to focus on reproduction.[167] On this account, women

analysis, but "*Virginia* makes clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not 'real' differences are involved").

[164] *Virginia*, 518 U.S. at 533.

[165] Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 145-46; *see also* Cahill, *Irreconcilable Differences*, *supra* note 128, at 1071 (explaining that "at some point, anti-stereotyping hits a wall of 'real differences' or 'inherent biological differences between the sexes,' and it stops").

[166] *See* Melanie Blackless, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne & Ellen Lee, *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 151 (2000) (describing sex criteria as "sex chromosome composition, gonadal structure, hormone levels, and the structure of the internal genital duct systems and external genitalia").

[167] *See, e.g.*, Cahill, *The New Maternity*, *supra* note 149, at 2233 ("Constitutional law has long reasoned that biological justifications are constitutional whereas sex-role stereotypes are not and that the most significant biological difference between women and men pertains to maternal certainty: the fact that birth ostensibly renders mothers more knowable than fathers."); Franklin, *Biological Warfare*, *supra* note 147, at 172 n.13 ("The Court has never specified exactly what counts as an 'inherent difference' between the sexes. But the only 'inherent differences' it has recognized, since it began to accord heightened scrutiny to sex-based state action, have involved reproductive biology."); Hasday, *supra* note 149, at 761 (describing the Court's biology exception to sex

are persons who (at least potentially) have the capacity to bear children, and men are persons who do not. *Virginia*'s reference to "[p]hysical differences between men and women" that remain "enduring"[168] suggests a broader conception of the biological features that distinguish the sexes.[169] The fact that neither courts nor scholars have identified a precise biological basis for sex under the doctrine is not surprising. The traditional concept of biological sex assumes that whatever the biological features of sex are, they are aligned, such that from one feature, the others can be inferred.[170]

II. RE-READING SEX UNDER EQUAL PROTECTION

The previous Part set forth the conventional view of biological sex under the Equal Protection Clause, how all sides of the recent transgender rights cases — even those holding transgender plaintiffs victorious — have accepted this reading, and the harms that this standard account sows. This Part contests the conventional account of the doctrine by retracing the role of biology in constitutional sex equality law. It recasts the relationship between biology and sex equality in two parts, first reconsidering the origins of the doctrine, and then following the doctrine's development. This new account reveals how, from the very beginning, the Supreme Court's sex equality jurisprudence was not premised in a biological understanding of sex. Rather than driving the doctrine, reliance on biology has been far more

discrimination as based in "the gestational capacity that all women (presumptively) possess").

[168] *Virginia*, 518 U.S. at 533 (explaining that "[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications," but "[p]hysical differences between men and women, however, are enduring" (citation omitted)).

[169] *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 145 n.333 (noting that "[t]he Court in *Virginia* does not specify what these 'inherent differences' are"). On the meaning of this language, see *infra* note 313 and accompanying text.

[170] *See* Blackless et al., *supra* note 166, at 151 (explaining that with respect to the various components of biological sex, "we generally consider Homo sapiens to be absolutely dimorphic," that is, to have either all female or all male components, but finding that as many as two percent of live births in the United States deviate from "the platonic ideal . . . for each sex," which consists of "absolute[] dimorphi[sm] with respect to sex chromosome composition, gonadal structure, hormone levels, and the structure of the internal genital duct systems and external genitalia").

limited and ambivalent than the conventional account would have it. The jurisprudence only turned to biology — and then hardly so — when other justifications had been deemed mere stereotypes. The turn to biology can thus be traced to the success of the doctrine's press against stereotypes. This reconsideration of the doctrine creates the possibility for rethinking the meaning of sex in equal protection law.

A. The Origins of Constitutional Sex Equality

One might expect that a search for constitutional meaning would start with the text. The Equal Protection Clause does not include the word "sex," let alone define it.[171] Scholars agree that neither the text nor the original intent of the Clause include application to sex,[172] and thus these features do not shed light on the meaning of sex for equal protection purposes.[173] Unsurprisingly then, the jurisprudence has

[171] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[172] *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002) (citing "general agreement that the central, original purpose of the Equal Protection Clause, indeed of the entire Fourteenth Amendment, was to protect African-Americans against the Black Codes. . . ."); Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230 (2000) (documenting that "[t]he Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women"); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 964 (2002) [hereinafter Seigel, *She the People*] ("[E]ven if the Amendment's framers did contemplate that its provisions would apply to women, they did not discuss the question in terms that would suggest that they expected or intended the Equal Protection Clause to disturb settled forms of gender status regulation."). *But see* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2 (2011) (acknowledging the "truism of modern constitutional law scholarship that originalism . . . cannot justify the Supreme Court's sex discrimination cases of the last forty years" but challenging this truism). For this reason, the state's turn to originalism in one transgender rights case is hard to explain. *See* Hecox v. Little, 104 F.4th 1061, 1076 n.9 (9th Cir. 2024) (rejecting the state's argument that "the ratifiers of the Fourteenth Amendment would have understood 'male' to correspond to the definition of 'biological male' written into the Act").

[173] Sex-related terms are used four times in other constitutional provisions. The term "male" appears three times in Section 2 of the Fourteenth Amendment

never focused on the word "sex." For this judicially constructed doctrine, we must look to the body of case law.

The foundation of constitutional sex equality doctrine can be found in *Frontiero v. Richardson*, where the Court struck down a law that made it easier for spousal benefits to be granted to wives than to husbands of military servicemembers.[174] There, a plurality of the Court explained why strict scrutiny should apply to sex.[175] *Frontiero* never mentions any biological aspect of sex. The decision's only reference to anything about the body is to "physical disability," to distinguish this trait from sex.[176]

The absence of biology in *Frontiero* is hardly surprising. The plurality concluded that strict scrutiny should apply to sex by way of a race-sex analogy.[177] The Supreme Court has long recognized race as a social, cultural, and political class rather than a biological one.[178] If treating race as a protected class does not turn on a biological understanding of race,

guaranteeing the right to vote, but only to men. *See* U.S. CONST. amend. XIV, § 2. The term "sex" again appears in the Nineteenth Amendment, disallowing abridgment of the right to vote "on the basis of sex." U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). These textual regulations of gender relations have not been part of the Court's equal protection jurisprudence. *See* Siegel, *She the People*, *supra* note 172, at 961-62 (documenting and critiquing this state of affairs). Given that these provisions referring to sex were "irrelevant" to the Court's sex equality law, *id.* at 965, there is little reason to give them weight here.

[174] 411 U.S. 677, 690-91 (1973) (plurality).

[175] *Id.* at 688 ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

[176] *Id.* at 686 ("And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

[177] *See* Siegel, *She the People*, *supra* note 173, at 961-63. For more on the race-sex analogy, see generally SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011) (providing an overview of the history of the race-sex analogy).

[178] *See* Braman, *supra* note 145, at 1462 ("The Court, when directly presented with the question of classification and the basis for racial status, has consistently . . . treated and discussed the two as products of social and political institutions."); Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 21 (2013) (explaining that "while the Court has rejected racial biology in law, it has never rejected the possibility that, outside of law, race is actually a biological entity").

and if the reasoning in *Frontiero* turns on an analogy to race, it stands to reason that treating sex as a protected class likewise does not turn on a biological understanding of sex. Ruth Bader Ginsburg, who has been credited with providing the analytical foundation for the *Frontiero* decision,[179] treated biology as irrelevant to scrutinizing sex classifications.[180] A closer look at the factors driving *Frontiero* — immutability, visibility, political power, history of discrimination, and the lack of connection with ability — makes clear how the plurality's conception of sex was not premised in biology.[181]

Start with "immutability," where the decision explained that

> Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.[182]

The decision does not say anything about the immutability of sex being grounded in biology. And it need not have, as immutability does not equal biology.[183] Social categories, such as national origin[184] and

[179] *See* Braman, *supra* note 145, at 1451 n.324 (stating that the *Frontiero* "opinion drew heavily from the amicus argument").

[180] *See* Siegel, *The Pregnant Citizen*, *supra* note 127, at 183-84 (showing how Ginsburg and other feminist advocates had from the doctrine's inception treated pregnancy as irrelevant to the need for exacting scrutiny under equal protection to rid the law of reliance on sex stereotypes); *infra* notes 234–236 and accompanying text.

[181] *See Frontiero*, 411 U.S. at 684-88 (discussing these factors).

[182] *Id.* at 686 (internal quotation marks and citation omitted).

[183] *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 15 (2015) ("Immutability is therefore not confined to biological traits; as this legitimacy example demonstrates, social categories too may be assigned at birth.").

[184] *See* Oyama v. California, 332 U.S. 633, 644-46 (1948).

illegitimacy,[185] are immutable traits. Ginsburg's brief relied on immutability,[186] not biology.[187]

The designation of sex at birth cannot be reduced to biology. Legal sex assignment is based on the visual identification of external genitalia at birth.[188] Human external genitalia does not present as a neat binary with male and female poles, but exists along a spectrum, with intersex persons in the middle.[189] Nor do human beings present as neatly sexually dimorphic, with external genitalia corresponding with reproductive organs, chromosomes, or the rest of the sex markers.[190] Given the biological indeterminacy of sex, sex assignment is inevitably a social, political, and legal matter.[191] It is the legal assignment of sex — sex as

[185] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[186] Brief of American Civil Liberties Union as Amicus Curiae Supporting Appellants at 28-29, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694) (arguing that sex classifications should be subject to strict scrutiny because, among other reasons, sex "is an immutable trait, a status into which the class members are locked by the accident of birth").

[187] *See* Law, *supra* note 115, at 980 (noting that "the ACLU brief in *Frontiero* did not focus on the reality of biological difference").

[188] *See* Jessica Knouse, *Intersexuality and the Social Construction of Anatomical Sex*, 12 CARDOZO J.L. & GENDER 135, 138 (2005) ("Generally, sex assignment occurs at birth based on a visual examination of an infant's external morphology.").

[189] *See* Sari M. van Anders, Zach C. Schudson, Emma C. Abed, William J. Beischel, Emily R. Dibble, Olivia D. Gunther, Val J. Kutchko & Elisabeth R. Silver, *Biological Sex, Gender, and Public Policy*, 4 BEHAV. & BRAIN SCI. 194, 194-96 (2017); Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 67 (2006) (discussing this literature and what it means for the law); Anne Fausto-Sterling, *The Five Sexes, Revisited*, 40 SCI. 18, 21 (2000) (explaining that "maintaining a two-party sexual system" is "in defiance of nature" because "biologically speaking, there are many gradations running from female to male; and depending on how one calls the shots, one can argue that along that spectrum lie at least five sexes — and perhaps even more"); Katrina Karkazis, *The Misuses of "Biological Sex,"* 394 LANCET 1898, 1898 (2019) (highlighting that there is no definitive trait of biological sex).

[190] *See* sources cited *supra* note 189.

[191] *See* ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 3 (Updated ed., 2020) ("[L]abeling someone a man or a woman is a social decision."); Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be?*, 34 NOÛS 31, 49 (2000) ("[A]ny distinctions between kinds of sexual and reproductive bodies are importantly political and open to contest."). *See generally* PAISLEY CURRAH, SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY (2022) (offering a book-length treatment of sex as a creature of politics and law).

status — rather than any underlying biological reality that is the immutable fact of sex.[192] *Frontiero*'s reliance on the immutability of sex does not require embracing a biological concept of sex.

A designation of sex at birth has, until recently, been essentially unchangeable.[193] Notwithstanding that sex designations can now be changed,[194] the status of sex remains immutable. One's sex assigned at birth, by definition, cannot be changed. So a person who later redesignates their sex attains a new identity: a transgender person. The significance of sex assigned at birth is always present as a salient legal and social fact. For example, transgender plaintiffs in sex discrimination cases are invariably described as "transgender" rather than simply by the new sex they have been designated, even after they have legally changed the sex designation on their official documents.[195] *Frontiero*'s reliance on the immutability of sex thus does not stand in tension with legally recognizing transgender status and the ability to change one's sex designation, as the en banc Eleventh Circuit erroneously concluded in *Adams*.[196]

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[192] *See* Braman, *supra* note 145, at 1449 ("[T]he Court's scrutiny is heightened when a person is unable to alter her status through meritorious action. The immutability of the status is the relevant issue, not the relationship between the status and a biological trait."); *cf.* RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 103 (2005) (explaining that the immutability of race is about the inability to change a racial status once it has been ascribed rather than an inability to alter any racial characteristics: "Once a status is ascribed, it is 'immutable' in the pragmatic sense that the individual cannot readily alter it").

[193] *See* CURRAH, *supra* note 191, at 41-42.

[194] *See Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations (last updated Sept. 17, 2018) [https://perma.cc/9ZAU-NZ7B].

[195] *See, e.g.*, Kasper *ex rel.* Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796 (11th Cir. 2022) (en banc) (describing such a plaintiff as "transgender" rather than simply by their new legal sex designation).

[196] *Id.* at 807-08 ("[W]e are unpersuaded by the dissent's argument that the district court could make any factual finding (that would not constitute clear error) to change an individual's immutable characteristic of biological sex," because "[t]o do so would refute the Supreme Court's longstanding recognition that 'sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth'" (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)). For this same reason, the Eleventh Circuit is wrong to suggest that "gender fluidity —

On the "'history of purposeful unequal treatment,'"[197] *Frontiero* noted that "throughout much of the 19th century[,] the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes" due to "pervasive . . . discrimination" in public and private life.[198] The plurality links this history of discrimination to whether the group is "in need of extraordinary protection from the majoritarian political process."[199] Even though women "do not constitute a small and powerless minority," *Frontiero* explained that they nonetheless suffer from a lack of political power "because of past discrimination."[200]

The history of discrimination against women that "has invidiously relegat[ed] the entire class of females to inferior legal status"[201] need not rely on a biological conception of sex. Feminist scholars have understood sex discrimination as a product of the social meaning of sex rather than any biological features.[202] Consider the denial of the right to

i.e., the practice . . . in which some individuals claim to change gender identities associated with the male and female sexes" renders sex "a mutable characteristic." *See id.* at 803 n.6. So long as the state continues to designate sex at birth, the fact of gender fluidity does not undermine the immutability of this designation.

[197] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

[198] *Frontiero*, 411 U.S. at 685-86 (citing the fact that women were denied the opportunity to "hold office, serve on juries, or bring suit in their own names," that "married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children," and that "women were denied even that right [to vote] — which is itself preservative of other basic civil and political rights — until adoption of the Nineteenth Amendment half a century [after African Americans]").

[199] *Murgia*, 427 U.S. at 313 (quoting *Rodriguez*, 411 U.S. at 28); *accord Frontiero*, 411 U.S. at 686 n.17 (noting that women "face pervasive . . . discrimination . . . in the political arena," citing that "women are vastly underrepresented in this Nation's decisionmaking councils," and that "[t]here has never been a female President").

[200] *Frontiero*, 411 U.S. at 686 n.17.

[201] *Id.* at 687.

[202] *See, e.g.*, Catharine A. MacKinnon, *A Feminist Defense of Transgender Sex Equality Rights*, 34 YALE J.L. & FEMINISM 88, 91 (2023) [hereinafter MacKinnon, *A Feminist Defense*] ("Women are not oppressed by our bodies — our hormones, chromosomes, vaginas, breasts, ovaries," but instead "are placed on the bottom of the gender hierarchy by the misogynistic meanings male dominant societies create and project onto us, attribute to us . . . .").

vote, which *Frontiero* cites.[203] The lack of women's suffrage was justified by their inferior social status within the family and not anything having to do with their bodies.[204] Even when sex discrimination is linked to biology, rarely has biology actually justified the second-class status of women. "In many cases, biology operates as the excuse or cover for social practices that hierarchize individual members of the social category 'man' over individual members of the social category 'woman.'"[205] Instead, "biology or anatomy serve as metaphors for a kind of inferiority that characterizes society's view of women."[206]

It is not immutability alone but immutability combined with the fact that the "characteristic frequently bears no relation to ability to perform or contribute to society."[207] The most prominent feature of the biological conception of sex — pregnancy — would have some relationship to ability, at least in some circumstances. Nonetheless, *Frontiero* says: "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria [race and national origin], is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[208] Unlike the analysis of women's political power, where a footnote explained why sex met the criterion despite its distinction from race on this factor,[209] there is no such caveat with regard to how

[203] *Frontiero*, 411 U.S. at 685.

[204] *See* Siegel, *She the People*, *supra* note 172, at 981-87 (explaining opposition to female suffrage in the idea of the family as a site of "male governance," which justified both coverture (married women's legal merger with their husbands) and "virtual [political] representation" of wives by the male head of household).

[205] Franke, *supra* note 149, at 36 ("Only in very rare cases can sex discrimination be reduced to a question of body parts."). For example, it is not the fact of pregnancy itself but a lack of social and legal support for it that engenders sex inequality. This is the argument of another of Justice Ginsburg's early cases. *See* Brief for the Petitioner at 25-26, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840 [hereinafter *Struck Brief*]; *infra* notes 234–237 and accompanying text.

[206] Franke, *supra* note 149, at 36.

[207] *Murgia*, 427 U.S. at 313 (considering whether the class has "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of [its] abilities"); *Frontiero*, 411 U.S. at 686.

[208] *Frontiero*, 411 U.S. at 686.

[209] *See id.* at 686 n.17 (explaining how, even though they were not a numerical minority, women continued to lack political power).

sex might affect ability. Rather, the plurality distinguished sex from "physical disability," making clear that it was not focused on sex as a feature of the body.[210]

Finally, the decision cites the "the high visibility of the sex characteristic" as another feature that augers in favor of heightened scrutiny.[211] Regardless of whether the biological conception of sex is premised in reproductive organs, genes, or genitals, none of these biological characteristics are highly visible. The more visible secondary sex characteristics are not reliable markers of these underlying biological characteristics,[212] nor are they the actual markers people use to determine sex.[213] While a birth certificate is a measure of traditional biological sex, such a marker of sex can hardly be deemed visible.

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[210] *Id.* at 686.

[211] *Id.* ("[B]ecause of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."); *cf.* 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, 497 (1998) (extensively discussing visibility as a facet of equal protection law and defining it as "effective corporeal visibility").

[212] *See, e.g.*, RAY L. BIRDWHISTELL, KINESICS & CONTEXT: ESSAYS ON BODY MOTION COMMUNICATION 39-46 (1970) (in evaluating how humans attribute sex, rejecting secondary sex characteristics because they are insufficiently dimorphic in humans); Ruth E. Johnson & M. Hassan Murad, *Gynecomastia: Pathophysiology, Evaluation, and Management*, 84 MAYO CLINIC PROCS. 1010 (2009) (discussing female-like breast development in men); Eric Matheson & Jennifer Bain, *Hirsutism in Women*, 100 AM. FAM. PHYSICIAN 168 (2019) (discussing male-like hair development in women).

[213] *See* SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 2 (1978) (explaining that "[p]enises, vaginas, beards, breasts, and so on in any combination are not conclusive evidence for categorizing someone as either a man or a woman in everyday life," and that "[p]reoperative transsexuals can be men with vaginas or women with penises, and, of course, the bearded lady is still a lady"); *cf.* Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 WL 6112790, at *24 (S.D. Ill. Dec. 27, 2021) (recounting how transgender female prisoner assigned to male prison was called a "bearded woman"). Although "adults give primary and secondary physical gender characteristics like genitals and breasts as reasons" for making sex attributions, research calls into question that "the reasons people give for assigning labels are the reasons they use . . . ." KESSLER & MCKENNA, *supra* note 213, at 98, 154-55 (concluding that people attribute sex on the basis of cultural genitals); *cf.* Sandra Lipsitz Bem, *Genital Knowledge and Gender Constancy in Preschool Children*, 60 CHILD DEV. 649 (1989) (finding that young children better identified the sex of a clothed child than a naked child, that is, they relied more on clothing and hairstyle than genitals to identify sex).

Rather, the visual markers of sex are for the most part socially determined.[214] In everyday life, we identify sex by reference to "cultural genitals": the easily observed symbols such as dress, facial hair, voice, and hairstyle that act as surrogates for anatomical genitals.[215] Some of these visible symbols of sex — dress, hairstyle — are clearly divorced from biology. Others, like the secondary sex characteristics of facial hair and voice, may be linked to biology, but are malleable.[216] While the fact of sex might be highly visible, it is not its biological underpinnings that make it so.[217]

Reading biology out of *Frontiero* is not an anachronism. Returning to the origins of the doctrine reveals how the notion of sex untethered from biology for purposes of constitutional sex equality is nothing new.

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[214] *See* KESSLER & MCKENNA, *supra* note 213, at 6 (asserting that "the fact of seeing two physical genders is as much of a socially constructed dichotomy as everything else").

[215] *Id.* at 153-55; *see also* David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1055 (2002) ("Socially, people treat persons as male or female based on presumptions about how male and female persons look and act."); Franke, *supra* note 149, at 58 (explaining that sex is based on "the cultural genital . . . which is proven by the signs of gender" rather than on the actual genital).

[216] *See* KESSLER & MCKENNA, *supra* note 213, at 157 (citing that the "height of the eyebrow from the center of the pupil differs considerably between adult American women and men," and attributing this to "eyebrow tweezing and expressive style"); Case, *Disaggregating Gender from Sex*, *supra* note 51, at 29-30 (citing sources that women in the twentieth century began speaking in a lower register to increase credibility as they entered the workforce in larger numbers). For an author who is otherwise exquisitely sensitive to the phenomena of conversion, passing, and covering, Professor Kenji Yoshino errs in treating the visible component of sex as biological. *Compare* Yoshino, *supra* note 147, at 923 (locating the ability to pass when it comes to sex in the "secondary sex characteristics" rather than in the performative signs and symbols like dress and behavior, which he places in the category of covering), *with* KESSLER & MCKENNA, *supra* note 213, at 126-39 (discussing how transgender people "pass" on the basis of performing gender but critiquing the notion of "passing" as applied to transgender persons because it "overlooks the ongoing process of 'doing' gender in everyday interactions that we all engage in").

[217] Note also that what makes something visible is not only what is displayed, but what is perceived. This fact emphasizes how the category of woman is a social rather than a biological one. *See* KESSLER & MCKENNA, *supra* note 213, at 157 (explaining that "[a]long with the displayer learning to accentuate certain signs, the attributor contributes to the accentuation of gender cues by selective perception," and that "members of our culture may look for facial hair, while in other cultures this might not be considered something to inspect").

In 1970, then Assistant Attorney General (and later Chief Justice) William Rehnquist saw in the movement behind the Equal Rights Amendment a "desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes."[218] As Catharine MacKinnon has explained: "It was obvious to all of us in the early women's movement that what we live as 'woman' is a social construction of male supremacy, and that the notion that it is based in nature is its most pernicious delusion."[219]

Frontiero laid the intellectual groundwork for heightened scrutiny of sex classifications.[220] But its case for strict scrutiny did not win the day as a matter of blackletter law.[221] Several years later, in *Craig v. Boren*,[222] the Court adopted a standard of intermediate scrutiny.[223] Scholars have suggested that this lower level of scrutiny was applied to sex because the Court understood sex — and not race — to be grounded in biology.[224] Yet there is little to support this understanding from the Court's decisions. *Craig* made no reference to biology, instead requiring that for a sex classification to survive, "the sex-centered generalization" must "actually comport[] with fact," leaving open the basis for such sex-specific "fact."[225] Neither *Craig* nor any other decision of the Court explains the lesser scrutiny for sex as compared to race on the basis of

[218] Memorandum from William Hubbs Rehnquist, Assistant Att'y Gen., Dep't Just., to Leonard Garment, Special Couns. to the President, at 4 (Sept. 15, 1986) (reprinted in *Rehnquist: ERA Would Threaten Family Unit* by LEGAL TIMES).

[219] Williams, *supra* note 2 (quoting Catharine MacKinnon).

[220] *See* Siegel, *She the People, supra* note 172, at 963 (treating *Frontiero* as the origin story for heightened scrutiny of sex classifications, explaining how "the Court derived sex discrimination doctrine from race discrimination doctrine," and exploring the consequences of this jurisprudential strategy).

[221] The reason it did not was less due to disagreement as a matter of constitutional analysis, and more to other considerations. *See* Frontiero v. Richardson, 411 U.S. 677, 691-92 (1973) (Powell, J., concurring) (explaining that adopting strict scrutiny was unnecessary to resolve the case and would have lacked "respect for duly prescribed legislative processes" given that the Equal Rights Amendment was then "in process of resolution"). For a discussion of how this nominally intermediate scrutiny is effectively quite strict, see *supra* note 143 and *infra* note 362 and accompanying text.

[222] 429 U.S. 190 (1976).

[223] *See supra* note 141 and accompanying text.

[224] *See supra* note 147 and accompanying text.

[225] 429 U.S. at 199.

biology. Biology is not the only way to justify a lesser standard of scrutiny for sex than race.[226]

Moreover, *Craig* did not render the plurality opinion in *Frontiero* a dead letter. In key sex discrimination precedents such as *United States v. Virginia* and the more recent *Sessions v. Morales-Santana*, the Court has continued to rely on it.[227] In fact, as this Article later argues, the doctrine that evolved more closely follows *Frontiero*'s exacting approach to scrutiny than *Craig*'s more lenient one.[228] Any notion that *Craig* simply superseded the plurality view of *Frontiero* ignores the latter decision's ongoing centrality in sex equality jurisprudence.

B. The Doctrine of Constitutional Sex Equality

The prior Section established that the biology of sex was not a significant — or any — presence at the inception of constitutional sex equality jurisprudence. This Section turns to what happened next. The standard account of the doctrine takes the biology of sex to be key to the holdings of major — and still vital — sex equality precedents, thus embedding a biological view of sex into the doctrine. This Section retraces the development of the doctrine, showing how the role of biology was not as central as has been claimed. A majority of the Court relied on biology to uphold a sex classification one lone time, and the validity of that precedent is now seriously in doubt.

This Section also unsettles the centrality of biology to the equal protection doctrine of sex by showing that biology could hardly be seen in the jurisprudence until over a decade after the first case striking down a sex classification under the Equal Protection Clause. This Section

[226] *See* Siegel, *She the People*, *supra* note 172, at 954-56 ("*First,* the framers of the Fourteenth Amendment were thinking about questions of race discrimination, not sex discrimination. . . . *Second*, . . . the difference in standards reflects a pervasive intuition that the problem of sex discrimination is not as grave, harmful, or significant in American history as the problem of race discrimination. . . . *Third,* underneath it all, there is a sense that sex discrimination is at root *different* from race discrimination," in that "[s]ex distinctions are not always harmful (or based on animus) the way race distinctions are. . . .").

[227] *See* Sessions v. Morales-Santana, 582 U.S. 48, 57, 58, 63 n.13, 73 n.22, 74 (2017) (relying heavily on *Frontiero* but citing *Craig* primarily on standing); United States v. Virginia, 518 U.S. 515, 531-33 (1996) (citing *Frontiero* but not *Craig*).

[228] *See supra* note 144 and *infra* note 362 and accompanying text.

theorizes that it was the success of the anti-stereotyping doctrine that prompted a turn to biology. With social roles deemed mere stereotypes incapable of surviving review, biology appeared to remain as an accurate, non-stereotypical basis for sex classifications. Yet by this point, biology could not be relied on non-controversially, prompting opinions recognizing that even biology was a cover for stereotypical thinking about the sexes. Increasingly exacting scrutiny of biological justifications for sex classifications brought about the demise of the Court's reliance on biology nearly as soon as it arose.

Before turning to the cases, it is worth situating the critique presented in this Section within a body of scholarship highly critical of some of the cases discussed below. Scholars have faulted some of this sex equality jurisprudence for mistaking the state's problematic reliance on sex stereotypes for unproblematic reliance on biology.[229] The discussion below evaluating the understanding of sex in this caselaw should not be read as an endorsement of the resolution of these cases. This Article agrees that "reasoning from the body" often fails to recognize the stereotypes in which it tracks — and this is precisely why it seeks to unsettle the biological account of sex.[230] The analysis below is in service of the main point this Article seeks to advance: that the standard account of the doctrine gets wrong the role of biology in constitutional sex equality law. Critiques focused on overlooked stereotypes — while correct and important — leave in place a biological understanding of sex and all of its attendant harms.[231]

1. The Absence of Biology

In several of the key early decisions striking down sex classifications, there was little opportunity to rely on biological sex difference. Biology could not easily be connected to the preference for male estate administrators in *Reed v. Reed*,[232] or the harsher treatment of husbands than wives when it came to eligibility for military spousal benefits in

[229] *See supra* notes 115–119 and accompanying text.

[230] *See supra* Part I.B.2.

[231] *See id.*

[232] 404 U.S. 71 (1971).

Frontiero v. Richardson.[233] But other early cases shed light on the significance of biology to the meaning of sex in the early days of the doctrine. What is most notable is the *absence* of reliance on biology, even when it would be relevant.

Telling in this regard is the 1972 case of *Struck v. Secretary of Defense,* which involved a challenge to an Air Force rule requiring pregnant servicemembers who gave birth to a child to be discharged.[234] The case was ultimately mooted, and thus there is no decision.[235] Yet the briefing by Ruth Bader Ginsburg — probably the single person most responsible for shaping constitutional sex equality law[236] — provides insight into just how little a role physical sex differences played in the early understanding of the doctrine. In their discussion of Justice Ginsburg's role in *Struck*, Professors Reva Siegel and Neil Siegel highlight that "from the very beginning," Justice Ginsburg "conceived discrimination against pregnant women as a core case of sex discrimination."[237] If sex discrimination on the basis of such a clearly biological feature as pregnancy was also its paradigmatic case, biology was no exception to the law of sex equality. Still further, Ginsburg viewed laws that discriminated on the basis of pregnancy to be problematic sex discrimination not because pregnancy was a biological phenomenon unique to women, but because of the way such laws "enforce[ed] sex roles of the separate spheres tradition," thereby "deny[ing] individuals equal opportunity *and* perpetuat[ing] the secondary social status of women."[238]

When *Struck* was before the Court, the standard of review for sex classifications was still unsettled. Ginsburg took the position that a rule that distinguished on the basis of pregnancy — the textbook example of a biological sex difference — failed even rational basis review.[239] Ginsburg treated biology as irrelevant to the analysis. Regardless of

[233] 411 U.S. 677 (1973).

[234] 409 U.S. 1071 (1972); *see* Struck v. Sec'y of Def., 460 F.2d 1372 (9th Cir. 1971).

[235] 409 U.S. 1071 (1972).

[236] *See* Franklin, *The Anti-Stereotyping Principle, supra* note 125, at 83.

[237] Neil S. Siegel & Reva B. Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 773 (2010).

[238] *Id.*

[239] *Struck Brief*, *supra* note 205, at 48.

pregnancy's effect on the body, she argued that the rule defied explanation because it treated pregnancy differently than all other temporary physical disabilities.[240]

Even when it came to a classification that turned squarely on a physical sex difference, Ginsburg relied on the anti-stereotyping approach she pioneered.[241] Without mention of biology, Ginsburg explained that the rule mandating immediate discharge of pregnant women

> reflect[ed] arbitrary notions of a woman's place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudgments; operating on the basis of characteristics assumed to typify pregnant women, and in total disregard of individual capacities and qualifications.[242]

For Ginsburg, while this pregnancy-based regulation failed even rational basis review, because regulations seemingly grounded in biology can both rely on and reinforce sex stereotypes, they should be subject to strict scrutiny, regardless of their basis in biology.[243] The Air Force changed its policy before the Court could decide the case.[244]

While *Reed* and *Frontiero* did not implicate biology, and *Struck* was mooted, there was another opportunity in the early case law for the Court to rely on biology where it declined to do so. In *Stanton v. Stanton*, the Court considered a state law with a lower age of maturity for girls than boys in a case where the law required child support payments to a son but not a daughter.[245] The Court was willing to assume that the sex classification was grounded, at least in part, in biology: "It may be true,

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[240] *Id.* at 12 (arguing that "[l]eave time would have been available to her for any period of actual disability," and thus "[d]enial of the same treatment for pregnancy defies rational explanation").

[241] *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 127.

[242] *Struck Brief*, *supra* note 205, at 7.

[243] *See id.* at 27-37; Siegel, *The Pregnant Citizen*, *supra* note 127, at 184 ("In *Struck*, Ginsburg argued that because pregnancy was a locus of traditional sex-role stereotyping, laws regulating pregnancy required strict scrutiny.").

[244] *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 127.

[245] 421 U.S. 7 (1975).

as the Utah court observed and as is argued here . . . that girls tend to mature earlier than boys."[246] Importantly, both the Utah Supreme Court and the state defending the sex classification in the United States Supreme Court stated the fact of sex-differentiated maturity in terms of a physical sex difference.[247] The state invited the Court "to take judicial notice of the fact that women mature physically at an earlier age than men"[248] — an invitation that the Court accepted.[249]

Yet even assuming this physical sex difference, the Court struck down the law as premised in "old notions," because "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[250] That is, even if girls mature faster than boys as a matter of biology, they should not be denied the parental support afforded boys that would enable opportunities that have historically been denied to girls. The Court was willing to strike down such a law premised in biological sex difference even on rational basis review.[251]

Scholars have identified *United States v. Virginia* as the first case to apply an anti-stereotyping approach to strike down a sex classification grounded in biology.[252] Yet given that *Stanton* credited the state's argument about biological sex difference but nonetheless struck down the sex classification as premised in stereotypes, the origins of this approach can be seen two decades earlier.[253] One might view *Stanton* as

[246] *Id.* at 14.

[247] Brief for the Appellee at 18, Stanton v. Stanton, 421 U.S. 7 (1975) (No. 73-1461) (relying on "the fact that women mature physically at an earlier age than men") [hereinafter *Stanton Brief*]; Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974) (upholding the law, citing the "widely accepted idea" that "girls tend generally to mature physically, emotionally and mentally before boys").

[248] *Stanton Brief*, *supra* note 247, at 18 ("[A]ppellee requests this court to take judicial notice of the fact that women mature physically at an earlier age than men.").

[249] *Stanton*, 421 U.S. at 14 (accepting that "[i]t may be true . . . as is argued here . . . that girls tend to mature earlier than boys").

[250] *Id.*

[251] The case was decided at a time when the standard of review for equal protection challenges to sex classifications was unsettled, a fact that the Court acknowledged, and then concluded that *Reed*, a case striking down a sex classification on rational basis review, "is controlling here." *Id.* at 13 (citing Reed v. Reed, 404 U.S. 71 (1971)).

[252] *See supra* note 162 and accompanying text.

[253] 421 U.S. 7 (1975).

an easy case because the law was grounded only in an average biological difference between men and women (in the age of maturity) rather than in one that divides the classes of male and female (like the capacity for pregnancy).[254] Yet this view would be revisionist. The biological justification at issue in *Virginia* also rested only on average physical sex difference, and scholars still viewed the Court's rigorous scrutiny of that sex classification as a turning point in the doctrine.[255] The Court's scrutiny of the biologically based sex classification in *Stanton* shows that the Court in fact never granted a free pass to sex classifications on the basis of biology in the way the standard account tells it.

The year after *Stanton*, the Court again invalidated a sex classification where the state offered biological sex difference as a justification, albeit in a more ambivalent fashion than *Stanton*.[256] *Craig v. Boren* involved a challenge to a state law allowing women but not men to buy weak beer between the ages of eighteen to twenty.[257] The state relied on an interest in reducing drunk-driving injuries because there was more drunk driving by men than women in that age group.[258] In its brief to the Court, the state argued that biological sex difference might justify the classification: "The [statistical] evidence submitted in this case demonstrates that there are different drinking and drinking-influenced behavior patterns between males and females aged 18–20. The

[254] Professor Mary Anne Case has made a similar argument about *Virginia*: that the case was an easy one notwithstanding any biological differences between men and women on physical strength, because such differences were only *average* differences between the sexes, and did not define the classes. *See* Case, *Quest for Perfect Proxies*, *supra* note 119, at 1456-57 (highlighting that none of the real differences that the state attempted to rely on "was categorical," and instead, "the most that was claimed was that the findings [of the district court] were true of the vast majority of one or the other sex").

[255] *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 145-46 (viewing *Virginia* as "mark[ing] a new departure for constitutional sex discrimination doctrine" because there "anti-stereotyping doctrine serves as a check on the state's regulation of 'real' differences"); Cass R. Sunstein, *Foreword: Leaving Things Undecided,* 110 HARV. L. REV. 4, 72-73 (1996) (describing *Virginia* as marking a departure in constitutional sex equality law, moving it from intermediate scrutiny to something "closer" to strict scrutiny).

[256] *See* Craig v. Boren, 429 U.S. 190 (1976).

[257] *Id.* at 191-92.

[258] *Id.* at 199-201.

differences may or may not be biological or psychological in origin; the evidence in this case is not conclusive in either possibility."[259] While the state's reliance on biology is marginal here, it is nonetheless noteworthy that this argument from biology made no difference to the Court. The Court struck down the law, rejecting the statistical evidence, despite its connection to biological sex difference, as insufficient to justify the classification.[260]

At the same time that the Court was developing sex discrimination protection under the Equal Protection Clause, Congress was contemplating the adoption of the Equal Rights Amendment ("ERA"), which would expressly bar sex discrimination in the Constitution.[261] Congress's consideration of the ERA involved discussions about the scope of the ERA as compared with existing sex discrimination protections under the Equal Protection Clause. These discussions reveal that as early as 1972, the Equal Protection Clause did not blindly accept sex classifications grounded in the different physiology of men and women but scrutinized such classifications for problematic stereotypes.

The Senate Committee on the Judiciary considered the following proposed amendment to the ERA: "Neither the United States nor any State shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them."[262] The Committee rejected the amendment because granting constitutional carte blanche to regulate on the basis of sex in the presence of biological sex differences would place the ERA *behind* where equal protection already was in terms of scrutinizing sex-based regulations related to biology:[263] "This substitute might well validate laws which are

[259] Brief of Appellees at 31-32, Craig v. Boren, 429 U.S. 190 (1976) (No. 75-628), 1976 WL 181330.

[260] *Craig*, 429 U.S. at 200 (holding that the State's "statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective [of enhancing traffic safety]").

[261] H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.").

[262] S. REP. NO. 92-689, at 5 (1972).

[263] *Id.* at 18 (stating that "adoption of this substitute would be a drastic step backwards in the struggle for equal rights").

unconstitutional even under the narrow interpretation presently given the 14th Amendment when sex discrimination is challenged."[264]

The Court's notorious 1974 *Geduldig v. Aiello*[265] decision upheld a pregnancy classification over a sex discrimination challenge. There, the Court held that a California law excluding pregnancy from its state disability insurance did not constitute unlawful sex discrimination under the Equal Protection Clause.[266] Both sides in the litigation grounded their position in the biological uniqueness of pregnancy, while reaching opposite — and categorical — conclusions about the implications of this premise. For the challengers of the law, pregnancy discrimination is *always* sex discrimination because "[t]he individual who receives a benefit or suffers a detriment because of a physical characteristic unique to one sex benefits or suffers because he or she belongs to one or the other sex."[267] For the state, pregnancy is *never* sex discrimination because it is a "unique human condition": "Without 'similarly circumstanced'" comparators who are treated differently, there can be "no basis for an equal protection claim."[268]

As a matter of blackletter equal protection law, *Geduldig* holds that pregnancy and sex are not synonymous. The Court distinguished the pregnancy classification before it from cases like *Frontiero*, which involved "gender as such:" "The lack of identity between the excluded disability and gender as such" was clear because the "program divides potential recipients into two groups — pregnant women and

[264] *Id.* (explaining that a law that favored men over women as estate administrators invalidated as irrational in *Reed v. Reed*, 404 U.S. 71 (1971), "might be upheld as based on a 'functional' difference between the sexes perceived by a State legislature"); S. REP. NO. 92-689, at 19 (1972) (quoting testimony that this amendment "would put women in a worse position than they are now").

[265] Geduldig v. Aiello, 417 U.S. 484 (1974).

[266] *Id.* at 494.

[267] Brief for Appellees at 31, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185752 [hereinafter *Geduldig Appellees Brief*] ("Sex-unique physical characteristics are precisely what define a man or woman as a member of one class or the other.").

[268] Brief for Appellant at 24, Geduldig v. Aiello, 417 U.S. 484 (No. 73-640), 1974 WL 185750.

nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[269]

But that didn't end the matter. The Court rejected the reasoning of the parties that the biology of sex meant that pregnancy regulations either always were sex classifications or never were. Instead, a pregnancy classification can amount to impermissible sex discrimination based on the social meaning of the regulation: when there is "a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other."[270]

Remarkably, the Court's analysis closely echoes the thinking of some feminist constitutional lawyers, including Ginsburg, who "argued that regulation of the pregnant woman was presumptively unconstitutional when it enforced stereotypes and sex role prescriptions of the separate-spheres tradition."[271] Instead of treating pregnancy as a sui generis biological phenomenon, this reasoning sees pregnancy regulations as part of a broader pattern that subordinates women as a social class "when they enforce[] stereotypical understandings of women's roles."[272] So while feminists vehemently disagreed with the Court's conclusion that the pregnancy regulation at issue in *Geduldig* did not trade in sex-based stereotypes, they were aligned with the Court in seeing pregnancy discrimination as sex discrimination because of biases, not bodies.[273]

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[269] *Geduldig*, 417 U.S. at 496 n.20 ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. . . . The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.").

[270] *Id.*; *see also* Siegel & Siegel, *supra* note 237, at 793 n.104 (explaining that while "*Geduldig* is often read as denying that pregnancy discrimination is sex discrimination," the decision instead "reasons that pregnancy discrimination is not always sex discriminatory or invidious, but sometimes may be").

[271] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1385 n.169 (2006) [hereinafter Siegel, *Constitutional Culture*].

[272] *Id.* at 1385.

[273] *Geduldig Appellees Brief*, *supra* note 267, at 24 ("As with other types of sex discrimination, discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny."); Brief Amici Curiae of the ACLU, the Center for Constitutional Rights, and the National

To be sure, *Geduldig* was not free from biological references in relation to sex. In dicta, the Court says that "only women can become pregnant."[274] And the Court's conclusion that the law did not "invidious[ly] discriminat[e]" against women was undoubtedly influenced by biology.[275] But, as a doctrinal matter, the Court did not view the pregnancy classification as a sex classification at all because it rejected a biological understanding of what counts as sex discrimination.[276]

To summarize, in the early days of the doctrine, no decision of the Court upheld a sex classification over equal protection challenge on the basis of biological difference. In at least one case, a sex classification that was undergirded by biological difference was struck down on rational basis review. The Court scrutinized sex classifications for stereotyping regardless of whether they were supposedly premised in biological sex differences. At the initial phase of increasing constitutional scrutiny of sex classifications, then, biology was not driving the doctrine of prohibited sex discrimination.

2. The Introduction of Biology

The previous discussion revealed that biological sex difference never provided a blanket exemption from scrutiny. Rather, laws that classified by sex were scrutinized for stereotypes, regardless of relevant biological sex differences.[277] This next discussion shows how even as biological reasoning began to enter the doctrine, reliance on it was tentative and partial. On closer inspection, one of the perceived high-water marks of

Organization for Women at 17, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640) (arguing that the law under challenge treats women "as detached from the work force when pregnancy disables them" and reflects a "stereotyped vision of women's place post-childbirth").

[274] *Geduldig*, 417 U.S. at 496 n.20.

[275] Siegel, *The Pregnant Citizen*, *supra* note 127, at 189, 193 (explaining that *Geduldig*'s rejection of the argument that the law was based in sex stereotypes about working mothers was due to a view of the neutrality of biological reasoning).

[276] As the Court became more circumspect about biological reasoning, it subjected pregnancy-related sex regulations to more exacting review and found them wanting. *See* Siegel, *The Pregnant Citizen*, *supra* note 127, at 204-11 (tracing this trajectory in the jurisprudence).

[277] *See supra* Part I.B.I.

the Court's reliance on biology, *Michael M. v. Superior Court*, displays the Court's ambivalence towards biology.[278]

Before turning to *Michael M.*, it is worth discussing an earlier, lesser-known case that has been cited as an example of the biological exception to the ban on sex classifications.[279] *Parham v. Hughes* addressed a state

[278] 450 U.S. 464 (1981) (plurality).

[279] *See* Case, *Quest for Perfect Proxies*, *supra* note 119, at 1457-58, 1458 n.51 (classifying *Parham v. Hughes*, 441 U.S. 347 (1979) (plurality), as a case upholding a sex classification on the basis of both biology and another sex-respecting rule not before the Court); Hasday, *supra* note 149, at 761-62, 761 n.26 (citing *Parham* as one of a class of cases upholding "sex-specific rules that the Court understands to be inseparably tied to the gestational capacity that all women (presumptively) possess"). This case is one in the line of "unwed father" cases — an area of law that treats men and women differently, as multiple scholars have recognized. *See, e.g.*, Cahill, *The New Maternity*, *supra* note 149 (documenting and critiquing the notions of motherhood and fatherhood embedded in this area of law); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016) (exploring unwed fathers' quest for rights and how they failed to achieve parity with mothers). As a matter of constitutional sex equality law, in none of the unwed father cases has the Supreme Court relied on biology to reject an equal protection challenge to the distinct treatment of unwed mothers and fathers. *See* Lehr v. Robertson, 463 U.S. 248, 260 n.16, 266-67 (1983) (upholding against an equal protection sex discrimination challenge a law treating mothers and fathers differently when it came to their rights to object to a nonmarital child's adoption because "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child," and here, the father had no relationship with the child, while referencing in a footnote biological sex differences with regard to the due process claim); *Parham*, 441 U.S. at 355 (upholding against an equal protection sex discrimination challenge a law treating mothers and fathers differently in their ability to sue for the wrongful death of an nonmarital child on the ground "that mothers and fathers of illegitimate children are not similarly situated," because "[u]nder Georgia law, only a father can, by voluntary unilateral action, make an illegitimate child legitimate"); Fiallo v. Bell, 430 U.S. 787, 794-95, 799 (1977) (rejecting equal protection sex discrimination challenge to law treating the immigration status of a nonmarital child differently depending on whether the mother or father is a U.S. citizen because deference to Congress in the area of immigration meant the law needed only "a facially legitimate and bona fide reason," which was met because of the "perceived absence in most cases of close family ties" between unwed father and child); Lalli v. Lalli, 439 U.S. 259, 262 n.3 (1978) (upholding law treating nonmarital child's ability to inherit from intestate father differently from intestate mother without considering equal protection sex discrimination claim because it was not properly raised); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (upholding a law allowing only unwed fathers who have legitimated a child to object to that child's adoption in a case where the equal protection challenge

law that barred an unwed father who had not legitimated his child from suing for the wrongful death of the child.[280] The Court upheld the law against a sex discrimination challenge.[281] The Court's gesture to biology is its statement that "unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown,"[282] presumably because mothers are necessarily present at a child's birth and fathers are not.

This decision and others make clear that this type of reasoning is based in social realities, not just the body.[283] The Court acknowledges that a mother's presence at birth does not necessarily translate into a known parent. While admittedly a "rare[]" event, some unwed biological mothers, like some unwed biological fathers, are unknown.[284] And whether unwed fathers are known is not dictated by biology, but is a product of social facts. The Court explains that "'[e]ven if [the unwed

was only to the disparate treatment of divorced and never married fathers, and not with regard to sex); Mayeri, *supra* note 279, at 2295 (noting that "the Justices . . . ultimately avoided[] a central question presented by these cases: how the evolving jurisprudence of equal protection, which made marriage and divorce formally sex-neutral, should apply to the parental rights of nonmarital fathers"); *cf.* Stanley v. Illinois, 405 U.S. 645, 658 (1972) (invalidating a legal presumption that unwed fathers would be unfit parents).

[280] 441 U.S. 347, 349 (1979) (plurality).

[281] *See id.* at 359.

[282] *Id.* at 355. For sustained treatment of the Court's reliance on the notion of known mothers and unknown fathers, see generally Cahill, *The New Maternity*, *supra* note 149.

[283] *See Parham*, 441 U.S. at 355 (noting that the mother's identity "will *rarely* be in doubt" (emphasis added)); *accord* Lalli, 439 U.S. 259 at 268 (plurality) (noting that "[e]stablishing maternity [is] *seldom* difficult" (emphasis added)); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (striking down a state law that denied an unmarried mother the right to recover for the wrongful death of her nonmarital children and acknowledging that the decision "[could] conceivably be a temptation to some to assert motherhood fraudulently").

[284] *Parham*, 441 U.S. at 355; *see also* Cahill, *The New Maternity*, *supra* note 149, at 2264 (discussing these cases and ways, in addition to reproductive technology, that genetic mothers may be unknown, including cases of babies switched at birth, adoption, and maternal fraud). This is becoming less "rare" in a world with reproductive technology where the gestational party may not be the genetic mother. *See* Cahill, *The New Maternity*, *supra* note 149, at 2226 (stating that "the practice of alternative reproduction did render maternity more complicated than Supreme Court doctrine had suggested"); NeJaime, *The Nature of Parenthood*, *supra* note 121, at 2285-2315 (discussing the impact of technology on legal parenthood).

father is] conscious [of the birth], he is very often totally unconcerned because of the absence of any ties to the mother.'"[285] In other words, the lack of involvement of an unwed father is often explained by the fact that men, untethered by the bonds of matrimony, are not interested in their children. Under this (overtly stereotypical) reasoning, fathers' more distant relationship with their children is just as much a product of social as biological fact.

Precisely because knowing the identity of either father or mother turns on biological and social facts, *Parham* quite rightly does not rest its holding on biology. The Court instead justifies the distinct treatment of unwed mothers and fathers by the fact that they are "not similarly situated" as a product of law rather than as a product of biology.[286] In explaining the different circumstances of mothers and fathers, the Court pointed not to the physical difference of pregnancy, but to "Georgia law," under which "only a father can by voluntary unilateral action make an illegitimate child legitimate."[287] In later cases, the Court made clear that biology would not and never did justify differential treatment of "similarly situated" mothers and fathers.[288]

It was not until 1981 that a Supreme Court case relied expressly on biology to validate a sex classification, in a plurality decision in *Michael M. v. Superior Court*.[289] In that case, the Court upheld a statutory rape law that criminalized sexual intercourse with girls under eighteen, but held only males criminally liable, even when the males were also

[285] *Parham*, 441 U.S. at 355 n.7 (quoting *Lalli*, 439 U.S. at 268-69).

[286] *Id.*at 355.

[287] *Id.* This sex discriminatory Georgia law was not challenged. *See* Case, *Quest for Perfect Proxies*, *supra* note 119, at 1457-58 (discussing category of cases upholding sex classifications on the basis of another sex discriminatory law not before the Court).

[288] Lehr v. Robertson, 463 U.S. 248, 267 (1983) ("We have held that these statutes [applying different rules of parentage based on sex] may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child."); *accord* Sessions v. Morales-Santana, 582 U.S. 47, 63 n.12 (2017) (explaining that *Lehr* "recognized that laws treating fathers and mothers differently 'may not constitutionally be applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child," but that "the 'similarly situated' condition was not satisfied in *Lehr*").

[289] Michael M. v. Superior Ct., 450 U.S. 464 (1981) (plurality).

minors.[290] The plurality reasoned that a law punishing only minor males and not minor females was permissible to further the state interest of preventing teenage pregnancy because males and females are "not similarly situated" with regard to the consequences of sex: "Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity."[291]

Unlike *Stanton v. Stanton*, which struck down a law premised in part on average biological sex differences,[292] the capacity for pregnancy, at least historically, set off the class of women as unique. Yet even here, we can see the ambivalence about reliance on biology to uphold sex classifications. Vigorous dissents adopted by four justices make clear that reliance on biology was always contested.[293] And the plurality does not merely explain how biological differences undergird the statute but provides assurance that stereotypes do not.[294] In other words, it was not a biological justification alone that would permit a sex classification, but consideration of the social meaning of the sex classification.

Still further, and crucial for the black-letter holding of *Michael M.*, the opinion that relies on biology was joined by only a plurality of the Court, with the pregnancy-based reasoning supported by four justices.[295] The fifth vote to uphold the law by Justice Blackmun says nothing about biological sex difference.[296] Justice Blackmun said the case was "an unattractive one to prosecute" because the minor female "appears not to have been an unwilling participant in at least the initial stages of the

[290] *Id.* at 466.

[291] *Id.* at 471.

[292] *See supra* notes 245–247 and accompanying text.

[293] The decision was fractured, with two dissenting opinions (and many scholars) strongly disagreeing that the law was not premised in sex stereotypes. *See Michael M.*, 450 U.S. at 488 (Brennan, J., dissenting); *id.* at 496 (Stevens, J., dissenting); *supra* notes 111–115 and accompanying text.

[294] *Michael M.*, 450 U.S. at 476 (noting that this is not "a case where the gender classification . . . rests on 'the baggage of sexual stereotypes'").

[295] *Id.* at 466.

[296] *Id.* at 482 (Blackmun, J., concurring) (voting to uphold the law because it "is a sufficiently reasoned and constitutional effort to control the problem [of teenage pregnancy] at its inception").

intimacies."[297] This suggests that the sex difference most relevant to Blackmun was culpability: if teenage girls but not teenage boys are unlikely to consent to sex, then it would be proper to punish only the latter. Given this, it cannot be said that the holding of *Michael M.* is based in biology.[298] Instead of the apotheosis of biological reasoning, then, *Michael M.* marks the beginning of a halting shift towards biological rationales in sex classification cases.

3. The (Failed) Turn to Biology

The Court issued its next pronouncement on a sex classification premised in biology a decade and a half after *Michael M.*, in *United States v. Virginia*.[299] From that time on, every equal protection challenge to a sex classification the Court considered was defended on the ground of biology, and all but one such challenged classification was struck down. This Section has catalogued these cases, which mark a turn to biology as the justification for sex classifications before the Court. This approach succeeded one lone time, and in a decision whose continuing validity is uncertain at best.

In *Virginia*, the Court considered an all-male admissions policy to the Virginia Military Institute.[300] The Court rejected a biological justification for the sex classification.[301] Notwithstanding average physical differences between the sexes that would render it more

[297] *Id.* at 483-85. As one dissent explains, this type of reasoning is the hallmark of stereotypical thinking about the sexes. *See id.* at 494 (Brennan, J., dissenting) (noting that "the historical development of [the law] demonstrates that [it] was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse").

[298] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (instructing that when a majority of justices fail to converge on a rationale, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"). The last time a majority of the Court cited *Michael M.* was the year it was decided, and then only for the standard of review. *See* Rostker v. Goldberg, 453 U.S. 57, 69 (1981). The only Supreme Court citation to *Michael M.* on the point of biological sex difference has been in dissent. *See* United States v. Windsor, 570 U.S. 744, 812 (2013) (Alito, J., dissenting).

[299] United States v. Virginia, 518 U.S. 515 (1996).

[300] *Id.* at 520.

[301] *Id.* at 534.

difficult for women to meet the admissions standards, this did not mean that no women could meet them.[302] Therefore, biology could not justify the sex-discriminatory policy.[303] *Virginia* demonstrated the Court's continued willingness, following *Stanton*, to scrutinize sex classifications grounded in biology for stereotypes and to strike down such classifications when they are. While *Virginia* has been cited as the first case to strike down a sex classification grounded in biological sex difference,[304] in this Article's telling, *Virginia* is a particularly clear example of the Court striking down a sex classification premised in biological difference, rather than its first such instance.

Notwithstanding *Virginia*'s clear rejection of a biological rationale for the sex classification before it, the language from *United States v. Virginia* about the "enduring" nature of "physical differences between men and women"[305] has taken on a life of its own. It has been repeatedly cited by state legislators to shore up traditional biological definitions of sex in the law[306] and has been weaponized in the culture wars over the meaning of sex.[307] It even served as the basis for the Sixth Circuit's assertion in *Williams v. Skrmetti* — a case now before the Supreme Court — that sex classifications grounded in biology avoid heightened scrutiny.[308]

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[302] *Id.* at 533.

[303] *Id.* at 534.

[304] *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 145-46 (arguing that *Virginia* "signaled an important shift in the Court's reasoning about 'real' differences" because it was the first case to apply the anti-stereotyping doctrine where the state relied on biological difference to justify a sex classification).

[305] *Virginia*, 518 U.S. at 533-34.

[306] *See* IDAHO CODE § 33-6202(1) ("The legislature finds that there are 'inherent differences between men and women. . . .' United States v. Virginia, 518 U.S. 515, 533 (1996)"); W. VA. CODE § 18-2-25d(1) ("There are inherent differences between biological males and biological females, and that these differences are cause for celebration, as determined by the Supreme Court of the United States in *United States v. Virginia* (1996) . . . .").

[307] *See, e.g.*, Jonathan Weisman, *A Demand to Define 'Woman' Injects Gender Politics into Jackson's Confirmation Hearings*, N.Y. TIMES (Mar. 23, 2022), https://www.nytimes.com/2022/03/23/us/politics/ketanji-brown-jackson-woman-definition.html (reporting on Senator Marsha Blackburn's questioning of Supreme Court nominee Ketanji Brown Jackson about the meaning of "woman" under *Virginia*).

[308] *See* L.W. by & through Williams v. Skrmetti, 83 F.4th 460, 486 (6th Cir. 2023) ("Recognizing and respecting biological sex differences does not amount to

It is worth quoting the relevant passage here:

> Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.[309]

At the risk of belaboring the obvious, the statement about "physical differences" is dicta.[310] *Virginia* invalidated the sex classification before it.[311] In making meaning of this language, note that the phrase "[i]nherent differences" is in quotation marks.[312] Professor Cary Franklin has indicated that the quotation marks may demonstrate "at least some uncertainty about the ontological status of these differences."[313] Or the quotation marks might demonstrate at least some uncertainty about the epistemological status of these differences: even if there is a biological component to sex, we may never know which part of the differences that we observe stem from biology rather than

stereotyping — unless Justice Ginsburg's observation in *United States v. Virginia* that biological differences between men and women 'are enduring' amounts to stereotyping (quoting *Virginia*, 518 U.S. at 533)), *cert. granted*, United States v. Skrmetti, 144 S. Ct. 2679 (2024); *supra* note 131 and accompanying text.

[309] *Virginia*, 518 U.S. at 533 (citations omitted).

[310] This statement was neither necessary to the holding nor subject to any adversarial testing. *See supra* notes 90–91 and accompanying text.

[311] 518 U.S. at 519.

[312] *Id.* at 533.

[313] Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 145-46, 145 n.333; *see also* Franklin, *Biological Warfare*, *supra* note 147, at 170 n.6 (suggesting that the quotation marks "reflect the Court's awareness of the long and sorry history of the government's reliance on specious biological distinctions to justify the differential treatment of the sexes and its increasing skepticism toward attempts to justify discrimination on those grounds").

society.[314] Under either reading, the passage could amount to a (glancing) recognition of sex as a social kind.[315]

After *Virginia* came *Nguyen v. INS*,[316] the first and only time a majority of the Court upheld a sex classification on the basis of biology over an equal protection sex discrimination challenge. There, the Court considered an equal protection challenge to a statute that governed the acquisition of citizenship by persons born abroad to unmarried parents, one of whom is a citizen and one of whom is not.[317] The statute imposed different and more burdensome requirements for the child's acquisition of citizenship when the citizen parent is the father rather than the mother.[318] In a 5–4 decision, the Court upheld the statute, relying in large part on biology.

The Court explained that the sex classification served both to "assure that a biological parent-child relationship exists,"[319] and "ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[320] The Court turned to biology — the woman's and not the man's inevitable presence at birth — to explain how the sex classification served both of those interests.[321] For the majority, this physical sex difference meant that, as to the first interest, "[i]n the case of the mother, the relation is verifiable from the birth

[314] *See* Yoshino, *supra* note 147, at 868 (interpreting Judith Butler's view of sex along these lines: "[T]here may be a biological component to sex, but that we will never be sure what that biological component is, as we can only apprehend it through culture (that is, gender)"); *see also* FAUSTO-STERLING, *supra* note 191, at 335 (discussing the compound concept of "*gender/sex*," introduced "because differences cannot knowingly be attributed to biology or gender socialization" (internal quotation marks omitted)).

[315] See *infra* Part III.A for a full discussion of sex as a social kind.

[316] 533 U.S. 53, 56 (2001).

[317] *Id.*

[318] *Id.* at 56-57.

[319] *Id.* at 54.

[320] *Id.* at 64-65.

[321] *Id.* at 64 (noting the "biological difference" that "[t]he mother is always present at birth, but that the father need not be") (internal quotation marks omitted).

itself,"[322] and as to the second interest, "the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth."[323] As in the plurality in *Michael M.*, the Court tried to provide assurance of the absence of grounding in sex stereotypes.[324]

The biological reasoning here about the certainty of the mother from birth marks a shift from the Court's earlier treatment of this point.[325] In *Parham* and other prior cases, the Court acknowledged that a mother's relationship to the events following the birth of a child is not just a biological but a social reality, so that the identity of the mother, just like the father, might be uncertain.[326] The *Nguyen* majority ignores this reality and the Court's prior recognition of it.

No one could consider the result in *Nguyen* uncontroversial. The decision came only after the challenged provision resulted in a draw in the Court a few years prior.[327] And this time, it was decided by only a

[322] *Id.* at 62 (explaining that "[t]he mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth," whereas "[i]n the case of the father, the uncontestable fact is that he need not be present at the birth," and, "[i]f he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood").

[323] *Id.* at 65 ("The mother knows that the child is in being and is hers and has an initial point of contact with him," and thus "[t]here is at least an opportunity for mother and child to develop a real, meaningful relationship.").

[324] *Id.* at 68, 73 (concluding that the sex classification "does not result from some stereotype," "is not marked by misconception and prejudice, nor does it show disrespect for either class"); *see* Franklin, *The Anti-Stereotyping Principle*, *supra* note 125, at 148 ("Although the Court in *Nguyen* viewed the sex-based citizenship statute as a simple reflection of biological realities, it did not contend that biological differences trump or obviate anti-stereotyping analysis.").

[325] *See* sources cited *supra* notes 270–276; Cahill, *The New Maternity*, *supra* note 149, at 2240 (explaining how the "law became more adamant about the constitutional mother's presumed obviousness," shifting from acknowledging instances of "rare" uncertainty to treating maternal identity as inevitably "clear" (internal quotation marks and citations omitted)).

[326] *See supra* notes 277–283 and accompanying text.

[327] *See* Miller v. Albright, 523 U.S. 420(1998) (preserving the lower court judgment upholding the law after a 4–4 decision in the Court). One other citizenship case upheld a sex classification with reference to biology, but without a majority decision. *See* Flores-Villar v. United States, 564 U.S. 210, 210 (2011) (mem.) (per curiam).

bare majority, with a powerful dissent[328] and much scholarly commentary explaining why the sex classification was grounded in stereotypes rather than biology.[329] The move made in *Nguyen* was never made again: the first time a majority of the Court upheld a sex classification on the basis of biology was also its last.[330]

Hardly more than a dozen years after *Nguyen*, a majority of the Court sided with the *Nguyen* dissent.[331] In *Sessions v. Morales-Santana*, the Court struck down a different sex classification in the same derivative citizenship statute that was challenged in *Nguyen*.[332] The provision required unwed citizen fathers to be present in the United States for far longer than unwed citizen mothers before the birth of a child to transmit citizenship to that child.[333] The Court reached its conclusion by "quietly abandon[ing] the logic of . . . *Nguyen*,"[334] and instead citing approvingly to the *Nguyen* dissent.[335]

Morales-Santana's rejection of biology met with no noted controversy. Without dissent,[336] the Court held that the sex-based parental presence requirement reproduced "the familiar stereotype" that fathers "would care little about, and have scant contact with, their nonmarital

[328] Nguyen v. INS, 533 U.S. 53, 78 (O'Connor, J., dissenting) ("The Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, but departs from the guidance of our precedents concerning such classifications in several ways." (citation omitted)).

[329] *See* sources cited *supra* note 123.

[330] The weight of even this one decision must be questioned in light of its context. Under the plenary power doctrine, "the line drawn by Congress between citizen and noncitizen is . . . largely immune from judicial control." Collins, *supra* note 121, at 174 (internal quotation marks omitted). Although *Nguyen* disclaimed reliance on the doctrine, it is hard to understand the deferential review in the case without it.

[331] *See* Sessions v. Morales-Santana, 582 U.S. 47 (2017) (invalidating under equal protection a law determining the citizenship status of children of unwed parents with one citizen parent that required citizen fathers to have a longer presence in the United States than citizen mothers to confer citizenship).

[332] *Id.*

[333] *Id.* at 51.

[334] Collins, *supra* note 121, at 199.

[335] *Morales-Santana*, 582 U.S. at 61.

[336] *Id.* at 78. (Thomas & Alito, JJ., concurring in part) (Gorsuch, J., took no part in the decision).

children."[337] At least one commentator views this as a general change in the Court's approach to "the gender-differentiated regulation of derivative citizenship" at issue in *Nguyen*, with a "majority opinion by Justice Ruth Bader Ginsburg that is notable for its clear account of the gender-based stereotypes concerning parental roles that have shaped the derivative citizenship statute in its every detail."[338] More specifically, *Nguyen*'s acceptance of a law "that regard[s] biological mothers as a child's 'natural guardian,' with rights and responsibilities that dwarf those of . . . biological nonmarital fathers" is "in significant tension with *Morales-Santana*'s deep skepticism of gender-based allocations of parental rights and status."[339]

If *Morales-Santana* brought an end to *Nguyen*'s reliance on the biology of sex as a proxy for parental relationship, another decision issued just weeks after *Morales-Santana*, *Pavan v. Smith*,[340] brought an end to *Nguyen*'s reliance on the biology of sex as a proxy for parental identity. It is helpful to situate *Pavan* as a sex equality claim in the context of same-sex marriage and parenthood. While *Obergefell v. Hodges*[341] did not turn expressly on a challenge to a sex classification under the Equal Protection Clause, it can be read to reject biological distinctions as the basis for sex classifications.

In the years before a federal right to marriage was enshrined in the law, sex-based parenting roles derived from biology remained an argument against same-sex marriage.[342] *Obergefell* rejected the notion that there was anything necessary — as a matter of biology or otherwise — about having one parent of each sex.[343] As we will see in *Pavan*,

[337] *Id.* at 62.

[338] Collins, *supra* note 121, at 173.

[339] *Id.* at 203.

[340] 582 U.S. 563 (2017) (per curiam). For more on how this case fits within the Court's sex equality jurisprudence, see generally Franklin, *Biological Warfare*, *supra* note 147.

[341] 576 U.S. 644 (2015).

[342] *See* Case, *Quest for Perfect Proxies*, *supra* note 119, at 1488 ("[P]rohibitions on homosexuality rely on stereotypes in the sense that they are based on 'fixed notions concerning the roles and abilities of m[ales] and [females].'" (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982))).

[343] *See Obergefell*, 576 U.S. at 668 ("[M]any same-sex couples provide loving and nurturing homes to their children . . . . Most states have allowed gays and lesbians to

Obergefell's holding that "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples'" has pressed the Court to reject the biological assumption it was willing to accept in *Nguyen*.[344]

Turning to *Pavan*, the Court struck down a state law that required the name of the mother's male spouse to appear on a child's birth certificate when the mother conceived a child by means of artificial insemination but not the mother's female spouse when the child was conceived "in those very same circumstances."[345] Because the state requires the birth mother's husband to be placed on the birth certificate even when he is not the biological father, the birth mother's wife must be afforded the same treatment.[346] The state argued that the sex classification was justified because reproductive differences between men and women meant that a male spouse typically has a biological connection to his wife's child, whereas a female spouse never does.[347] The Court rejected this biology-based argument because it did not always lead men and women to be differently situated.[348]

Returning to *Nguyen*, recall that part of the state's reliance on sex there was, similar to *Pavan*, to "assur[e] that a biological parent-child relationship exists."[349] *Nguyen* validated the reliance on sex to achieve this interest because "[t]he mother's status is documented in *most instances* by the birth certificate or hospital records and the witnesses who attest to her having given birth," whereas "[i]n the case of the father, the uncontestable fact is that he need not be present at the

adopt . . . . This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.").

344 *Pavan*, 582 U.S. at 564 (quoting *Obergefell*, 576 U.S. at 676).

345 *Id.* at 566.

346 *Id.*

347 Brief for the Respondent in Opposition at 19, Pavan v. Smith, 582 U.S. 563 (2017) (No. 16-992) (arguing that the legal challenge "ignore[s] the basic fact that — unlike a husband — a mother's female spouse will never be a marital child's biological parent"). The state's argument is factually incorrect, as a lesbian couple could conceive a child with the egg of the non-gestational mother.

348 *Pavan*, 582 U.S. at 566-67 (discussing children born "by way of anonymous sperm donation," when neither the mother's husband nor her wife will be biologically related to the child).

349 Nguyen v. INS, 533 U.S. 53, 62 (2001).

birth," and, "[i]f he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood."[350] The dissent in *Pavan* cited the *Nguyen* decision for the view that the Constitution permits reliance on biological sex difference for purposes of identifying a parent-child relationship, even if imperfectly.[351]

The *Pavan* Court rejected this view. The fact that biological sex difference would frequently leave men and women differently situated with regard to their biological connection to a child was insufficient to support a sex classification, because they would sometimes be situated in exactly the same way.[352] Yet the sex classification at issue in *Nguyen* served to identify a biological relationship between parent and child only "in most instances."[353] In other words, just as in *Pavan*, there would be mothers and fathers who are similarly situated but treated differently under the law.[354] It is hard to see how *Nguyen*'s reliance on biological sex difference as an imperfect proxy for parental identity survives *Pavan*'s rejection of this very same argument.

In all, *Morales-Santana* and *Pavan* together suggest a sub silentio overruling of *Nguyen*, ending the Court's lone foray into biologically based sex classifications with a whimper instead of a bang. Despite these developments calling into question the ongoing validity of the biological reasoning in *Nguyen*, decisions like *Adams*, where the Eleventh Circuit relies heavily on *Nguyen* to reject transgender rights claims, fail to wrestle with or even acknowledge this subsequent case law.[355] Ongoing reliance on the standard account of sex as biology without considering

[350] *Id.* (emphasis added).

[351] *Pavan*, 582 U.S. at 568 (Gorsuch, J., dissenting) (reasoning that "birth registration regime[s] based on biology" do not "offend[] the Constitution" and citing *Nguyen*).

[352] *See id.* at 566-67.

[353] *Nguyen*, 533 U.S. at 62.

[354] This could occur when a mother has a home birth, and she is not "documented . . . by . . . records" or "attest[ed]" to by "witnesses" as the biological mother of the child. *Id.* Thus, there is uncertainty about her parental identity, but she is still afforded the presumption of motherhood, whereas a father is not. The circumstance of maternal uncertainty is substantially compounded by reproductive technology. *See* Cahill, *The New Maternity*, *supra* note 149, at 2227; NeJaime, *The Nature of Parenthood*, *supra* note 121, at 2286-88.

[355] *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 803 n.6, 809-10 (11th Cir. 2022) (en banc).

these later cases renders the reasoning and result of cases like *Adams* legally dubious.

4. Biology and Equal Protection Redux

In the quarter century since *Virginia* was decided, all of the equal protection challenges to sex classifications before the Court have been argued in terms of biology,[356] and the only challenge where a majority of the Court upheld the classification, in *Nguyen*, is almost surely a dead letter.[357] Professor Reva Siegel has noted the shift toward biological explanations for sex classifications, positing that "with modernization, social roles are expressed in terms of reproductive physiology rather than in the language of separate spheres, domesticity, or marriage."[358] This Article presses this observation further and suggests that the doctrine itself encouraged this shift. The success of the anti-stereotyping approach may have brought about the demise of reliance on overt stereotypes about social roles, but also encouraged the turn to biology as the exclusive site for legitimate sex difference.[359]

Arguments from biology have long been made to justify distinct treatment of the sexes.[360] Social and biological arguments upholding sex classifications were once muddled. In a case upholding a maximum hours labor law for women only, for example, the Court reasoned that because "[t]he two sexes differ in structure of body," "the two sexes" also "differ . . . in the functions to be performed by each."[361] The biology

[356] *See* Pavan v. Smith, 582 U.S. 563 (2017) (per curiam); Sessions v. Morales-Santana, 582 U.S. 47 (2017); Flores-Villar v. United States, 564 U.S. 210 (2011) (mem.) (per curiam); Miller v. Albright, 523 U.S. 420 (1998) (plurality).

[357] *See supra* notes 332–338 and accompanying text.

[358] Siegel, *The Pregnant Citizen*, *supra* note 127, at 214.

[359] *Cf.* Franklin, *Biological Warfare*, *supra* note 147, at 186-87 (showing how more exacting constitutional scrutiny brought a parallel shift from moral arguments to biological arguments in the context of opposition to same-sex marriage). To be clear, the change here is not monocausal. This Article merely seeks to add the legal doctrine as one part of the story.

[360] *See* Siegel, *The Pregnant Citizen*, *supra* note 127, at 177 n.44 (noting that "the practice of appealing to women's physiology to make arguments about their roles began in the late nineteenth century in the physicians' campaign to criminalize abortion").

[361] Muller v. Oregon, 208 U.S. 412, 422 (1908).

of the sexes and the social roles of the sexes were one and the same, and there was no need to disentangle them.

The anti-stereotyping doctrine brought an end to sex classifications based in generalities about sex, even mostly accurate ones.[362] This meant that the anti-stereotyping principle required the defenders of sex classifications to rid their asserted justifications of reliance on social roles. What was left was biology.

Yet the turn to biology occurred at the same time as even biological justifications were more heavily scrutinized for stereotypes, and generally failed such scrutiny. Few of the laws grounded in biological sex difference could be justified by such differences alone. Rather, those biological differences served as a proxy for a social reality related to the state's asserted interest. For example, in *Nguyen*, the idea of the mother's necessary presence at birth stood in for the social reality of the child's relationship with the mother and with the United States[363] — an idea that the Court has since come to appreciate as a stereotype.[364] The exacting scrutiny applied to these sex classifications made clear how

[362] The Court's invalidation of sex classifications when sex is not a perfectly accurate proxy has been seen as approaching strict scrutiny. *See* United States v. Virginia, 518 U.S. 515, 579 (1996) (Scalia, J., dissenting) (describing the holding of *Virginia* — "that VMI's all-male composition is unconstitutional because 'some women are capable of all of the individual activities required of VMI cadets'" as an "unacknowledged adoption of what amounts to (at least) strict scrutiny"); Case, *Quest for Perfect Proxies*, *supra* note 119, at 1453 (explaining that because race classifications can still survive strict scrutiny when they are narrowly tailored to serve a compelling government interest, "[t]he perfect proxy test has always had the capacity to be more strict even than strict scrutiny"); Sunstein, *supra* note 255, at 72-73 (describing *Virginia* as moving the doctrine from intermediate scrutiny to something "closer" to strict scrutiny).

[363] Nguyen v. INS, 533 U.S. 53, 74, 83-89 (2001) (O'Connor, J., dissenting) (arguing that the claim that the contested law's reliance on sex "substantially relates to the achievement of the goal of a 'real, practical relationship' thus finds support not in biological differences but instead in a stereotype — i.e., 'the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children'"); NeJaime, *The Nature of Parenthood*, *supra* note 121, at 2283 (explaining how "the Court in [*Nguyen*] translated differences in the biological dimensions of parenthood into differences in the social dimensions").

[364] *See* Sessions v. Morales-Santana, 582 U.S. 47, 48, 59 (2017) ("[T]wo once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws . . . : In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.")

biology could not be isolated as a standalone justification for the classifications under attack. As the Court became more willing to distinguish biological facts from social realities, biology became a weak justification for sex-based regulation, too.

III. SEX WITHOUT BIOLOGY UNDER EQUAL PROTECTION

The last Part's reconsideration of the jurisprudence revealed that to the extent the Court embraced biology as a justification for sex classifications, this embrace was far more tentative, contested, inconsistent, and, ultimately, fleeting, than has been recognized. If lower courts are not bound by a biological understanding of sex, and if the Supreme Court need not treat sex as biology as a matter of stare decisis, then how should we understand sex for constitutional sex equality purposes? Answering this question is the task of this Part.

This Part argues for understanding sex as a social kind, which for women shares the feature of social subordination. It then takes this analysis out for a spin, seeing whether a state's interest in relying on sex as a social kind could withstand heightened scrutiny in a few key areas of contest, such as bathrooms and sports. Next, this Part considers who fits within this understanding of sex. Drawing on intersectionality theory and transfeminist literature, it concludes that transgender persons should be placed in the sex category with which they identify. In doing so, I shore up courts' arguments for transgender rights that are currently on unnecessarily shaky ground. By avoiding the pitfalls of a biological understand of sex, a social understanding of sex opens up new possibilities for transgender rights and for sex equality.

A. Sex as a Social Kind

Equal protection jurisprudence supports treating sex not as a natural kind, but as a social kind, that is, a kind that has been constructed by social forces.[365] Return to this Article's reading of *Frontiero*'s plurality decision explaining why sex classifications deserve heightened scrutiny

[365] *See* Rachel McKinnon, *Stereotype Threat and Attributional Ambiguity for Trans Women*, 29 HYPATIA 857, 859 (2014) (explaining the view of "'male' and 'female' as not representing natural kinds, but rather as social constructs based on family resemblances, as Ludwig Wittgenstein put it").

— a decision that has been and continues to be the mainstay of sex equality jurisprudence, repeatedly cited by the Court in its major sex equality decisions notwithstanding its plurality status.[366] I explained how that decision did not support much less require an understanding of sex as biological.[367] I now make the affirmative claim that the reasons on which *Frontiero* rested — immutability, visibility, political power, history of discrimination, and connection with ability — are most consistent with an understanding of sex as a social kind.[368] This does not require extensive argument because the basis for such a reading is implicit in my earlier analysis. I make it explicit here.

Immutability. I argued earlier that immutability turns not on biology, but on the lasting and consequential impact of an initial sex designation — a political and legal decision, rather than a biological one.[369] Leading philosopher of science Anne Fausto-Sterling puts it succinctly: the biological indeterminacy of sex means that the "labeling [of] someone a man or a woman is a social decision. We may use scientific knowledge to help us make the decision, but only our beliefs about gender — not science — can define our sex."[370]

The race-sex analogy on which *Frontiero* relied to apply heightened scrutiny to sex classifications sheds light on how the designation of sex is a social, political, and legal designation rather than a biological one.[371] "[S]cientific and legislative classificatory disarray . . . has repeatedly moved the Supreme Court to understand and treat racial status as the product of social and political institutions."[372] Sex exhibits similar scientific and legislative classificatory disarray. As Professor Paisley Currah has powerfully demonstrated, legislatures have long defined sex in multiple and conflicting ways across time and jurisdictions, and even

[366] Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality); *supra* notes 228–229 and accompanying text.

[367] *See supra* notes 174–217 and accompanying text.

[368] *See Frontiero*, 411 U.S. at 684-88.

[369] *See supra* notes 188–189 and accompanying text.

[370] FAUSTO-STERLING, *supra* note 191, at 3 ("Furthermore, our beliefs about gender affect what kinds of knowledge scientists produce about sex in the first place."); *see also supra* notes 184–189 and accompanying text.

[371] *See supra* notes 171–177 and accompanying text.

[372] Braman, *supra* note 145, at 1380-81, 1398 (discussing how the rules of racial classification have varied considerably across time and context).

within the same jurisdiction for various purposes.[373] Just as with racial classifications, "the diversity of opinion and indeterminacy of application appear today as clear evidence of the political nature of classifications."[374] While prior scholarship has emphasized how the race-sex analogy has limited the scope of women's rights,[375] the race-sex analogy also holds promise for a more expansive understanding of sex equality by supporting the notion of sex as a social class.

History of Purposeful Unequal Treatment and Lack of Political Power. *Frontiero* attributed the subordinated "position of women in our society . . . to pervasive . . . discrimination" in public and private life.[376] The decision explains that this discrimination has "invidiously relegat[ed] the entire class of females to inferior legal status."[377] This is the definition of sex as a social kind: a class constructed by its social treatment.[378] Emphasizing the social nature of identity, the plurality's focus was not on anything essential about women's bodies, but on the "position of women in . . . society."[379] This analysis sounds strikingly similar to feminist legal theorist Catharine MacKinnon's social analysis of sex: "[W]omen's oppression is enforced through . . . a social and political, not biological, arrangement. . . . Women are not men's biological inferiors; we are constrained to be men's social inferiors. This power division, not our bodies, is what makes women a political group and the women's movement a political movement."[380]

Lack of Connection with Ability. If sex were a matter of biology, it would seem strange to highlight how sex "frequently bears no relation to ability to perform or contribute to society."[381] To be sure, the weasel

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[373] CURRAH, *supra* note 191, at 7; *see also* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 733 (2008) (noting "hundreds" of government policies determining sex that are "conflicting").

[374] Braman, *supra* note 145, at 1398.

[375] *See* Siegel, *She the People*, *supra* note 172, at 957-60 (spelling out some of the limits of the race model for sex equality).

[376] Frontiero v. Richardson, 411 U.S. 677, 685-86 (1973) (plurality opinion).

[377] *Id.* at 687.

[378] *See infra* notes 404–410 and accompanying text.

[379] *Frontiero*, 411 U.S. at 685.

[380] MacKinnon, *A Feminist Defense*, *supra* note 202, at 90; *see also* MacKinnon, *Exploring Transgender Law*, *supra* note 108 (describing deep roots of this view).

[381] *Frontiero*, 411 U.S. at 686.

word "frequently" allows some wiggle room. One might argue that the decision recognized biological sex difference and simply treated it as minor. Yet recall that the opinion not only adopts this stance but does so by distinguishing sex from "physical disability."[382]

In a later case, the Court emphasized the social rather than biological nature of the relationship between a protected trait and ability, asking whether the class of persons with the protected trait has "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[383] The Court is not simply interested in a question about the inherent abilities of a particular class of people and the bodies they inhabit, but about how members of the group are limited by their social status and the stereotypes they face as a result of this status. On this view, *Frontiero*'s consideration of the "ability to perform or contribute to society" is about a social process that constructs ability rather than any biological features the group may or may not have.[384]

Visibility. I argued earlier that none of the biological characteristics of sex that the conventional account is premised on — reproductive organs, genitals, chromosomes, or hormones — are "high[ly] visible" or visible at all — and that it is our social markers of sex that make it visible.[385] As one classic text on gender attribution summarizes the visibility of sex: "[T]he fact of seeing two physical genders is as much of a socially constructed dichotomy as everything else."[386]

Visibility only matters because the jurisprudence is concerned with a social process rather than anything essential about a particular class of people: "[B]ecause of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[387] We are not looking at facts about anyone's body, but how others react to it. Biology is beside the point. What matters is the existence of a social process whereby a group

[382] *Id.*

[383] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam).

[384] *Frontiero*, 411 U.S. at 686.

[385] *Id.*; *see also supra* note 211 and accompanying text.

[386] KESSLER & MCKENNA, *supra* note 213, at 6.

[387] *Frontiero*, 411 U.S. at 686.

of people is rendered a subordinated social class by systematic discrimination.[388]

If sex is a social kind, what social kind is it? Returning to *Frontiero*, the opinion makes explicit its concern with women as members of a particular kind of social class who have been subordinated precisely because of their membership in the class.[389] As that decision says, "[O]ur Nation has had a long and unfortunate history of sex discrimination."[390] And "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[391] The Court states that what unifies the class of women, indeed, what renders them a class for purposes of heightened scrutiny, is that such discrimination "has invidiously relegat[ed] the entire class of females to inferior legal status."[392]

After *Frontiero*, the Court issued three decisions upholding sex classifications based in whole or in part on the social subordination of women as a class.[393] In the most important of those decisions, *Califano v. Webster*, which relied solely on this rationale, the Court upheld a law that allowed women wage earners to exclude three more low-earning years than men in calculating their base earnings for Social Security.[394] The Court made clear that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized" as an important

[388] *See infra* notes 404–405 and accompanying text.

[389] *Frontiero*, 411 U.S. at 684.

[390] *Id.* at 591.

[391] *Id.* at 686.

[392] *Id.* at 687.

[393] *Califano v. Webster* relied on this rationale alone. *See* 430 U.S. 313, 320 (1977) (per curiam). Two other cases relied on this rationale along with others. *See* Schlesinger v. Ballard, 419 U.S. 498, 508, 510 (1975) (upholding rule that granted women more time than men to earn a promotion under military's "up or out" rule due to women's exclusion from combat positions and deference to congressional determinations of military readiness); Kahn v. Shevin, 416 U.S. 351, 355-56 (1974) (upholding the granting to widows but not widowers of an annual $500 property-tax exemption because of discrimination against women in the job market and deference to state tax schemes).

[394] *See Califano*, 430 U.S. at 320.

governmental objective that can withstand scrutiny.[395] In applying this logic to the law before it, the Court explained: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."[396] Because "women have been unfairly hindered from earning as much as men," the law "works directly to remedy some part of the effect of past discrimination."[397] Professor Mary Anne Case has clarified that these types of arguments do not rely on "overbroad generalizations"[398] about the sexes because "all women, even those not demonstrably materially affected by it," are "subject to ambient discrimination on the basis of sex."[399]

Twenty years later, in *United States v. Virginia*, the Court, with one lone dissent, recounted the permissible justifications for state reliance on sex and did so in line with an understanding of sex as a socially subordinated class.[400] The Court explained:

> Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam), to "promot[e] equal employment opportunity," *see California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.[401]

[395] *Id.* at 317.

[396] *Id.* at 318 (quoting Kahn v. Shevin, 416 U.S. 351, 353 (1974)).

[397] *Id.* at 318.

[398] United States v. Virginia, 518 U.S. 515, 533 (1996).

[399] Case, *Quest for Perfect Proxies*, *supra* note 119, at 1454 n.39; *cf.* Haslanger, *supra* note 191, at 45-46 (on a theory of women as a subordinated social class, considering whether there are "*some* women . . . who aren't oppressed, and in particular, aren't oppressed *as women*" but concluding that there are not "many cases (if any)" and to the extent they exist, "these individuals (or possible individuals) are not counterexamples" to "a meaningful political category" for sex equality purposes).

[400] *See Virginia*, 518 U.S. at 533-34.

[401] *Id.* (internal citation omitted).

In the two decisions the Court cites, *Califano v. Webster*, just discussed, and *California Federal*, the Court permitted the state to rely on sex to combat systematic discrimination on the basis of membership in the class.[402] *California Federal*, decided as a matter of statutory rather than constitutional law, considered a state law mandating that employers grant leave to pregnant workers.[403] The Court was quite explicit that its understanding of the class of women was based in the social reality of working while pregnant rather than pregnancy as a mere biological fact: "[Discrimination] is a social phenomenon encased in a social context," and addressing it requires "[a] realistic understanding of conditions found in today's labor environment."[404] The Court also emphasized that the law in question "promoted equal employment opportunity" by requiring employers to reinstate workers after leave following childbirth.[405] The Court's focus was not on the physical condition of pregnancy, but the social reality of discrimination due to commonly held stereotypes about mothers' commitment to work.[406]

By contrast, *Virginia*'s oft-cited dicta about "[p]hysical differences between men and women" as "enduring" is followed by no similar citation. Rather, the citation is to a decision already fifty years old, from before the birth of the Court's constitutional sex equality jurisprudence,

[402] *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290-91 (1987) (holding that a state law granting preferential treatment to pregnancy was not preempted by a federal employment discrimination statute's bar on pregnancy discrimination); *Califano*, 430 U.S. at 320 (allowing women wage earners to exclude more low-earning years than men in the computation of their Social Security benefits because the sex classification served to compensate women "for particular economic disabilities suffered").

[403] *See Guerra*, 479 U.S. at 272.

[404] *Id.* at 289 (first alteration in original) (internal quotation marks and citation omitted).

[405] *Id.*

[406] *See id.* ("By requiring employers to reinstate women after a reasonable pregnancy disability leave, § 12945(b)(2) ensures that they will not lose their jobs on account of pregnancy disability."). The statute also did "not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers," as it required that leave "cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions." *Id.* at 290.

and has nothing to do with physical differences between the sexes.[407] The quotation drawn from that precedent is entirely compatible with sex as a social class: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."[408]

This notion of the class of women defined by their subordinated social status is hardly unique to constitutional sex equality law. In presenting her theory of sex as a social class, decorated MIT philosopher Sally Haslanger asks a key question of sex without biology: whether there is anything social that all females can plausibly be said to have in common.[409] What unifies women as a class for Haslanger is that they "occupy a particular *kind* of social position, . . . one of sexually marked subordinate. So women have in common that their (assumed) sex has socially disadvantaged them."[410]

Significant strands of feminist thought locate the meaning of sex in the lived experience of subordination because of membership in the class of women. While often associated with post-modern gender theorist Judith Butler, the notion of sex as a social construction has far deeper roots, which we can see in Simone de Beauvoir's recognition that "[o]ne is not born, one rather becomes, a woman."[411] Professor Catharine MacKinnon echoes this perspective: "Women's oppression is enforced through gender, specifically gender hierarchy, a social and political, not biological, arrangement."[412] Put simply, "Inequality because of sex defines and situates women as women."[413]

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[407] *See* Ballard v. United States, 329 U.S. 187, 193 (1946) ("We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted.").

[408] *Id.*

[409] *See* Haslanger, *supra* note 191, at 37.

[410] *Id.* at 45 (explaining that "this is a function of, e.g., how one is viewed, how one is treated, and how one's life is structured socially, legally, and economically").

[411] DE BEAUVOIR, *supra* note 1, at 273; *see also* Sara Heinämaa, *What Is a Woman? Butler and Beauvoir on the Foundations of the Sexual Difference*, 12 HYPATIA 20, 22-33 (1997) (arguing that for de Beauvoir, biology did not bring about sexual difference independent of the socio-cultural environment).

[412] MacKinnon, *A Feminist Defense*, *supra* note 202, at 90.

[413] MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 40, at 215.

While this Article primarily interprets the Constitution rather than making normative claims about the preferred understanding of sex, it is nonetheless worth considering several concerns about the idea of sex as a social class. First is that it assumes that all women share a common experience. As Haslanger explains, sex as this type of social kind need not be essentialist.[414] "[D]epending on context, one's sex may have a very different meaning and it may position one in very different kinds of hierarchies," with variation "from culture to culture."[415] This is also true for "individual to individual within a culture depending on how the meaning of sex interacts with other socially salient characteristics (e.g., race, class, sexuality, etc.)."[416] Because of this type of intersectionality, "the social implications of being female vary."[417] In some contexts, subsets of men are oppressed.[418] For example, "being Black *and male* marks one as a target for certain forms of systematic violence (e.g., by the police)."[419]

Second is that this view of social subordination robs women of agency, as they are powerless to fight against hegemonic sexism. But how the system treats anyone is open to contestation and therefore does not fully determine an individual's experience. Sometimes what Haslanger calls the "dominant ideology" can be contested, resisted, or temporarily elided so it is not fully totalizing.[420] The result is that "there are dominant ideologies and dominant social structures that work together to bias . . . micro-level interactions, however varied and complex they may be, so that for the most part males are privileged and females are disadvantaged."[421]

Third is the potential harmful impact of this reading of sex on some sex equality claims. Equal protection arguments supporting women's

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[414] *See* Haslanger, *supra* note 191, at 39.

[415] *Id.*

[416] *Id.* For the foundational text on intersectionality, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, *Demarginalizing the Intersection*].

[417] Haslanger, *supra* note 191, at 39.

[418] *See id.* at 40-41.

[419] *Id.* at 41.

[420] *Id.* at 42.

[421] *Id.* at 41.

rights have sometimes been based in the body. For example, some feminists have argued that because pregnancy is unique to women, pregnancy-related regulations, including abortion regulations, should be subject to heightened scrutiny as sex classifications.[422] One might worry that a social conception of sex undermines this type of argument. This is of special concern with the Supreme Court eviscerating the due process grounding for abortion rights.[423] The need to ground such rights in another part of the Constitution is perhaps more pressing than ever.[424]

Understanding sex as based in social subordination rather than the body can continue to undergird — and even strengthen — these equal protection arguments. The argument runs that restrictions on reproductive rights or other invidious pregnancy regulations are motivated by stereotypical and subordinating ideas about the role of women as mothers,[425] and thus are vulnerable under equal protection.[426] As feminist lawyers, including Justice Ginsburg, have argued, we can appreciate pregnancy discrimination as sex discrimination better as a

[422] *See, e.g.*, *Geduldig Appellees Brief*, *supra* note 267, at 31-32 (making this argument about pregnancy because "[s]ex-unique physical characteristics are precisely what define a man or woman as a member of one class or the other"); Law, *supra* note 115, at 1007 (emphasizing the biological aspect of pregnancy in arguing for sex equality scrutiny of pregnancy and abortion regulations: "pregnancy, abortion, reproduction, and creation of another human being *are* special — very special," because "[w]omen have these experiences," and "[m]en do not," and thus "[a]n equality doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men").

[423] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

[424] In *Dobbs*, the Court rejected the sex equality argument in the most cursory of ways, relying on a citation to a single precedent, which does not address the issue. *See id.* at 245 (holding that this argument is "squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications").

[425] For the foundational study, see KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 200-02, 205 (1985).

[426] *See* Siegel, *Constitutional Culture*, *supra* note 271, at 1385 (recapitulating the argument that regulations of pregnancy are unconstitutional "when they enforce[] stereotypical understandings of women's roles"); *supra* notes 234–238, 271–273 and accompanying text.

matter of social subordination than as a matter of biology.[427] As the work of Professor Reva Siegel has shown, rather than strengthening the basis for legal challenges to pregnancy regulations, biological reasoning about sex "obscures the gender-based judgments that may animate such regulations and the gender-based injuries they can inflict on women."[428] Sex as biology, "[m]ore than any doctrinal factor," limits these claims.[429] Instead of a barrier to reproductive rights, a social understanding of sex may be their salvation.

B. What Counts

This Section evaluates how several different types of sex-based regulation would fare under equal protection scrutiny on a social understanding of sex. First, it considers how governments with a legitimate interest in regulating based on the body — what I refer to as *somatic* regulation — can and should do so without relying on sex. Second, it considers whether and to what extent the state may rely on sex to combat a history of discrimination, what I refer to as *subordination* regulations. Finally, it considers what I refer to as the use of sex as

[427] *See* Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (arguing that "legal challenges to undue restrictions on abortion procedures . . . center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature"); Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (recognizing that a pregnancy regulation will amount to impermissible sex discrimination when it is "designed to effect an invidious discrimination against the members of one sex or the other"); Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143 (1978) ("Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society."); Siegel, *Reasoning from the Body*, *supra* note 37, at 265 ("Abortion-restrictive regulation can be analyzed as an expression of sex discrimination: as legislation that reflects traditional sex-role assumptions about women and presents problems of gender bias discernible in other forms of sex-based state action.").

[428] Siegel, *Reasoning from the Body*, *supra* note 37, at 265 ("When abortion-restrictive regulation is analyzed in physiological paradigms, as past cases have shown, the inquiry focuses on questions concerning gestation.").

[429] *Id.* ("[I[f restrictions on abortion are analyzed in a social framework, they present questions concerning the regulation of motherhood, and, thus, value judgments concerning women's roles.").

symbol and whether it can survive scrutiny. It explores these questions by returning to current controversies over athletics and bathrooms.

1. Soma

Adopting a social understanding of sex could go a long way towards advancing sex equality by muting the type of "reasoning from the body" that tends to undermine many forms of sex equality, from transgender rights to gay and lesbian rights, to women's rights.[430] This doesn't mean that the state cannot fulfill its legitimate interests in regulating on the basis of the body. However, the state then has to regulate on the basis of biology directly rather than through the backdoor of sex. I call this *somatic* regulation.[431]

Consider, for example, a sex classification allocating benefits to women due to the physical condition of pregnancy.[432] If the state's interest is in the physiological function of pregnancy, the state should regulate on this basis rather than rely on sex.[433] We can already see this shift occurring. The recently enacted Pregnant Workers Fairness Act requires that employers provide reasonable accommodations on the basis of "pregnancy, childbirth, or related medical conditions of a qualified employee" without any limit on the basis of sex.[434]

Some feminists have worried about the expressive effect of shifts from "pregnant women" to "pregnant people" or from "breastfeeding"

[430] *See id.*; *see also supra* Part I.C. We shouldn't need a social understanding of sex to rid the law of sex classifications justified by biology because sex never perfectly tracks biology. *See* Cahill, *Irreconcilable Differences*, *supra* note 128, at 1073 (arguing that "biologically rationalized sex discrimination *is* a sex stereotype — all the way down"). As explained above, the Court has been moving towards recognizing sex as an imperfect (and impermissible) proxy for biology, with the lower courts lagging behind. *See supra* notes 161, 332–354 and accompanying text.

[431] *See APA Dictionary of Psychology: Soma*, AM. PSYCH. ASS'N, https://dictionary.apa.org/soma (last updated Apr. 19, 2018) [https://perma.cc/8J2Y-PT4N] (defining "soma" as "the physical body . . . as distinguished from the mind").

[432] Examples of these types of sex-based regulations in pregnancy are discussed in Fontana & Schoenbaum, *Unsexing Pregnancy*, *supra* note 123, at 332-42.

[433] *See supra* notes 141–144, 330–353 (discussing the exacting requirements for relying on sex as a proxy under the doctrine).

[434] 42 U.S.C. § 2000gg-1(1).

to "chestfeeding."[435] The concern is about the linguistic expansion of these experiences so long identified as the exclusive realm of women.[436] But reserving only to women areas of social life like expecting a child is more likely to "perpetuate" than to combat "the legal, social, and economic inferiority of women."[437] Gender-neutral terms do not exclude or privilege anyone. It is also possible to recognize certain biological and social facts as predominantly experienced by women without relying on language that excludes others who share these experiences.[438]

Turning to the context of athletics, states have claimed that relying on biological sex difference to segregate sports furthers "equality of athletic opportunity."[439] Note that the state's concern is asymmetric, that is, the state has only shown concern with policing who participates in women's or girls' sports, and not who participates in men's or boys' sports.[440] When it comes to the biological justification for sex

[435] *See* Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 229-30 (2016) (discussing objection to transgender inclusion in reproductive rights for severing its connection to womanhood); Emma Green, *The Culture War Over 'Pregnant People*,' ATLANTIC (Sept. 17, 2021), https://www.theatlantic.com/politics/archive/2021/09/pregnant-people-gender-identity/620031/ [https://perma.cc/68LX-K2K9]; Michael Powell, *A Vanishing Word in Abortion Debate: 'Women*,' N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/women-gender-aclu-abortion.html.

[436] *See* sources cited *supra* note 435.

[437] United States v. Virginia, 518 U.S. 515, 534 (1996)*; see* Fontana & Schoenbaum, *Unsexing Pregnancy*, *supra* note 123 (making this argument in the context of pregnancy); Schoenbaum, *Unsexing Breastfeeding*, *supra* note 123 (making this argument in the context of breastfeeding).

[438] *See* Green, *supra* note 435 ("You can talk about birthing as an experience that is common to so many women, as well as an experience for transgender men and nonbinary people. You can have more expansive language. . . . You can put emphasis in different places while still recognizing broader harm." (quoting ACLU Deputy Legal Director Louise Melling)).

[439] Clark, *ex rel.* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (upholding sex classification for female-only volleyball team over challenge from cisgender boys).

[440] *See, e.g.*, IDAHO CODE ANN. § 33-6203(2) (2020) (stating that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex," but nothing about sports for men or boys); W. VA. CODE § 18-2-25d(c)(2) (2021) (requiring that teams designated female "shall not be open to students of the

segregation, the reason for this asymmetry is the idea that those identified male at birth will have a physiological advantage over those identified female at birth, but not the reverse.[441]

A spate of recent state laws tie sex segregation in athletics to biological sex in broad strokes. For just one typical example that's being litigated, an Idaho law requires that "biological sex" be determined by "relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels."[442]

The concern about unfair physiological advantage based on biological sex difference may be sincere.[443] At least at the elite athletic level, these concerns have been raised not only against transgender women, but against cisgender women. Consider Olympic champion middle-distance runner Caster Semenya, a cisgender intersex woman with testosterone levels in the male range.[444] The governing body of international track has required her to suppress those levels to participate in certain women's track events.[445] Moreover, these laws are concerned only with the girls' teams and place no limit on who — male or female — can join the boys' teams, further indicating that a concern about "competitive fairness" is sincere.[446]

male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport").

[441] *See, e.g.*, W. VA. CODE § 18-2-25d(a)(3) ("Biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females . . . .").

[442] IDAHO CODE ANN. § 33-6203(3).

[443] *See* United States v. Virginia, 518 U.S. 515, 533 (1996) ("The [state's] justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

[444] *See* Jeré Longman, *Track's Caster Semenya Loses Appeal to Defend 800-Meter Title*, N.Y. TIMES, https://www.nytimes.com/2020/09/08/sports/olympics/caster-semenya-court-ruling.html (last updated June 28, 2021. A law like Idaho's could also exclude someone like Semenya from competing with girls because she wouldn't meet that law's definition of a biological female.

[445] *See id.*

[446] *See* Hecox v. Little, 104 F.4th 1061, 1071 (9th Cir. 2024) (noting that the Idaho law "do[es] not include any limitation for transgender individuals who wish to participate on athletic teams designated for men"); B.P.J. v. W. Va. State Bd. Ed., 98 4th 542, 556 (4th 2024) (explaining that because the West Virginia law "does not 'restrict the

Yet the state's sincerity is called into question by other terms of these laws, which appear more concerned with retaining traditional biological definitions of sex than with ensuring "equality of athletic opportunity." Even if there is some relationship between "equality of athletic opportunity" and biological sex difference, recently enacted laws like Idaho's are undoubtedly "overbroad generalizations" from the perspective of athletic advantage.[447] First, these laws can apply to athletics at any age, [448] including before the participating athletes have undergone puberty, when there is little suggestion that biological sex difference matters.[449] Second, these laws apply equally to all sex-segregated athletics,[450] even though it is far from clear that boys or men have the same (or any) biological advantage over girls or women across

eligibility of any student'—male or female—'to participate in any . . . teams or sports designated as males, men, or boys,'" it "would not have forbidden Gavin Grimm (a transgender boy) from playing on the boys teams at B.P.J.'s school but it does forbid B.P.J. (a transgender girl) from playing on the girls teams").

[447] *Virginia*, 518 U.S. at 533.

[448] *See Hecox*, 104 F.4th at 1071 (explaining that the law "appl[ies] to all levels of competition in Idaho state schools, including elementary school").

[449] *See* David J. Handelsman, Angelica L. Hirschberg & Stephane Bermon, *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REV. 803, 803 (2018) ("Prior to puberty, there is no sex difference in circulating testosterone concentrations or athletic performance."). *But see infra* note 456 and accompanying text for discussion of one expert asserting contrary position.

[450] *See, e.g.*, *Hecox*, 104 F.4th at 1071 (explaining that the law "appl[ies] to all levels of competition in Idaho state schools, including . . . club teams").

all sports[451] or that competitive fairness is an important interest at all levels of athletic competition.[452]

Third, the state's claimed interest in "equality of athletic opportunity" is betrayed by its focus on features of sex assigned at birth (chromosomes, reproductive anatomy, endogenous hormones) rather than features of an athlete's *current* body.[453] Substantial (though not all) expert opinion on the role of biological sex difference in athletic performance has converged on the primary driver being circulating testosterone level: the testosterone currently in someone's body, whether occurring naturally or by intervention (adding or suppressing testosterone).[454] Yet these laws

[451] *See* Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1251, 1266 (2018) ("challeng[ing] the prevailing assumption that male athletes are better than female athletes at *all* athletic endeavors" based on "[a]vailable evidence [which] supports the claim that in some instances some female athletes perform as well or better than male athletes at particular endeavors, while in other instances the pervasive norm of segregation means that we haven't yet accumulated enough information to reach a conclusion"); *cf.* Press Release, World Athletics, IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations, (May 7, 2019), https://worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg [https://perma.cc/YMQ2-HWK8] (explaining that testosterone limits cover only elite track events between 400 meters and one mile because "the evidence to date indicates that" these events "are where the most performance-enhancing benefits can be obtained from elevated levels of circulating testosterone").

[452] *Cf.* Kimberly A. Yuracko, *Transgender Inclusion and Girls' Sports: A Look at What's at Stake*, 2023 AM. J. L. & EQUAL. 374, 375, 389 (2023) (distinguishing different benefits that sports bring, and suggesting that when only "basic" benefits rather than "special" or competitive benefits are at stake, "[i]ncluding transgender girls on girls' sex-segregated recreational teams . . . would not deprive cisgender girls of equal access to the basic benefits of sports").

[453] One law, which dispenses with hormones altogether, makes this quite explicit with its title: "Clarifying participation for sports events to be based on biological sex of the athlete at birth." W. VA. CODE § 18-2-25d; *see also id.* § 18-2-25d(b)(1) ("'Biological sex' means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.").

[454] *See Hecox*, 104 F.4th at 1084 (citing "medical consensus that the primary known driver of differences in athletic performance between elite male athletes and elite female athletes is the difference in [circulating] testosterone levels, as opposed to endogenously produced testosterone levels" (internal quotation marks omitted) (alteration in original)); CT. OF ARB. FOR SPORT, EXECUTIVE SUMMARY OF CASTER SEMENYA CHALLENGE 5 (May 1, 2019), https://www.tas-cas.org/fileadmin/user_upload/CAS_

turn not on circulating hormone levels, but on reproductive organs, chromosomes, or endogenous hormone levels.[455] For transgender girls who have blocked puberty, neither their reproductive organs, nor their chromosomes, nor their endogenous hormone levels themselves confer an athletic advantage.[456] This legal design can only

Executive_Summary__5794_.pdf [https://perma.cc/Z3UR-VDAL] (finding that "testosterone is the primary driver of the sex difference in sports performance between males and females"); *cf.* Jeré Longman, *Scientists Correct Study That Limited Some Female Runners*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/08/18/sports/olympics/interex-athletes-olympics.html (reporting on research correction that shows a correlation between higher testosterone levels and better performance, but not causation). Not everyone agrees. On one side of this is the view that going through male puberty confers a permanent athletic advantage, regardless of one's current hormone levels. *See* Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONT. PROBS. 63, 118-19, 122-23 (2017) (arguing that "the testes" "produce" "an androgenic endocrine system including bioavailable testosterone outside of the female range, . . . which builds a male body beginning in utero and then in puberty," and thus the category of female athlete should "not be open to intersex and trans athletes who had testes and testosterone in the male range through puberty" and critiquing a rule that would rely on testosterone levels alone because "an individual's T levels are only one among a number of factors that contribute to athletic performance"). On the other side of this is the view that even circulating hormone levels do not have a meaningful impact on athletic performance. *See* Veronica Ivy & Aryn Conrad, *Including Trans Women Athletes in Competitive Sport: Analyzing the Science, Law, and Principles and Policies of Fairness in Competition*, 46 PHIL. TOPICS 103, 117 n.17 (2018) ("While it's certainly undeniable that, at present, there is a performance gap between the best men and best women, it's not at all clear that that should be primarily attributed to differences in pubertal circulating testosterone . . . and the gap is consistently closing over time. It's also unclear how much of that gap is due to sociological factors such as how misogynistic societies discourage athletic development in girls and women."). For a discussion of these opposing views, see Yuracko, *supra* note 452, at 400-02.

[455] Even those who adopt the position that having gone through male puberty confers an athletic advantage do not attribute this advantage to these features. *See, e.g.*, Lambelet Coleman, *supra* note 454, at 118 (relying on testes to determine whether someone is male, but not because the testes confer an athletic advantage); David Epstein, *Why I Changed My Mind About the Caster Semenya Case*, SLATE (Sept. 18, 2020, 5:50 AM), https://slate.com/culture/2020/09/caster-semenya-ruling-testosterone-in-sports.html [https://perma.cc/A6XB-FYG9] (noting that "nobody thinks a penis is the source of the male advantage in sports").

[456] In *B.P.J.*, the Fourth Circuit declined to grant summary judgment in favor of either party because of conflicting evidence on the question of whether "[e]ven without undergoing . . . puberty, do people whose sex is assigned as male at birth enjoy a meaningful competitive advantage over cisgender girls?" *See* B.P.J. v. W. Va. State Bd. of

be understood as an effort to deny transgender girls and women access to female athletics.[457]

Laws like Idaho's treat endogenous (naturally occurring) hormones as determinative of sex even when someone undergoes hormone treatment that suppresses or augments endogenous hormones.[458] Under those circumstances, endogenous hormones do not determine athletic ability; hormones currently circulating in the body do. Yet these laws ignore biological function in favor of biological form. Laws like this one cannot be too concerned with equality of opportunity because they would allow a transgender boy who has increased his testosterone levels through treatment to participate against girls, because the statute does not consider circulating hormone levels.[459] The state's true interest is in what the body *represents* rather than what the body *does*.

Educ., 98 F.4th 542, 561 (4th Cir. 2024). While "defendants' expert contended that cisgender boys perform better than cisgender girls in some fitness contests even before puberty," the plaintiff highlighted that this expert also "admitted that these alleged differences are 'modest,' that no studies have examined the performance of transgender girls, and that no studies have addressed whether the 'modest' differences in athletic performance between pre-pubertal cisgender boys and pre-pubertal cisgender girls are attributable to innate biological causes rather than social causes, such as greater encouragement of athleticism in young boys." Brief of Plaintiff-Appellant B.P.J. at 42 n.7, B.P.J. v. W.Va. State Bd. of Educ., 98 F.4th 542 (4th 2024) (Nos. 23-1078, 23-1130) (citations omitted). As the Ninth Circuit recognized, the weight of the evidence favors the plaintiff. *See Hecox*, 104 F.4th at 1084 (citing "a medical consensus that the primary known driver of differences in athletic performance between elite male athletes and elite female athletes is the difference in [circulating] testosterones levels" beginning at puberty (internal quotation marks omitted)); Handelsman et al., *supra* note 449, at 803 (noting that "[p]rior to puberty, there is no sex difference in circulating testosterone concentrations or athletic performance").

457 *Hecox*, 104 F.4th at 1086 (affirming the district court's "ruling that Idaho's interest was not in 'promoting sex equality' but 'excluding transgender women and girls from women's sports entirely'" (quoting 479 F. Supp. 3d 930, 983 (D. Idaho 2020))); *B.P.J.*, 98 F.4th at 556 ("The undisputed purpose — and only effect — of [the state law's] definition [of sex] is to exclude transgender girls from the definition of 'female' and thus to exclude them from participation on girls sports teams.").

458 *See Hecox*, 104 F.4th at 1075 ("[T]he Act does *not* allow sex to be verified by a transgender woman's levels of circulating testosterone, which can be altered through medical treatment.").

459 I raise this possibility not to suggest even a remote likelihood of it happening, but to highlight the irrationality of the state's definition of sex.

Courts have reached mixed results in cases with transgender girls raising challenges to laws like this one. In one case, *D.N. v. DeSantis,* the district court upheld such a law based on a traditional understanding of sex as biology. The court stated that "it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes," and that "[t]his is not an overbroad generalization."[460] But this does not follow. Because it is only true "on average," this is precisely the type of "overbroad generalization" that the Court has struck down.[461] The court declined to consider the plaintiff's assertion that even granting average physical differences, the law was unconstitutional as applied to transgender girls like her who "begin [hormone] treatments at a young age" and thus are similarly situated to cisgender girls so that their exclusion does not advance the state's interest.[462]

Another district court did take up the plaintiff's argument that she was similarly situated to cisgender girls because of the hormone treatments she underwent: "Given B.P.J.'s concession that circulating testosterone in males creates a biological difference in athletic performance, I do not see how I could find that the state's classification based on biological sex is not substantially related to its interest in providing equal athletic opportunities for females."[463] This also does not follow. If "medical consensus" is "that the largest known biological cause of average differences in athletic performance between [males and females] is circulating testosterone beginning with puberty,"[464] then ignoring the effect of hormone treatments that determine circulating testosterone levels makes no sense. Nor does defining sex for athletic purposes based on "reproductive biology and genetics,"[465] as the law in

[460] *See* D.N. by Jessica N. v. DeSantis, 701 F. Supp. 3d 1244, 1256 (S.D. Fla. 2023) (quoting B.P.J. v. W. Va. State Bd. of Educ., 649 F. Supp. 3d 220, 231 (S.D.W. Va. 2023), *rev'd*, 98 F.4th 542 (4th Cir. 2024)).

[461] United States v. Virginia, 518 U.S. 515, 533 (1996) (barring reliance on "overbroad generalizations about the different talents, capacities, or preferences of males and females").

[462] *D.N. by Jessica N.*, 701 F. Supp. 3d at 1259-60 (refusing to consider as-applied challenge).

[463] *B.P.J.*, 649 F. Supp. 3d. at 231.

[464] *Id.* (alteration in original).

[465] W. VA. CODE § 18-2-25d(b)(1).

this case did. Circulating hormone levels do not have any necessary connection with "reproductive biology and genetics" and instead may be determined by hormone suppression or augmentation. On this evidence, treating two persons with the same circulating testosterone level differently fails to advance the state's interest, regardless of the average characteristics of men or women.[466] In its decision reversing the district court's grant of summary judgment to the school board in this case, the Fourth Circuit made clear that the factual question of the impact of hormone treatment was precisely what plaintiff's equal protection challenge turned on.[467]

The Ninth Circuit sided with a transgender female plaintiff in a similar case that did not fall prey to these types of errors. Instead, that court followed the approach suggested above based in functional physiology, relying on the "medical consensus" that circulating testosterone level after puberty is the primary driver of male athletic advantage; that a transgender female who has undergone hormone suppression resembles a cisgender female in hormonal make-up; and thus that a transgender female with such a hormonal profile is "similarly situated" to a cisgender female for purposes of the law.[468] On the right evidence, the state can rely on hormone levels to segregate sports,[469] like it might sometimes rely on other physiological classifications in athletics.[470]

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[466] *See supra* notes 142–147, 362–368 and accompanying text.

[467] *See B.P.J*, 98 F.4th at 561 (stating the "one final question for purposes of B.P.J.'s as-applied equal protection challenge: Even without undergoing . . . puberty, do people whose sex is assigned as male at birth enjoy a meaningful competitive advantage over cisgender girls?").

[468] *See* Hecox v. Little, 479 F. Supp. 3d 930, 975, 982 (D. Idaho 2020) (questioning whether transgender females "actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular"), *aff'd*, 104 F.4th 1061 (9th Cir. 2024).

[469] *See Hecox*, 479 F. Supp. 3d. at 984 (concluding that "the Act's definition of 'biological sex' intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance").

[470] *Cf.* Cahill, *Irreconcilable Differences*, *supra* note 128, at 1143 (arguing that "defenders of sex segregation in sports should bear the burden of showing why sex segregation is preferable to, say, segregation on the basis of 'height, weight, or skill rather than solely on gender,' as already occurs in some sports, like wrestling"). A number of elite sports

2. Subordination

Biological advantage is not the only reason some states police women's sports. Four decades ago, the Ninth Circuit rejected a challenge brought by cisgender males seeking access to a girls' team based on "promoting equality of athletic opportunity" due to "physiolog[y]" *and* to "redressing past discrimination against women in athletics."[471] In other words, sex segregation in athletics is a product not just of the body, but of sex as a social class. Regulating on the basis of sex to redress the subordinating effects of a history of discrimination could be a legitimate interest on the social understanding of sex.

We can see the Court "reasoning from anti-subordination values in defining constitutional equality" in *United States v. Virginia*.[472] As *Virginia* instructs, a sex classification "can compensate . . . to advance full development of the talent and capacities of our Nation's people" but cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and female" or otherwise "create or perpetuate the legal, social, and economic inferiority of women."[473] As this quotation suggests, relying on sex to redress women's social disadvantage need not rely on "overbroad generalizations."[474] This is because "all women, even those not demonstrably materially affected by it, a[re] subject to ambient discrimination on the basis of sex."[475]

apply a hormone-level rule to both transgender and cisgender athletes. *See, e.g.*, Molly Hurford, *The UCI Announces Changes to Its Policy on Transgender Athletes*, BICYCLING (June 17, 2022, 3:06 PM), https://www.bicycling.com/news/a40320907/uci-transgender-policy-2022/ [https://perma.cc/J8VQ-6LNC] (reporting on policy of determining eligibility for transgender athletes based on circulating testosterone levels); Press Release, World Athletics, *supra* note 451, at 1258 (announcing policy of determining eligibility for cisgender athletes with differences of sex development based on circulating testosterone levels).

[471] Clark, *ex rel.* Clark v. Az. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982).

[472] Siegel & Siegel, *supra* note 237, at 774 (reading *Virginia* to express the view that sex equality law "requires the judiciary closely to examine laws that classify on the basis of sex but allows government to differentiate between men and women so long as 'such classifications [are] not . . . used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women").

[473] United States v. Virginia, 518 U.S. 515, 533-34 (1996).

[474] *Id.*

[475] Case, *Quest for Perfect Proxies*, *supra* note 119, at 1454 n.39.

One might wonder whether the state can still have a legitimate interest in relying on sex to redress social disadvantage after the Court's decision in *Students for Fair Admissions*. In that case, the Court reiterated its rejection of "societal discrimination" as a "compelling interest" that can justify relying on race.[476] This decision is unlikely to limit the state's use of sex for this purpose. Blackletter law applies strict scrutiny to race classifications while applying more forgiving intermediate scrutiny to sex classifications.[477] Even if the Court's treatment of sex classifications has in fact been something "closer" to strict scrutiny, as some commentators have suggested,[478] the Court's race jurisprudence is unlikely to hang over the remedial use of sex. In *Virginia*, the Court, with only one justice dissenting, suggested its approval of the use of sex classifications for this type of compensatory purpose.[479] *Virginia* came in the same year that the Court pronounced a prohibition on the use of race for the same reason.[480] The Court's distinct treatment of sex and race in the very same term indicates the Court's longstanding willingness to apply a more lax approach to the use of sex than to the use of race for anti-subordination purposes, perhaps because of the

[476] Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 208 (2023) (internal quotation marks omitted).

[477] *Compare id.* at 206-07 (describing "strict scrutiny" as asking "whether the racial classification is used to further compelling governmental interests," and "whether the government's use of race is 'narrowly tailored' — meaning 'necessary' — to achieve that interest"), *with* Craig v. Boren, 429 U.S. 190, 197 (1976) (noting that intermediate scrutiny invalidates sex-based classifications unless they "serve important governmental objectives" by means that are "substantially related to achievement of those objects").

[478] Sunstein, *supra* note 255, at 72-73 (describing *Virginia* as moving the doctrine from intermediate scrutiny to something "closer" to strict scrutiny); *see also Virginia*, 518 U.S. at 579 (Scalia, J., dissenting) (describing the decision as an "unacknowledged adoption of what amounts to (at least) strict scrutiny").

[479] *Compare Virginia*, 518 U.S. at 533 n.7 (noting that "it is the mission of some single-sex schools to dissipate, rather than perpetuate, traditional gender classifications" and suggesting that such schools would be permissible), *with* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

[480] *See* Shaw v. Hunt, 517 U. S. 899, 909-10 (1996) (in a case about the Voting Rights Act, stating that "an effort to alleviate the effects of societal discrimination is not a compelling interest").

"pervasive intuition" that "[s]ex distinctions are not always harmful (or based on animus) the way race distinctions are."[481]

Still, distinguishing sex classifications properly combating subordination from those improperly perpetuating stereotypes is not an easy task. Drawing this line requires carefully scrutinizing both the purpose and the effect of the law in question.[482] Courts have emphasized the context-sensitive nature of the inquiry.[483] As the Supreme Court has explained, "[d]iscrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration of the uniqueness of the 'disadvantaged' individuals."[484]

Returning to athletics, appreciating the social role of sex sheds light on what might otherwise amount to puzzles in the context of sex segregation there. First, who is considered similarly situated to cisgender female athletes. In *B.P.J.*, the district court stated that the plaintiff's position that cisgender "boys [with] circulating testosterone levels similar to the average girl because of medical conditions or medical interventions" would not be "similarly situated [to cisgender girls]" for purposes of the Equal Protection Clause "is inconsistent with [plaintiff's] argument that the availability of hormone therapies makes transgender girls similarly situated to cisgender girls."[485] But those two positions are only "inconsistent" if hormone levels *alone* are what justify

[481] Siegel, *She the People*, *supra* note 172, at 954-56; *see also Students for Fair Admissions*, 600 U.S. at 208 ("Our acceptance of race-based state action has been rare for a reason. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,'" and "[t]hat principle cannot be overridden except in the most extraordinary case." (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943))).

[482] *See Virginia*, 518 U.S. at 535-36 (requiring that "'benign' justifications" should "not be accepted automatically," that "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded," and that the sex classification serve the remedial purpose it sets out to achieve).

[483] *See* Hecox v. Little, 104 F.4th 1061, 1091 (9th Cir. 2024) ("Heightened scrutiny analysis is an extraordinarily fact-bound test.").

[484] Cal. Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 289 (1987).

[485] B.P.J. v. W. Va. State Bd. of Educ., 649 F. Supp. 3d 220, 232 (S.D.W. Va. 2023), *rev'd*, 98 F.4th 542 (4th 2024).

sex segregation in athletics. If sex as a social class is another justification, these two positions are perfectly consonant. On this view, cisgender boys and cisgender girls with similar hormone levels are not similarly situated because of distinct social experiences that situate them differently with regard to the state's asserted interest of relying on sex to "redress[] past discrimination against women in athletics."[486]

Second, the reason why society has segregated sports by sex and not by other biological features that are at least as correlated with athletic success, like height in many sports.[487] If states were focused on equality of athletic opportunity, it might seem odd to sex segregate athletics with its questionable relationship to biological difference, especially below elite levels of competition, and permit a foot or more of height difference in sports within the sex classification. The social understanding of sex can help to explain why sports are segregated by sex and not typically by physiological features like height.

Third, the controversy surrounding the exclusion of cisgender female athletes like Caster Semenya from elite women's competition based on hormone levels.[488] Semenya was assigned female at birth and has been treated as such her whole life.[489] In addition to respecting her gender identification, her exclusion is contrary to the social understanding of sex and one of the reasons for sex segregation in athletics — as a remedy for class-wide status-based discrimination.

Determining whether any particular use of sex to combat subordination is justified, in athletics or otherwise, requires a context-dependent inquiry that falls outside the margins of this Article.[490] My

[486] Clark *ex rel.* Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982).

[487] *See* Ivy & Conrad, *supra* note 454, at 123 (noting that sports are not segregated on the basis of height, even though "height is a natural physical characteristic that can confer large competitive advantages, much larger than the 8-12 percent being attributed to testosterone").

[488] *See* Longman, *supra* note 444.

[489] *See id.*

[490] A proposed Title IX regulation setting forth criteria for participation in sex-separate athletic teams recognizes the context-dependent nature of the inquiry. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R.

aim has been to show how redressing social subordination is a legitimate use of sex under equal protection doctrine. Determining whether any use of sex in this way is permissible requires subjecting the sex classification in question to the exacting scrutiny that equal protection requires.

3. Symbol

I turn now to sex segregation in bathrooms and the use of sex as symbol. We have long known that the sex segregation of bathrooms has little to do with biology or privacy.[491] As several cases have now held, there is no reason to exclude transgender students from the bathrooms they seek to access on the basis of privacy.[492] As the Fourth and Seventh Circuits tell it: "[T]he [school] Board's policy is not substantially related to its important interest in protecting students' privacy" because "the Board ignores the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'"[493] For the same reason,

pt. 106) (requiring consideration of the sport, level of competition, and grade or education level).

[491] *See* Franke, *supra* note 149, at 82 (arguing that "there are no significant differences in male and female anatomy that require separate and distinct sanitary facilities," and that "[a]lthough privacy may be an important cultural value, it is not a 'real difference' of the kind courts demand when it requires that separate facilities be justified by real and demonstrative differences"); Erving Goffman, *The Arrangement Between the Sexes*, 4 THEORY & SOC'Y 301, 316 (1977) ("[T]he sequestering arrangement [of the sexes for bathroom use] as such cannot be tied to matters biological, only to folk conceptions about biological matters. The *functioning* of sex-differentiated organs is involved, but there is nothing in this functioning that *biologically* recommends segregation; *that* arrangement is totally a cultural matter."). To the extent the state interest is in privacy, enhancing privacy mechanisms would serve this interest better than sex segregation. *See* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L. J. 78, 141-42 (2019) (noting how bathrooms, with their "flimsy walls and large gaps," offer "privacy as pretense").

[492] *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613-14 (4th Cir. 2020); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1052-53 (7th Cir. 2017).

[493] *Grimm*, 972 F.3d at 613-14; *accord Whitaker*, 858 F.3d at 1052-53 (reasoning that sex segregation "does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door").

though, there is no reason to exclude *anyone* from the bathroom on the basis of privacy.

If privacy does not justify sex-segregated bathrooms, what, if anything, does? The meaning of sex segregation, like many social practices, is not obvious on its face, and turns in large part on context. As Justice Thurgood Marshall noted: "A sign that says 'men only' looks very different on a bathroom door than a courthouse door."[494] A feminist icon no less than Ruth Bader Ginsburg wrote that bathrooms were segregated by sex "without implying inferiority."[495] Perhaps sex-segregated bathrooms fight women's subordination by enhancing their safety in light of the history of sexual and other violence and abuse of women.[496] If they could be shown to do so in purpose and effect, they could withstand scrutiny. But it is not at all clear that sex segregation enhances rather than undermines safety, because, among other reasons, "where all people use the same restroom, more people would be present, and would-be assailants could no longer expect to find only potential 'victims' in the restroom."[497]

Not everyone would agree with Marshall's or Ginsburg's[498] view of the benign meaning of the "men only" sign on a bathroom door. Professors Liz Sepper and Deborah Dinner highlight the view that sex-segregated bathrooms are premised in the idea of "women as inherently vulnerable . . . and men as inherently predatory."[499] The sex segregation of bathrooms has been connected to the subordination of women not just in purpose but in effect, as the absence of female restrooms has been

494 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in part and dissenting in part).

495 *See* Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21.

496 *See generally* W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 YALE L. & POL'Y REV. 227, 229 (2018) (arguing that "a key purpose of sex-separation in bathrooms was to protect women and girls from sexual harassment and sexual assault in the workplace and other venues").

497 Sepper & Dinner, *supra* note 491, at 142 (noting that "unisex multiuser facilities might have improved safety"); *cf.* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1756-62 (1998) (arguing that sex segregation facilitates sexual harassment).

498 *See supra* notes 494–495 and accompanying text.

499 *See* Sepper & Dinner, *supra* note 491, at 142.

used to exclude women from employment and public accommodations.[500] Sex-segregated bathrooms may also be undergirded by now-rejected notions of heteronormativity.[501]

Let me introduce one more possible explanation for sex-segregated bathrooms: sex as symbol.[502] Social scientists have studied symbols as touchstones of culture.[503] Symbols can help "to order the world and make it conceptually manageable."[504] The symbolic use of sex is unencumbered by any need to serve a biological or functional purpose. Its role is in ordering and making meaning.[505] As sociologist Erving Goffman explained about bathrooms in 1977: "[W]hat one has is a case of institutional reflexivity: toilet segregation is presented as a natural consequence of the difference between the sex-classes, when in fact it is rather a means of honoring, if not producing, this difference."[506] This is sex as symbol.[507]

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[500] *See id.* at 140-41 (discussing also how sex-segregated toilets may not be equal, noting difficulty of measuring equality but considering urination opportunities or wait times).

[501] *See* Naomi Schoenbaum, *Heteronormativity in Employment Discrimination Law*, 56 WASHBURN L.J. 245, 248-52 (2017) (explaining that same-sex spaces might have been thought of as no-sex spaces under heteronormative ideas of sex).

[502] Symbols "confer[] order, coherence, and significance upon a people, their surroundings, and the workings of their universe." KEITH H. BASSO & HENRY A. SELBY, MEANING IN ANTHROPOLOGY 3 (1976).

[503] *See* Janet Hoskins, *Symbolism in Anthropology*, *in* 23 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 860, 860 (2d ed., 2015) (explaining that symbols "transmit[] pattern[s] of meaning" that allow people "to communicate, perpetuate, and develop their knowledge about and attitudes toward life" (internal quotation marks and citation omitted)).

[504] *Id.* at 862.

[505] For example, sex difference is "a remarkable organizational device" for maintaining class relations, with "gender, not religion, [a]s the opiate of the masses." Goffman, *supra* note 491, at 315 (explaining that because "the deepest sense of what one is — one's gender identity — is something that is given its initial character from ingredients that do not bear on ethnicity or socio-economic stratification, . . . we all acquire a deep capacity to shield ourselves from what we gain and lose by virtue of our placement in the overall social hierarchy").

[506] *Id.* at 316.

[507] *Cf. id.* at 307 (in studying the arrangement of the sexes, focusing on "what *symbolic* reading is given to the arrangement" (emphasis added)).

When it comes to bathrooms, sex may be a remnant and reminder of the way we were. As Professors Sepper and Dinner have explained, a spate of laws requiring sex segregation were passed at the moment when greater equality between the sexes was coming into place in the law, in response to the fear "that sex equality would obliterate, as far as possible, the distinction between the sexes."[508] Goffman captured this notion of sex for its own sake by describing sex segregation in places like bathrooms as a "with-then-apart rhythm" for public life, "as if equality and sameness were a masquerade that was to be periodically dropped."[509] Perhaps we are willing to continue sex segregation for this type of symbolic purpose precisely where the stakes feel the lowest — bathrooms, not courtrooms.[510]

If the only purpose of a sex classification is to serve as a symbol, this would be insufficient to withstand scrutiny on a facial challenge.[511] In cases brought by transgender plaintiffs seeking access to bathrooms without facially challenging the classification, the sex classification should be understood in social rather than somatic terms. As noted above, there is nothing about the body that is related to the privacy of bathrooms as they are currently used — "by entering a stall and closing the door"[512] — so any biological distinction is irrelevant. The question then is what grants sex its important symbolic function. On the social understanding of sex, the reason why sex matters is because of how it constitutes us all as social beings. If the state segregates bathrooms, it should do so on the basis of a social understanding of sex. I explain how to do so in the next Part.

C. Who Counts

If sex is a social kind for equal protection purposes, then how should the class of women (or men) be defined? Drawing from a rich

[508] *See* Sepper & Dinner, *supra* note 491, at 139 (internal quotation marks omitted).

[509] Goffman, *supra* note 491, at 316.

[510] Crucially, the stakes can be extraordinarily high — life or death — for those who are denied access to the bathroom that accords with their identity.

[511] *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (requiring an "exceedingly persuasive" justification).

[512] Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No.1 Bd. of Educ., 858 F.3d 1034, 1052-53 (7th Cir. 2017).

philosophical and transfeminist literature on what defines the class of women, this Section explains how a social understanding of sex joins cisgender and transgender women as a class (and cisgender and transgender men as a class). This Section argues that those who are socially marked as women and treated as such should count as women, regardless of the body, because of a sufficiently common and salient social experience, notwithstanding some variation among the class.[513] This Section further argues that even those transgender women who are not perceived as female are subject to norms of femininity, whether adopted or not, that are sufficient to bring them within the class of women. The same could be said of men as a social class.[514]

Courts have already recognized that transgender persons face discrimination that is some species of sex discrimination. The Supreme Court has held that discrimination because of transgender identity is necessarily discrimination because of sex,[515] and lower courts have held that transgender girls face discrimination that renders them similarly situated to cisgender girls.[516] However, as explained earlier, these rulings don't go far enough in explaining why cisgender and transgender women can be joined as a social class united by a shared experience of subordination.[517]

An intersectional analysis shows the way.[518] Transfeminist scholarship has powerfully explored the commonalities between the subordination

[513] *See* Haslanger, *supra* note 191, at 45 ("Women are those who occupy a particular *kind* of position, viz., one of sexually-marked subordinate.").

[514] *See id.* at 42 ("[L]ocat[ing] the social classes men and women in a broad structure of subordination and privilege....").

[515] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (holding in the context of a statutory ban on sex discrimination that transgender discrimination is per se sex discrimination).

[516] *See* Hecox v. Little, 104 F.4th 1061, 1082 (9th Cir. 2024) (noting that "transgender women, like women generally . . . have historically been discriminated against, not favored").

[517] *See supra* notes 94–100 and accompanying text.

[518] For the classic texts of transfeminism, see JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 13 (2d ed. 2016); Emi Koyama, *The Transfeminist Manifesto*, *in* CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY 244, 245 (Rory Dicker & Alison Piepmeier eds., 2003) (describing transfeminism as "a movement by and for trans women who view their liberation to be intrinsically linked to the liberation of all women" that "stands up for trans and non-

of trans women and the subordination of all women, both as a matter of theory and as a matter of practical reality. First, the theory. The class of women includes those persons who are subordinated as women or are subordinated in sufficiently similar ways, regardless of any biological or physiological features. Returning to the work of philosopher Sally Haslanger: "[O]nce we focus our attention on gender as social position, we must allow that one can be a woman without ever . . . having a female body."[519]

Once sex is a social class not limited to those with female bodies, we can appreciate that the phenomenon of being subordinated as a woman affects women of all stripes, cis and trans. As transfeminist scholar Julia Serano has explained, much of the discrimination that trans women face is what she terms "transmisogyny," the intersection of transphobia and misogyny.[520] Serano distinguishes between oppositional sexism (based in the belief in a rigid divide between male and female) and traditional sexism (based in the belief that maleness is superior to femaleness) and locates much of the oppression of transgender women as rooted in the latter.[521] Transmisogyny places trans women squarely within the social class of women:

> The idea that femininity is subordinate to masculinity dismisses women as a whole and shapes virtually all popular myths and stereotypes about trans women.
>
> . . .
>
> In a male-centered gender hierarchy, where it is assumed that men are better than women and that masculinity is superior to femininity, there is no greater perceived threat than the

trans women alike, and asks non-trans women to stand up for trans-women in return"). For surveys of the literature, see Talia Mae Bettcher, *Trans Feminism: Recent Philosophical Developments*, 12 PHIL. COMPASS 1, 2 (2017) ("Trans feminism explicitly proceeds from the recognition of the intersections of sexist and transphobic oppressions."); Susan Stryker & Talia M. Bettcher, *Introduction: Trans/Feminisms*, 3 TRANSGENDER STUD. Q. 5 (2016).

[519] Haslanger, *supra* note 191, at 38.

[520] *See* SERANO, *supra* note 518, at 14-15 ("When a trans person is ridiculed or dismissed not merely for failing to live up to gender norms, but for their expression of femaleness or femininity, they become the victim of a specific form of discrimination: trans-misogyny.").

[521] *See id.* at 14.

> existence of trans women, who despite being born male and inheriting male privilege 'choose' to be female instead. By embracing our own femaleness and femininity, we, in a sense cast a shadow of a doubt over the supposed supremacy of maleness and masculinity.[522]

Catharine MacKinnon puts it this way: "Under male dominance, in transitioning, trans women lose status," and "[t]rans women are doubly intersectionally discriminated against as women and as trans, triply if of color. . . . Trans women, as women, become newly sexualized as targets for incursion, abuse, and devaluation."[523]

As a practical matter, trans women are subordinated in a variety of ways *as women*, that is, they face the same mechanisms of sex-based oppression that cisgender women face and that render sex a coherent social kind.[524] Both cisgender and transgender women experience high rates of violence, which is especially pronounced among Black cisgender and transgender women.[525] Simply being a woman can be dangerous, and trans women are "particularly vulnerable."[526] Trans women may be

[522] *Id.* at 3, 15.

[523] MacKinnon, *A Feminist Defense*, *supra* note 202, at 94.

[524] *See* Koyama, *supra* note 518, at 252 ("[T]rans women are targeted because we live as women."); Talia Bettcher, *Feminist Perspectives on Trans Issues*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, https://plato.stanford.edu/Archives/win2022/entries/feminism-trans/ (last updated Jan. 8, 2014) [https://perma.cc/7SY3-T2CE] ("Many trans women, because they are *women*, are well acquainted with mechanisms of sexism and sexual violence.").

[525] *Compare* Sari Reisner, JoAnne Keatley & Stefan Baral, *Transgender Community Voices: A Participatory Population Perspective*, 388 LANCET 327 (2016) (citing high rates of violence against transgender women), *and Dismantling a Culture of Violence*, HUM. RTS. CAMPAIGN FOUND., https://reports.hrc.org/dismantling-a-culture-of-violence (last visited Sept. 8, 2024) [https://perma.cc/A9RX-DEFE] (citing high rates of violence, including killings, against Black transgender women, with racism and sexism as factors), *with* Jessica Leight, Comment, *Intimate Partner Violence Against Women: A Persistent and Urgent Challenge*, 399 LANCET 770 (2022) (citing high rates of violence against cisgender women), *and* ASHA DUMONTHIER, CHANDRA CHILDERS & JESSICA MILLI, THE STATUS OF BLACK WOMEN IN THE UNITED STATES 119-21(2017), https://iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17.pdf [https://perma.cc/A4YT-L5UY] (citing high rates of violence, including killings, against Black cisgender women, with racism and sexism as factors).

[526] Koyama, *supra* note 518, at 252 (stating that violence against women is "a systematic function of the patriarchy to keep all women subjugated" and "trans women, like other groups of women who suffer from multiple oppressions, are particularly

assaulted by men when their trans status is revealed.[527] The discovery of the victim's trans identity, especially a penis, can trigger or exacerbate a violent attack.[528] This phenomenon is sufficiently common that it has served as the basis for a defense in criminal law, the Trans Panic Defense, for men who have murdered trans women after discovering their trans identity.[529] Underscoring the disjunction between the social meaning of sex and biology, perhaps the greatest symbol of the male body — the penis — does not negate but rather heightens sex-based subordination of trans women as women.

Sexuality too has been a tool of subordination of the whole class of women. On one theory of women as a social class, "the linchpin of the subordination of women, the impetus and structure of women's gendered status as second class, is sexuality."[530] Sexuality as a tool of oppression operates against trans women, too. Julia Serano has explained how the media "hypersexualizes" trans women and how these depictions suggest that women, whether transgender or cisgender, "have no worth beyond their ability to be sexualized. . . . [The media's and] audience's fascination with the feminization of trans women is a by-product of their sexualization of all women."[531]

Like cisgender women, transgender women face discrimination in the workplace for being women. Some of this may be for failing to conform to sex stereotypes, that is, for being perceived as insufficiently feminine.[532] Some of this may be in the form of traditional sexism, that

vulnerable to violence compared to women with non-trans privilege"). *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*] (exploring violence against women of color as a product of intersecting racism and sexism).

[527] Koyama, *supra* note 518, at 253.

[528] *Id.*

[529] *See* Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1415, 1424 (2020) (describing defense where a man kills a transgender woman with whom he was intimate upon discovery that the victim was transgender).

[530] MacKinnon, *Exploring Transgender Law*, *supra* note 108, at 6-7 ("[T]his has nothing whatsoever to do with biology, which serves, however powerfully, as sexuality's after-the-fact attributed naturalized rationalization and supposed ratification.").

[531] SERANO, *supra* note 518, at 16, 45.

[532] *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228, 235, 251 (1989) (plurality) (holding that it was prohibited sex discrimination for a cisgender woman to be denied a

is, simply for being women. Consider one telling case, *Schroer v. Billington*.[533] There, a transgender woman was denied a job at the Library of Congress after she told the employer that she was transgender and would be presenting as a woman.[534] One of the reasons the employer gave for denying her the job was the definition of traditional sexism: that the people to whom the plaintiff would report "would perceive her to be a woman, and would refuse to believe that she could possibly have the credentials [experience in Special Forces] that she had."[535] In other words, simply because she is a woman, she could not be qualified for the job.[536] Another case of employment discrimination against a transgender woman who was fired as an airline pilot — an overwhelmingly male occupation — smacks of similar traditional sexism.[537]

Despite the shared experiences of transgender and cisgender women, there are of course differences in their experiences. Yet these differences do not undermine transgender women's inclusion. Teachings from intersectionality theory show us how. That theory, developed by Professor Kimberlé Crenshaw, powerfully explained how Black women's experiences differ from white women's experiences, but that they are nonetheless cohered by the identity of being women.[538] Excluding trans women from the class of women because of their different experience undermines not only trans women, but *any* woman who has been (or could be) excluded on the basis of different experiences, including Black women, lesbian women, and disabled

promotion for being viewed as an insufficiently "feminine" woman because an employer may not "evaluate employees by assuming or insisting that they matched the stereotype associated with their group"), *with* Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (holding that it was prohibited sex discrimination for a transgender woman to be denied a position for being viewed as an "insufficiently feminine woman"). *See generally* Schoenbaum, *The New Law of Gender Nonconformity*, *supra* note 52, at 888-99 (discussing employment discrimination common to transgender and cisgender women).

533 *Billington*, 577 F. Supp. 2d at 293.

534 *Id.* at 299, 305.

535 *Id.*

536 *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (identifying sex discrimination in "overbroad generalizations about the different talents, capacities, or preferences of males and females").

537 *See* Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 840 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081, 1081-82 (7th Cir. 1984).

538 *See* Crenshaw, *Demarginalizing the Intersection*, *supra* note 416, at 140.

women.[539] Intersectionality instructs that we are each the product of multiple identities, and that these identities are not mutually exclusive, but mutually constitutive.[540]

There continues to be pushback from some corners of feminist thought to a shift in the meaning of sex. The opposition would locate womanhood in living one's entire life as female and the commonalities that are presumed to flow from this.[541] One commentator locates these common experiences primarily in the body, assuming that the following experiences are exclusive to cisgender women: "[S]uffer[ing] through business meetings with men talking to their breasts," "w[a]k[i]n[g] up after sex terrified they'd forgotten to take their birth control pills," "cop[ing] with the onset of their periods in the middle of a crowded subway," or "the fear of being too weak to ward off rapists."[542]

This understanding of sex problematically biologizes the social experience of being a woman — reappropriating the tool of biology that has historically been used to oppress women.[543] And it employs "overbroad generalizations"[544] about the experiences of transgender women who do in fact suffer some of these same indignities.[545] Transgender women share with cisgender women a paramount concern with the need for control over their bodies, including freedom from

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[539] *See* Emi Koyama, *Whose Feminism Is It Anyway? The Unspoken Racism of the Trans Inclusion Debate*, *in* THE TRANSGENDER STUDIES READER 698, 704 (Susan Stryker and Stephen Whittle eds., 2006) (arguing that the exclusion of trans women from the class of women is inherently racist for this reason).

[540] *See* Crenshaw, *Mapping the Margins*, *supra* note 526, at 1242 (arguing for the importance of exposing the intersecting identities of Black and woman and that "ignoring difference within groups contributes to tension among groups").

[541] *See* Elinor Burkett, Opinion, *What Makes a Woman?*, N.Y. TIMES (June 6, 2015), https://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html ("People who haven't lived their whole lives as women . . . shouldn't get to define us [women]. . . . They haven't traveled through the world as women and been shaped by all that this entails.").

[542] *See id.*

[543] *See supra* notes 202–298 and accompanying text.

[544] United States v. Virginia, 518 U.S. 515, 533 (1996).

[545] *See, e.g.*, Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 WL 6112790, at *2 (S.D. Ill. Dec. 27, 2021) (recounting how transgender woman housed in men's prison was subject to ongoing sexual assault and harassment).

violence and sexual abuse.[546] While transgender women may not worry about having forgotten to take a birth control pill, they may worry about their access to and use of these very same hormones[547] — a worry now heightened for transgender and cisgender women alike.[548]

This is not to deny that trans women at one time likely experienced male privilege. However, acknowledging this does not mean that trans women should be excluded from the class of women. Appreciating why this is so again calls on intersectionality theory. Trans women experience "a dynamic interaction between male privilege and the disadvantage of being [both] trans" and women.[549] While a trans woman may have some access to male privilege, "at the same time she experiences vast emotional, social, and financial disadvantages for being trans" and for being a woman.[550] These intersecting identities undermine the claim that trans women are inherently more privileged than other women.

Some feminists have also dismissed trans women as antithetical to the feminist project for reinforcing sex stereotypes that feminism has long tried to combat.[551] While it is true that many popular depictions of trans women assume that they "want to achieve a stereotypically feminine appearance and gender role," this is not the case.[552] There is a distinction between identifying as a woman and projecting a feminine image, with many trans women, just like many cis women, "who do not follow, or

[546] *See supra* notes 524–525 and accompanying text.

[547] *See* Koyama, *supra* note 518, at 255 ("[T]he hormones that many trans women take are similar in origin and chemical composition to what non-trans women take for birth control, emergency contraception, and hormone replacement therapy. As trans women, we share concerns over safety, cost, and availability of these estrogen-related pills.").

[548] *Dobbs* has called into question the legal right to access these hormones for all women. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

[549] Koyama, *supra* note 518, at 248.

[550] *Id.*

[551] *See* SERANO, *supra* note 518, at 16.

[552] *Id.* at 41.

feel inclined to follow, norms of feminine behavior."[553] The media's focus on trans women's compliance with stereotypical feminine gender norms is "built on a foundation of unspoken misogyny": "[T]hat women have no worth beyond the extent to which they can be sexualized."[554]

To the extent that trans women present in stereotypically feminine ways, we should blame them no more than we blame cisgender women for doing so, and probably (a lot) less. Trans women, like all women, make choices about their presentation within constraints, including a "binary gender system."[555] They "are encouraged and sometimes required to adopt the traditional definition of femininity" both "to be accepted and legitimatized by the medical community," and to be safe and comfortable in the world, which often depends "on how well [they] can 'pass' as women."[556]

What about trans women who do not present as women in a socially legible way? There is a strong case to include them in the social class of women as well. The social class of women is constructed not only by how others treat women, but by the dynamic between one's identity and the social norms that regulate that identity. As philosopher Katharine Jenkins argues, one need not be treated as a woman by others to become subject to the dominant (subordinating) ideology of female sex.[557] Rather, this can be accomplished by one's own subjective identification as a woman, because "the oppressive nature of the social position of 'woman' plays a role in shaping female gender identity."[558] Once one identifies as a woman, she becomes subject to the dominant ideology of what it means to be a woman, regardless of whether she feels moved to comply with this ideology, and regardless of how others treat her.[559] As

[553] *See id.* at 35 ("[T]here are as many types of trans women as there are women in general."); Katharine Jenkins, *Amelioration and Inclusion: Gender Identity and the Concept of Woman*, 126 ETHICS 394, 409 (2016).

[554] SERANO, *supra* note 518, at 47.

[555] Koyama, *supra* note 518, at 246.

[556] *Id.*

[557] *See* Jenkins, *supra* note 553, at 410-11.

[558] *Id.* at 410, 412 ("In the context of current dominant ideology, having a female gender identity means having an internal 'map' that is formed to guide someone who is subordinated on the basis of [female sex].").

[559] *See id.* at 411 (explaining that "having a female gender identity does not necessarily involve having internalized norms of femininity in the sense of accepting them on some

Pulitzer prize-winning transgender author Andrea Long Chu has rendered this phenomenon: "Cis women hate when trans women envy them, perhaps because they cannot imagine that they are in possession of anything worth envying. . . . I would give anything to hate myself the way you do, assuming it's different from the way I hate myself. . . ."[560]

The idea of the regulatory force of identity working through subjective processes imposed from within rather than (only) enforced from without is supported by decades of post-modern theory. This body of thought teaches that norms of behavior regulate not just from the outside in, but from within the subject herself. Borrowing from Foucault, Judith Butler explains how "regulatory power not only acts upon a preexisting subject but also shapes and forms that subject," and thus "to become subject to a regulation is also . . . *to be brought into being as a subject precisely through being regulated*."[561] The regulatory force of gender norms brings women "into being" merely through their identification as women. In this way, gender norms form women from the inside out.

Being perceived as a woman and treated as such is sufficient to bring a woman "into being," but it is not necessary.[562] Identifying as a woman,

level," but "[r]ather, what is important is that one takes those norms to be relevant to oneself; whether one feels at all moved to actually comply with the relevant norms is a distinct question").

[560] Andrea Long Chu, *The Pink*, *in* ISSUE 34: HEAD CASE (Friends of the Pod & Coalition of the Willing eds., 2019), https://www.nplusonemag.com/issue-34/politics/the-pink/ [https://perma.cc/9YK7-MZ7D].

[561] JUDITH BUTLER, UNDOING GENDER 41 (2004) (emphasis added).

[562] MacKinnon has reached a similar conclusion with some shared reasoning, but without a focus on being subject to the regulatory force of gender norms:

> "[W]oman" is a combination of sex and gender, such that sex can be a sufficient condition for being a woman, but has never been a necessary one. Sufficient, because most women so assigned at birth do not affirmatively identify with all women and women's interests, or even as women really, many (even most) are not critical of male supremacy, but remain constrained to live women's lives whether they see it that way or not. They are our people. Not necessary, because not only are trans women living women's lives — often much the worst of that life — but the transgender women I know, anyway, embrace womanhood consciously, are far more woman-identified than a vast swath of those assigned female at birth (so-called "natal women") that I also know . . . . Trans women are, politically, women. They are our people too.

and thereby becoming subject to hegemonic gender norms (whether they are abided or not) is another way that a woman is brought "into being" as a social kind. This means that either being designated female at birth or having a female gender identity — one's internal sense of one's sex — would control sex designations. The law in many respects (though not all) is moving in this direction.[563]

Scholars have advocated for gender identity as the touchstone of sex but have largely done so in the register of autonomy.[564] While autonomy may provide an important normative justification for respecting gender identity, my argument sounds a different note. It is precisely the *constraining* effects of gender norms that should make gender identity the touchstone of sex, as it is these gender norms that can have a limiting effect on all those who adopt the identity.

Where does this leave trans men? Trans men have lived part of their lives, sometimes a significant part of their lives, subject to female subordination. They have also been subject to the subordination that accompanies being trans. If a trans man seeks access to a space for (socially subordinated) women, should he be included? On the one hand, "since trans men are also vulnerable to sexism, transphobia, and the interblending thereof, trans feminism would be ill-advised to exclude them from its purview."[565] On the other hand, at least some trans men gain status in transitioning.[566]

How trans men fit within a binary system of sex will be context dependent. For example, the admissions policies of women's colleges with regard to transgender women and men have been the subject of controversy for some time.[567] To the extent that women's colleges limit

MacKinnon, *A Feminist Defense*, *supra* note 202, at 92.

[563] *See* Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335, 335 (2024).

[564] *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1860 (2022).

[565] Bettcher, *supra* note 518, at 2.

[566] KRISTEN SCHILT, JUST ONE OF THE GUYS: TRANSGENDER MEN AND THE PERSISTENCE OF GENDER INEQUALITY 161 (2011) (explaining that "some [trans men] benefit from . . . the advantages that men in general gain from the subordination of women — particularly educated, white [trans men] who physically pass as men"); MacKinnon, *A Feminist Defense*, *supra* note 202, at 94 (noting that in transitioning "trans men gain [status]").

[567] On whether transgender male and female students fit within the purposes of women's colleges, see HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? 85-110

admission on the basis of sex to address discrimination against women, transgender women should be included.[568] Transgender men should be too, if they so choose, as they too have been subject to similar forms of discrimination for much of their lives. When sex is used for symbolic purposes — as with bathrooms, perhaps — trans men should be treated as men.

As for nonbinary persons, it is consistent with the thrust of the arguments here to include nonbinary persons assigned female at birth in women's colleges as they likewise have faced discrimination as girls or women for a large part of their lives (and sports if they meet any relevant physiological requirements).[569] A full consideration of how nonbinary persons fit within a sex equality jurisprudence premised on a sex binary is outside the scope of this Article.[570] However, a shift away from a biological understanding of sex, as this Article advocates, holds promise for destabilizing sex-based classifications, which will facilitate the embrace of nonbinary persons into a law — and life — of sex equality.

CONCLUSION

This Article has shown how the conventional reading of constitutional sex equality jurisprudence as grounded in the biology of sex is wrong and harmful to the cause of transgender equality and to the cause of sex equality writ large. It has argued instead for a reading of constitutional

(2017); Editorial, *Transgender Students at Women's Colleges*, N.Y. TIMES (May 5, 2015), https://www.nytimes.com/2015/05/05/opinion/transgender-students-at-womens-colleges.html; Ruth Padawer, *When Women Become Men at Wellesley*, N.Y. TIMES (Oct. 15, 2014), https://www.nytimes.com/2014/10/19/magazine/when-women-become-men-at-wellesley-college.html.

[568] These are private undergraduate institutions that are granted an exception from Title IX's ban on sex discrimination, *see* 20 U.S.C. § 1681(a)(1), so litigation under the federal constitutional or statutory law is unlikely. I discuss these schools as a salient social example.

[569] Alternatively, sex-based admissions regardless of their contours may not be justified if schools can serve their mission of fighting historical sex subordination by admissions on the basis of shared politics rather than shared identity. *See* DAVIS, *supra* note 567, at 111-40.

[570] For an article that explores this question, see Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 956 (2019).

sex equality based in sex as a subordinated social class that could unite the class of women and the class of men, whether cisgender or transgender, and considered how this understanding of sex would stand up to scrutiny.

The story I have told is mostly one of law. But the ends this Article seeks to achieve in reframing our understanding of sex cannot be attained through law alone. This must also be a political project. We have work to do to strive for broader acceptance of sex as a social class. Public approval of this new concept of sex will require a social movement whose goal is to promote solidarity between transgender women and cisgender women by emphasizing the social rather than the biological dimensions of sex. This movement could be forged through the shared interests of at least some strands of feminism and transfeminism: bringing an end to the sex binary — the division of the sexes into two classes — and the sex hierarchy — the superiority of masculine over feminine.[571] Such a movement can seek to demonstrate how combatting discrimination against transgender women pushes back against limiting notions of femininity that constrain all women.[572] Only when we recognize how the categories of male and female limit us all will we reach true sex equality.

[571] *See* SERANO, *supra* note 518, at 16 (urging advocates of transgender equality both to "challenge binary gender norms" and to "challenge the idea that femininity is inferior to masculinity" because "by necessity, trans activism must be at its core a feminist movement").

[572] *See* Jules Gleeson, *Judith Butler: 'We Need to Rethink the Category of Woman*,' GUARDIAN (Sept. 7, 2021), https://www.theguardian.com/lifeandstyle/2021/sep/07/judith-butler-interview-gender [https://perma.cc/FAC6-B8CL] ("Politically, securing greater freedoms for women requires that we rethink the category of 'women' to include those new possibilities.").