Defining "Woman": Biological Sex and Gender

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"Can you provide a definition for the word 'woman'?" Senator Marsha Blackburn of Tennessee.

"I can't. . . . Not in this context. I'm not a biologist." Judge Ketanji Brown Jackson of the United States Court of Appeals for the District of Columbia Circuit.[1]

"Take notes, Madame Speaker, I'm about to define what a woman is for you. XX chromosomes, no tallywacker." Representative Madison Cawthorn of North Carolina.[2]

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[1] USA Today, *Justice Ketanji Brown's Confirmation Judicial Committee Hearing*, (Mar. 23, 2022), https://www.youtube.com/watch?v=BWtGzJxiONU [https://perma.cc/9XC3-BFCH]. This exchange occurred on March 22, 2022, during the United States Senate Committee on the Judiciary hearing on the nomination of Judge Ketanji Brown Jackson to become the 116th Associate Justice of the United States Supreme Court.

[2] This statement occurred on the floor of the House of Representatives on April 4, 2022. John Bowden, *Madison Cawthorn Mocked for Defining a Woman as Someone with 'No Tallywhacker,'* INDEP. (Apr. 4, 2022, 7:32 PM), https://www.the-independent.com/news/world/americas/us-politics/madison-cawthorn-woman-tallywhacker-speech-b2050750.html [https://perma.cc/W8G6-3GDE].

I. INTRODUCTION

Arguments about how to define "woman" and the meaning of "sex" more generally have become a proxy of sorts for the culture wars currently animating disagreements between conservatives and liberals with respect to the rights of sexual minorities and the role that gender identity plays in society more generally, whether in education, sports, marriage, or reproduction.[3] The general assumption by those on the political right is that "sex" has traditionally meant biological sex—that a determination of whether one is male or female, a man or a woman, could be easily resolved by resorting to the science of biology. By contrast, those on the political left have argued for a more inclusive definition of "sex," one that embraces difference in terms of gender identity and that places importance on an individual's own understanding of identity. It is generally assumed that this broader definition of "sex," one that considers aspects of sex or gender beyond issues of biology, is of relatively recent vintage, a product of progressive or "woke"[4] thinking.

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[3] *See* Tom Joyce, *People Are Waking up to the Reality of Gender*, WASH. EXAM'R (June 30, 2022, 12:00 AM), https:/www.washingtonexaminer.com/restoring-america/community-family/people-are-waking-up-to-the-reality-of-gender [https://perma.cc/9KTM-57ZL] (addressing polls concerning public views of gender identity and expressing hope that "we may see the end of woke gender ideology's dominance in popular culture"); Zachary Faria, *The Washington Post Doesn't Think Only Women Can Get Pregnant*, WASH. EXAM'R (July 13, 2022, 5:32 PM), https://www.washingtonexaminer.com/opinion/1274312/the-washington-post-doesnt-think-only-women-can-get-pregnant [https://perma.cc/V9KG-WK23] (recounting exchange between Senator Josh Hawley and Law Professor Khiara Bridges about whether "people with the capacity for pregnancy" has the same meaning as "women," in the context of a Senate Judiciary Hearing about abortion, and opining that the Washington Post reporting of that exchange indicated that it "is now being held hostage to gender ideology").

[4] Although the term "woke" is used as a pejorative by the political right, its common meaning is "alert to injustice and discrimination in society." *Woke*, OXFORD ENG. DICTIONARY (Sept. 2023), https://www.oed.com/dictionary/woke_adj2?tab=meaning_and_use [https://perma.cc/RVW2-VTX2]. The term was added to the Oxford English Dictionary in 2017. *Id.* See Perry Bacon, Jr., *What We Really Mean When We Say 'Woke,' 'Elites' and Other Politically Fraught Terms*, WASH. POST (Sept. 19, 2022, 9:07 AM) https://www.washingtonpost.com/opinions/2022/09/19/decoding-political-phrases-midterms-perry-bacon

This Article, by reviewing legal authority on the meaning traditionally given to the term "sex," under both the anti-discrimination laws and the United States Constitution, challenges the notion that the broader understanding of that term is of recent vintage, at least as a legal matter. Instead, although some courts and some individual judges and justices have declared that "sex" meant only "biological sex," the way in which that term was interpreted, from the earliest court decisions, casts doubt on those assertions. Instead, the term "sex" has traditionally been defined to include traits and characteristics beyond biological sex, to the extent that biological sex is understood to be determined by chromosomes or anatomy.

Next, this Article challenges the notion that the science of biology defines "biological sex" as a binary classification, defining who is a woman and who is a man simply by reference to chromosomes and anatomy. Instead, the science of biology does not support binary classifications, and gender identity itself appears to have a biological basis. The simplicity that social conservatives seek with respect to the definition of "woman" by resorting to biology is not supported by current understandings of biology itself.

These insights, while important for determining the appropriateness of extending protection of the anti-discrimination laws to gender identity, and perhaps to sexual orientation,[5] are also important in determining the general scope of the anti-discrimination laws and the nature of the protection that those laws provide against all forms of sex discrimination, including sexual harassment and sexual stereotyping. That is, an insistence that protection against discrimination on the basis of "sex" is limited to aspects of sex determined by chromosomes or anatomy serves not only to deny protection to sexual minorities but also risks limiting the protections provided generally to all individuals with respect to sex- and gender-linked traits or characteristics.

II. WHAT THE SUPREME COURT HAS SAID ABOUT "SEX" DISCRIMINATION

Neither the Supreme Court's traditional interpretation of the statutory and constitutional prohibitions against sex discrimination nor its more recent jurisprudence support a limitation of the term "sex" to what is often called "biological sex," that is, physical characteristics associated with sex or gender, whether those characteristics stem from genetics or aspects of anatomy, such

[https://perma.cc/7B6H-9W9L] (noting that the term 'woke' was once largely used by Black people, invoking the idea to stay mindful of racism in America, but is now used "by political figures on the center-left, center-right and right as a kind of epithet against those they view as too left-wing on racial, gender and LGBTQ issues"), for a discussion of the use of the term "woke" by the political right.

[5] While many of the issues that arise with respect to gender identity, both with respect to legal issues and issues of science, may also apply with respect to sexual orientation, this Article focuses on issues of gender identity, and issues concerning sexual orientation are generally beyond the scope of this Article.

as genitals. Instead, the Court has repeatedly found violations of the statutory and constitutional prohibitions against sex discrimination when employers and other actors imposed disadvantages on the basis of sex- or gender-based characteristics totally unrelated to biology and instead based on societal or other expectations or prejudices.

A. The Supreme Court's Traditional Understanding of "Sex" Discrimination

One of the earliest cases decided by the United States Supreme Court under Title VII of the Civil Rights Act of 1964 was *Phillips v. Martin Marietta Corp.*,[6] decided only five and one-half years after the effective date of the Act. *Martin Marietta* involved a claim by a woman with preschool-aged children that she had been discriminated against on the basis of sex, because of the employer's policy of not accepting job applications from women with preschool-aged children, while employing men who had children of that age.[7] The lower courts had granted summary judgment against the employee, but the Court reversed in a per curiam opinion. The Court held that the employer had violated the Act by having different hiring policies for men and women unless the employer could show that "[t]he existence of such conflicting family obligations" were "demonstrably more relevant to job performance for a woman than for a man" and therefore sufficient to establish the existence of a bona fide occupational qualification.[8] Justice Marshall's concurrence chided the majority for falling "into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination."[9] He noted that Congress intended to prevent employers from refusing to hire women based on "characterizations of the proper domestic roles of the sexes."[10]

This case, decided by the Court over 50 years ago, recognized that the prohibition on sex discrimination in Title VII reached more than just biological sex. The employer did not discriminate against Ida Phillips and other women with preschool-aged children because of a biological difference between the sexes, such as the capacity for pregnancy. Instead, the employer discriminated because of assumptions about the parental responsibilities of those women—as compared to those of men—based on societal stereotypes about the role of women in society. And while the majority of the Court hinted that reliance on such stereotypes might be justified, even the majority recognized that that reliance was a form of sex discrimination in violation of

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[6] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[7] *Id.* at 543.

[8] *Id.* at 544.

[9] *Id.* at 545 (Marshall, J., concurring).

[10] *Id.* In support of his position, Justice Marshall pointed to the federal Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, which rejected the notion that the bona fide occupational qualification defense could be established based on "stereotyped characterizations of the sexes." *Id.* (citing 29 C.F.R. § 1604 (a)(1)(ii)).

Title VII. Accordingly, even this early Court recognized that the meaning of "sex" in Title VII was not limited to biological differences between the sexes.[11]

Another Supreme Court case that demonstrates that the term "sex" in Title VII has not been interpreted to be limited to biological sex is *Price Waterhouse v. Hopkins*.[12] *Price Waterhouse*, decided more than a decade and a half after *Martin Marietta,* is still almost three and one-half decades old. It is true that the principal decision in the *Price Waterhouse* case represents only a plurality of the Court, but portions of Justice O'Connor's concurrence suggest that she also agreed on the meaning of "sex," or "gender"[13] as she termed it, in Title VII.

The *Price Waterhouse* case involved a claim by Ann Hopkins that she was denied partnership in an accounting firm because she was viewed as not sufficiently feminine, not because of any biological or anatomical trait. The stated objections to her candidacy for partnership included that she was "macho" and needed a course in "charm school;" she was told that to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[14]

Although much of the plurality's decision was about the issue of causation, that decision also addressed the status of sexual stereotyping as a form of sex discrimination. The plurality declared that:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of

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[11] Puzzlingly, Justice Alito's dissent in Bostock v. Clayton Cty, 590 U.S.644, 666-68 (2020), discussed below, asserts that the Court's decision in *Martin Marietta* "merely held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex." *Id.* at 717–20 (Alito, J., dissenting). But he does not explain why employer discrimination based on parental responsibilities has anything to do with biology, genetics, or anatomy. Indeed, it does not. Unless Alito is using "biological sex" to mean any differences between men and women, even those that are unrelated to biology, his statement about the *Martin Marietta* case being about biological sex is clearly wrong.

[12] Price Waterhouse v. Hopkins, 490 U.S. 228, 239–41 (1989).

[13] Both the plurality and Justice O'Connor used the term "gender" rather than "sex" in describing the type of discrimination engaged in by the employer and prohibited by Title VII. *Id.* at 229 (plurality opinion); *Id.* at 265–66 (O'Conner, J., concurring).

[14] *Id.* at 233–35 (plurality opinion).

> disparate treatment of men and women resulting from sex stereotypes."[15]

The plurality's analysis clearly indicated that reliance on sexual stereotyping in making employment decisions was unlawful sex discrimination under Title VII.[16] And reliance on sexual stereotyping—here, penalizing a woman for being too masculine and not acting or presenting in a feminine manner—has nothing to do with biology, anatomy, or genetics, but instead is connected to social expectations for men and women.

Justice O'Connor's concurrence also recognized that reliance on sexual stereotypes is a form of sex discrimination. Her opinion described the district court's findings that sexual stereotyping played a role in the denial of partnership and then noted that Hopkins "had proved discriminatory input into the decisional process."[17] Justice O'Connor also noted that "respondent here is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process."[18] While Justice O'Connor had disagreements with the plurality about the role of causation in this case, she seemed to be on the same page as the plurality with respect to the status of sexual stereotyping as sex discrimination.[19]

Cases decided under the U.S. Constitution also demonstrate that the Supreme Court has traditionally defined "sex" to include aspects of gender

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[15] *Id.* at 251 (alteration in original) (citing City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978)). The Court in *Manhart* also made clear that Title VII's prohibition against sex discrimination reached sexual stereotyping, by indicating that "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." 435 U.S. at 707.

[16] *Price Waterhouse*, 490 U.S. at 251 (plurality opinion). The plurality went on to note that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" because the plaintiff must show that the remarks actually played a role in the challenged employment decision and were not simply "stray remarks." *Id.* (plurality opinion). This language did not call into question the status of sex stereotyping as a form of sex discrimination, but merely makes clear that both intent to discriminate and causation are required to establish a violation of Title VII's prohibition against sex discrimination.

[17] *Id.* at 272 (O'Connor, J., concurring in the judgment).

[18] *Id.* at 273.

[19] The three-person dissent in *Price Waterhouse*, on the other hand, while declaring that "Title VII creates no independent cause of action for sex stereotyping," indicated that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent," but that the "ultimate question . . . is whether discrimination caused the plaintiff's harm." *Id.* at 294 (Kennedy, J., dissenting). It is not entirely clear whether the dissent was questioning the status of sex stereotyping as sex discrimination, or only asserting that a showing of causation was required for a violation of the statute. Later in the decision, the dissent noted that "Hopkins plainly presented a strong case . . . of the presence of discrimination in Price Waterhouse's partnership process." *Id.* at 295. This would seem to suggest that even the dissent believed that the evidence of sexual stereotyping in this case constituted the presence of discrimination.

beyond biological sex. In *Frontiero v. Richardson*,[20] decided nearly 50 years ago, the Court considered a due process challenge to a federal statute that allowed a male servicemember to claim his spouse as a dependent for purposes of fringe benefits regardless of actual dependent status while requiring a female servicemember to prove dependency to obtain those same spousal benefits.[21] The lower court had suggested that the purpose of the distinction made by the statute was based on administrative convenience, because of the fact that "the husband in our society is generally the 'breadwinner' in the family—and the wife typically the 'dependent' partner."[22] The plurality of the Court[23] had no difficulty concluding that this classification was a form of sex discrimination,[24] even though that discrimination had nothing to do with biological distinctions between men and women. The plurality noted that the Nation's "long and unfortunate history of sex discrimination" had caused legislation to be "laden with gross, stereotyped distinctions between the sexes."[25]

The three concurring justices disagreed with the position of the plurality that all classifications based on sex should be subject to strict scrutiny, instead determining that it was better to reserve that issue,[26] but nothing in their opinion suggests that they viewed the discrimination at issue in that case as anything other than a form of sex discrimination. This decision, then, represents another instance in which the Supreme Court found the constitutional prohibition against discrimination on the basis of sex to reach distinctions between men and women that had nothing to do with biology and everything to do with sexual stereotyping.[27]

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[20] Frontiero v. Richardson, 411 U.S. 677 (1973).

[21] *Id.* at 679 (plurality opinion).

[22] *Id.* at 679–82.

[23] The opinion announcing the judgment of the Court was written by Justice Brennan and joined by Justices Douglas, White, and Marshall. *Id.*at 677.

[24] *Id.* at 688 ("The sole basis of the classification established in the challenged statutes is the sex of the individuals involved.").

[25] *Id.* at 684–85.

[26] Frontiero v. Richardson, 411 U.S. 677, 691–92 (1973) (Powell, J., concurring in the judgment).

[27] The previous term, the Supreme Court unanimously held in *Reed v. Reed*, 404 U.S. 71 (1971), that an Idaho statute that gave priority to men over women in the designation of executor of an estate violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated on the basis of sex in an arbitrary manner. *Id.* at 76. The Idaho Supreme Court had indicated that "nature itself has established the distinction" and that the legislature had properly concluded that "in general men are better qualified to act as an administrator than are women." *Reed v. Reed*, 465 P.2d 635, 638 (Idaho 1970). While the Idaho Supreme Court may have been invoking biology when it indicated that "nature" was the cause of distinctions between men and women, neither the classification drawn by the Idaho statute nor its asserted justification had anything to do with biology but instead was the product of sexual stereotyping.

The Supreme Court's decision in *Craig v. Boren*[28] provides another example of the Court's application of the constitutional prohibition of sex discrimination to a classification based on stereotyped assumptions about sexual differences rather than biological differences. The classification in that case was an Oklahoma statute that allowed the sale of 3.2% beer to women at age 18 while prohibiting such sale to men until they reached the age of 21.[29] The Court rejected the use of "maleness" as a "proxy for drinking and driving,"[30] suggesting that laws of this type were likely the reflection of "social stereotypes."[31] The concurring opinion by Justice Stevens was more explicit in its reasoning. He rejected the notion that the distinction was based on any physical differences between men and women, noting that men generally have a greater capacity to consume alcohol than women because of their larger size.[32] He suggested that, instead, the distinction likely represents "nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket."[33]

Similarly, the Court's decision in *Stanton v. Stanton*[34] explicitly found a violation of equal protection when a Utah statute required child support for daughters only until age 18, but for sons until age 21, by noting the stereotypes that underlie the distinction:

> No 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. Women's activities and responsibilities are increasing and expanding. . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.[35]

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[28] Craig v. Boren, 429 U.S. 190, 204–05 (1976).

[29] *Id.* at 191–92.

[30] *Id.* at 197–204.

[31] *Id.* at 202 n.14.

[32] *Id.* at 212–13 n.4 (Stevens, J., concurring).

[33] *Id.* at 213 n.5.

[34] Stanton v. Stanton, 421 U.S. 7 (1975).

[35] *Id.* at 14–15 (citations omitted).

Again, the Court recognized as unconstitutional sex discrimination a classification based not on a physical or biological characteristic, but one based on societal stereotypes about gender.

The Court reached a similar conclusion in *Califano v. Westcott*,[36] in which it struck down a statutory provision providing Aid to Families with Dependent Children benefits to families whose dependent children were deprived of parental support because of the unemployment of the father but not when the mother became unemployed.[37] In rejecting the gender classification as not substantially related to important and valid statutory goals, the Court noted that the distinction was "part of the 'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of home and family life,'"[38] and therefore insufficient to save the classification from due process challenge.

B. The Supreme Court's Current Understanding of "Sex" Discrimination

The Supreme Court's recent decision in *Bostock v. Clayton County, Georgia*[39] presumably represents the Court's current understanding of the meaning of "sex" under Title VII of the Civil Rights Act of 1964. In that case, in the context of whether discrimination on the basis of sexual orientation and gender identity were forms of sex discrimination, the majority of the Court assumed, but did not decide, that "sex" in Title VII refers "only to biological distinctions between male and female."[40] But in spite of the Court's stated assumption, it is clear from a review of the rest of the majority's decision that the Court did not limit its understanding of that term to biological distinctions between men and women. Instead, the majority's opinion made clear that the statute's prohibition against sex discrimination prohibits consideration of sex- or gender-linked characteristics of men and women that have nothing to do with biology. Just a few pages after the Court's stated assumption about the meaning of "sex," the majority made clear that discrimination based on gender-linked, but not biological, traits also violates Title VII:

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[36] Califano v. Westcott, 443 U.S. 76 (1979).

[37] *Id.* at 79–80.

[38] *Id.* at 89 (citations omitted) (quoting Orr v. Orr, 440 U.S. 268, 283 (1979); *Stanton*, 421 U.S. at 10; Taylor v. Louisiana, 419 U.S. 522, 534 n.15 (1975)).

[39] Bostock v. Clayton Cty., 590 U.S. 644. 655 (2020).

[40] *Id.* The Court noted that employers in the cases before the Court argued that the term "sex" referred to "status as either male or female [as] determined by reproductive biology," while the employees contended that "the term bore a broader scope, capturing more than anatomy." *Id.* (alteration in original). The Court said that "because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female." *Id.*

> This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.[41]

The Court's language made clear that it believes that discrimination based on femininity or masculinity involves discrimination on the basis of sex, even though the Court surely does not view femininity or masculinity as biological characteristics. Instead, the majority appeared to be embracing the view that discrimination based on sexual stereotyping—requiring women to be feminine and men to be masculine—is a form of sex discrimination.

The dissent by Justices Alito and Thomas in *Bostock* argued that it is "a faulty premise" that Title VII forbids discrimination based on sex stereotypes,[42] arguing incorrectly that the Court's decision in *Price Waterhouse v. Hopkins*[43] does not support that premise.[44] But even if Alito were correct as to the status of discrimination based on sexual stereotyping as sex discrimination before the Court's decision in *Bostock*, he is clearly wrong

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[41] *Id.* at 659. The majority returned to its understanding that discrimination based on sexual stereotyping is a form of sex discrimination in another few pages when it declared "[s]o just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same." *Id.* at 662.

[42] *Bostock,* 590 U.S. at 699 (Alito, J., dissenting).

[43] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[44] *Bostock*, 590 U.S. at 699 (Alito, J., dissenting). Alito's dissent attempted to read the plurality's opinion in *Price Waterhouse* as rejecting the conclusion that Title VII prohibits discrimination based on sexual stereotypes, by citing to the language in that case indicating that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision." *Id.* at 251. But the plurality was not questioning the status of sex stereotyping as a form of sex discrimination; instead, it was indicating that causation, as well as intent to discriminate, was required for a Title VII violation. *See Price Waterhouse*, 490 U.S. at 231–33. What the plurality did say about the legality of sexual stereotyping makes clear that Alito is misreading the plurality decision:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Id. at 251 (alteration in original) (quoting City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 n.13 (1978). Justice Alito in his *Bostock* dissent also asserted, again wrongly, that the two concurring justices in *Price Waterhouse* did not "comment on the issue of stereotypes." *Bostock*, 590 U.S. at 700 n.17 (Alito, J., dissenting). As discussed above, Justice O'Connor's concurrence clearly does so. *See Price Waterhouse*, 490 U.S. at 261–79 (O'Conner, J., concurring).

afterward. In light of the Court's clear language about discrimination based on femininity and masculinity being unlawful under Title VII, Alito's indication that the Court "apparently finds [that argument] unpersuasive"[45] is not only wrong but disingenuous.

The Alito dissent insisted that Title VII's prohibition of discrimination because of sex was "as clear as clear could be" and that it "meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth."[46] The dissent also indicated that "until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex."[47] But, as discussed below, the dissent was wrong—demonstrably wrong—with respect to both of those assertions.

By his use of the term "biological sex," Justice Alito seemed to be referencing issues of genetics and anatomy, not other types of differences between men and women. In his *Bostock* dissent, he gave an example of what he seemed to think counts as a matter of biological sex, that is, issues concerning pregnancy. He noted the definition of "because of sex" in Title VII as including pregnancy, childbirth, and related medical conditions, which he said are conditions "biologically tied to sex."[48] He asserted that "[t]his definition should inform the meaning of 'because of sex' in Title VII more generally."[49] He did not say how that definition should inform the meaning of "sex": did he mean that only factors biologically linked to sex should be within that definition? Nor did he mention that the amendment of Title VII to add that definition of "sex," which includes, but is not limited to, pregnancy and related conditions, was made necessary because of the Supreme Court's initial conclusion that discrimination based on pregnancy

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[45] *Bostock*, 590 U.S. at 699 (Alito, J., dissenting).

[46] *Id.* at 686.

[47] *Id.* at 688.

[48] *Id.* at 695 n.16.

[49] *Id.* Alito is not the only judge to wrongly assert that protection for "sex" means only physiology. In his dissent in *Adams v. School Board of St. Johns County*, 968 F.3d 1286, 1318 (11th Cir. 2020) (Pryor, C.J., dissenting), *aff'd*, 3 F.4th 1299 (11th Cir. 2021), *rev'd en banc*, 57 F.4th 791 (11th Cir. 2022), Chief Judge Pryor, in the context of an equal protection challenge insisted that the Supreme Court "has long grounded its sex-discrimination jurisprudence in reproductive biology," citing a few of the Court's cases that, in fact, did address issues of reproductive differences between the sexes. But that some of the Court's cases reference reproductive issues does not mean that all of them do, as demonstrated above. And the dissent's assertion that "the Court's justification for giving heightened scrutiny to sex-based classifications makes sense only with reference to physiology,"*id.*, is just as wrong. As demonstrated above, the Court has justified its imposition of heightened scrutiny by reference to the dangers of sex stereotyping, being more likely to find sex discrimination to be justified when it is based on physiology and less likely to be justified when it is based on sex stereotyping. *See supra* text accompanying notes 20–38.

was not, in fact, a form of sex discrimination.[50] It is at least ironic that Alito now seems to believe that discrimination based on pregnancy is the paradigm form of sex discrimination when it took an act of Congress[51] for the Court to recognize that pregnancy was a form of sex discrimination.

Curiously, *Bostock* appears to be the first Supreme Court case in which the term "biological sex" was said to constitute the definition of the term "sex."[52] This seems to cast doubt on the assertion that the term "sex" has always meant "biological sex," given that that term has not generally been used by the Court. And even in other cases in which members of the Court discussed issues of biological differences based on sex or gender, they recognized that issues of "sex" involved issues other than biology.[53]

An example of this is the Court's decision in *Miller v. Albright*,[54] in which the Court rejected an equal protection challenge to a federal statute applying different standards for citizenship for an illegitimate child born abroad,

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[50] Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e–2(k) (1978).

[51] As the majority in *Young v. United Parcel Service Inc.*, 575 U.S. 206, 210 (2015), pronounced, "[t]he Pregnancy Discrimination Act makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy." *Id.* Even the dissent in *Young* indicates that the "thrust of the Pregnancy Discrimination Act is that pregnancy discrimination is sex discrimination." *Id.* at 244 (Scalia, J., dissenting).

[52] A Westlaw search with the term "biological sex" in quotation marks revealed only one other United States Supreme Court case, *Farmer v. Brennan*, 511 U.S. 825 (1994). That case involved a claim by a transgender female inmate that her Eighth Amendment rights against cruel and unusual punishment had been violated by her placement in the general male prison population, resulting in her rape. *Id.* at 829–30. The Court noted that "[t]he practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex." *Id.* at 829. A Westlaw search with the term "biological gender" in quotation marks revealed no Supreme Court cases.

[53] *See* J.E.B. v. Alabama, 511 U.S. 127, 156 (1994) (Rehnquist, C.J., dissenting) (In context of equal protection challenge to use of preemptory challenges in jury selection based on sex, stating: "[t]he two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought to the jury room."). *But see id.* at 157 n.1 (Scalia, J., dissenting) ("Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple."). It is not clear whether Scalia intended by this language to limit the term "sex" to physical characteristics or whether he was simply mocking the majority's use of what he viewed as politically correct language. Other parts of his opinion, such as when he notes that "[t]oday's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors," causes me to come down on the side of a mocking explanation for his language.

[54] Miller v. Albright, 523 U.S. 420 (1998).

depending on whether the child's mother or father was the U.S. citizen.[55] In an opinion announcing the decision of the Court, while assuming that the distinction made by the statute would be invalid if it were "merely the product of an outmoded stereotype,"[56] Justice Stevens indicated that the distinction was instead based on biological differences between the sexes:

> None of the premises on which the statutory classification is grounded can be fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex. The biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands. Indeed, it is the suggestion that simply because Congress has authorized citizenship at birth for children born abroad to unmarried mothers, it cannot impose any postbirth conditions upon the granting of citizenship to the foreign-born children of citizen fathers, that might be characterized as merely a byproduct of the strong presumption that gender-based legal distinctions are suspect.[57]

The opinion recognized that both sexual stereotyping and decisions based on biological sex can constitute discrimination based on sex; indeed, the opinion suggested that stereotyped decisions based on gender are more likely to implicate prohibitions on sex discrimination, while distinctions based on biology are more likely to be upheld against such challenges.[58]

The same sentiment about the relative relationship between classifications based on biology and classifications based on sexual

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[55] *Id.* at 424.

[56] *Id.* at 443.

[57] *Id.* at 444–45; *see also* Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 64 (2001) (upholding against an equal protection challenge aspect of an immigration statute requiring different actions by a father who is citizen than a mother who is a citizen with respect to establishing citizenship of a child born outside the United States, the Court indicated: "[t]he equal protection question is whether the distinction is lawful. Here, the 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."); *id.* at 68 (rejecting the notion that the distinction made by the statute was the result of a gender-based stereotype); *id.* at 76 (O'Connor, J., dissenting) (arguing the statutory provision was unconstitutional based on an "overbroad sex-based generalization").

[58] Justice O'Connor's opinion concurring in judgment makes this point more explicitly by indicating that "[i]t is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny." *Miller*, 523 U.S. at 452 (O'Connor, J., concurring in judgment). Justice Breyer's dissent also agreed with this statement. *Id.* at 476 (Breyer, J., dissenting). Justice Ginsburg's dissent agreed with that statement and took the position that the distinctions made by the statute were, in fact, based on gender stereotypes and therefore were invalid. *Id.* at 469–70 (Ginsburg, J., dissenting).

stereotyping can be found in the majority opinion in *United States v. Virginia*,[59] the case in which the Supreme Court struck down the decision of the state of Virginia to deny women admittance to Virginia Military Institute.[60] The Court majority, in an opinion authored by Justice Ginsburg, indicated that although classifications based on sex were to be judged by heightened scrutiny, all such classifications were not proscribed because "[p]hysical differences between men and women . . . are enduring."[61] But, the Court said, sex-based classifications cannot be used "to create or perpetuate the legal, social, and economic inferiority of women."[62] The majority's opinion then went on to establish that the justifications behind the exclusion of women were based primarily on generalizations about the "capacities or preferences of men and women,"[63] that is, stereotypes.

III. WHAT THE LOWER COURTS HAVE SAID ABOUT THE MEANING OF "SEX"

As indicated above, Justice Alito's dissent in *Bostock v. Clayton County, Georgia*[64] asserted that the "clear as clear could be" meaning of "sex" discrimination under Title VII was "discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth."[65] He also insisted that "until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex."[66] Perhaps he meant that *when* the circuit courts were considering issues of sexual orientation and gender identity in particular, the circuit courts interpreted "sex" to mean biological sex, in order to deny the protection of the statute to sexual minorities; even then, the second of the two statements recounted above is not accurate. But the fact that some circuit courts were applying that outcome determinative standard—"sex" means biological sex only when sexual minorities are the ones asserting the right to be free from discrimination[67]—is a far cry from support for the assertion that the circuit

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

[60] *Id.* at 519.

[61] *Id.* at 533.

[62] *Id.* at 534.

[63] *See id.* at 540–44.

[64] Bostock v. Clayton Cnty, 590 U.S. 64 (2020).

[65] *Id.* at 686 (Alito, J., dissenting).

[66] *Id.* at 688.

[67] A Westlaw search using the term "biological sex" in quotation marks produced 49 cases from the federal circuit courts. Of those 49 cases, 25 of those cases were decided before 2017. Of those 25 cases, all but one address issues related to sexual orientation or gender identity. A Westlaw search using the term "biological gender" in quotation marks produced 11 cases from the federal circuit courts. Of those 11 cases, seven were decided before 2017. All but one of

courts generally interpreted "sex" in Title VII to be limited to biological sex, or, as Alito put it—discrimination based on genetic and anatomical characteristics and then only those present at the time of birth. The first of his two statements recounted above finds even less support in the decisions of the circuit courts, either before or after 2017.

A. General Meaning of "Sex" by Circuit Courts

In a number of different cases, the circuit courts have been required to determine the meaning of the term "sex," either in the context of statutory interpretation or in connection with determining the scope of constitutional protections against sex discrimination. In many of those cases, the courts did not limit the meaning of "sex" to genetic or anatomical characteristics present at birth or even to physical characteristics associated with gender generally. Instead, the circuit courts indicated that discrimination on the basis of a number of sex or gender-related characteristics, real or perceived, constituted unlawful sex discrimination.

In an early Title VII case, decided over 40 years ago, the Seventh Circuit concluded that the prohibition of discrimination on the basis of "sex" prohibited discrimination based on offensive, sex-based stereotypes. *Carroll v. Talman Federal Savings and Loan Ass'n of Chicago*[68] involved a challenge to the employer's policy requiring female employees to wear uniforms while allowing men of the same rank to wear normal business attire.[69] The court noted not only that the policy was discriminatory because it would be natural for customers to assume that the uniformed women had a less professional status than their non-uniformed male colleagues, but that the policy was also discriminatory because it was based on "offensive stereotypes prohibited by Title VII," that is, the employer's admitted assumption "that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can."[70]

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those cases addressed issues related to sexual orientation or gender identity. I do not suggest by this that all of these cases represent the use of the term or concept of biological sex in order to deny protections to sexual minorities; rather, my point is that the term or concept of biological sex was rarely at issue in cases that did not involve claims of discrimination by sexual minorities.

[68] Carroll v. Talman Fed. Sav. and Loan Ass'n of Chi., 604 F.2d 1028, 1029 (7th Cir. 1979).

[69] *Id.* at 1029. Men were allowed to wear suits, a sports jacket and pants, or "leisure suits," if worn with a jacket or tie. Women were required to wear color coordinated skirts or slacks and the choice of a jacket, tunic, or vest furnished by the employer. *Id.* at 1029–30. The certain days on which women were exempted from the uniform requirement were called "glamour days" by the employer. *Id.* at 1033 n.16.

[70] *Id.* at 1033, 1033 n.17. The dissenting judge seemed to be complaining about being accused of stereotyping, indicating that "the favorite putting-down remark that is resorted to when anyone is so bold as to delineate actual factual differences between men and women . . . is to accuse the person of indulging in stereotyping." *Id.* at 1034 (Pell, J., dissenting). Yet, it is a little hard to interpret his statement that the employer's dress code for female employees "is designed to create a businesslike rather than a fashion fair atmosphere" as anything other than

A number of circuit courts had expressly found that the term "sex" under Title VII included discrimination based on notions of masculinity or femininity. For example, in *EEOC v. Boh Brothers Construction Co.*,[71] a male supervisor subjected a male employee, an iron worker, to daily harassment, apparently because the employee used Wet Ones rather than toilet paper.[72] The court of appeals held that the Equal Employment Opportunity Commission (EEOC) had presented sufficient evidence to support the jury verdict for the EEOC, based on evidence that the supervisor engaged in the harassment because of his belief that the ironworker was insufficiently masculine—"not a manly-enough man"—and that evidence of sexual stereotyping was sufficient to establish that the harassment was because of "sex."[73] The discrimination at issue in this case was based on a perception of masculinity or femininity, not anatomical differences. According to the supervisor, he objected to the iron worker's use of Wet Ones to "wipe [his] ass" because they should be used by women or babies.[74]

An example in the statutory context concluding that "sex" included notions of femininity is found in the Eighth Circuit case of *Lewis v. Heartland Inns of America, LLC*.[75] In that case, the female plaintiff challenged her termination under Title VII, alleging that she had been terminated from her position at the front desk of a hotel because her appearance was "slightly more masculine," avoiding makeup and wearing her hair short; she was apparently not considered "pretty" enough and did not have the "Midwestern

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stereotyping women as unable to choose businesslike dress without the assistance of the employer's dress code. *Id.* at 1037.

[71] EEOC v. Boh Bros. Const. Co., 731 F.3d 444 (5th Cir. 2013).

[72] *Id.* at 449–50.

[73] *Id.* at 453–61. The supervisor expressly disclaimed perceiving the iron worker to be gay. He indicated that "I did not think he was queer or homosexual. Never did, do not now." *Id.* at 458. Interestingly, while one of the dissents found the evidence insufficient to establish a violation of Title VII, that dissent noted that the facts and language in the case were "not for tender ears" and that the "vulgarities can cast turmoil in a strong stomach." *Id.* at 470 (Jolly, J., dissenting). Another dissent saw the "hypersensitivity" blessed by the majority as nudging the law "in a direction that hastens cultural decay and undermines—if even just a little bit—an important part of what is good about private employment in the United States." *Id.* at 486–87 (Smith, J., dissenting). It is not clear what part of the supervisor's conduct the judge found important to the goodness of private employment—perhaps the right to call subordinates "pussy," "princess," or "faggot," or perhaps the right to approach a subordinate from behind and simulate anal intercourse with him. *See id.* at 449 (majority opinion).

[74] *Id.* at 450. I assume that it goes without saying that not only men, but also women and babies, have the anatomical features for which Wet Ones might be useful.

[75] Lewis v. Heartland Inns of America, 591 F.3d 1033 (8th Cir. 2010); *see also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (indicating in the Title VII context that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (citations omitted)).

girl look."[76] The court of appeals noted that the Supreme Court's decision in *Price Waterhouse*, as well as earlier (and later) circuit court cases, supported the conclusion that Title VII prohibits sex stereotyping.[77] Because the court concluded that the evidence provided by the plaintiff could be evidence of "wrongful sex stereotyping," the court found that the district court had incorrectly granted summary judgment for the employer, even though the plaintiff had not presented evidence of how men were treated.[78] Discrimination against women because they are not stereotypically feminine in appearance may be based on physical traits, but such discrimination is clearly not based on biological, genetic, or anatomical aspects of sex.[79]

An example of a court giving a broader definition of sex discrimination, including societal notions about the proper role of the genders, in the constitutional context is the Second Circuit case of *Back v. Hastings on Hudson Union Free School District*.[80] This case involved an equal protection challenge to the denial of tenure and subsequent termination of a school psychologist, based on allegations that those employment actions were based on her status as the mother of a young child and the belief that she could not have the necessary devotion to her job while at the same time being a good mother.[81] The court of appeals held that stereotyping about young mothers was a form of gender discrimination, regardless of whether the plaintiff had evidence about how fathers were treated.[82] The court relied on the theory of sexual stereotyping from the *Price Waterhouse* case, making clear that that theory applied "as much to the supposition that a woman *will* conform to a gender stereotype (and therefore will not, for example, be dedicated to her job), as

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[76] *Lewis*, 591 F.3d at 1035–36.

[77] *Id.* at 1038–39; *see also* Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1111–12 (9th Cir. 2006) (In the context of a bartender who lost her position because she refused to wear makeup, the court of appeals held that Title VII sex discrimination case could be made out based on evidence that sexual stereotyping played a role in challenged employment decision, although the court found a lack of evidence that the policy "was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear."). I am hesitant to even cite to this case, because I think the majority's analysis is so clearly wrong; I do so because the case does reflect that circuit courts were defining sex to include more than anatomical and genetic characteristics well before 2017. As a factual matter, however, it is the dissent that better understood that a policy indicating that women are professional only if they wear full makeup—foundation, blush, mascara, and lip color—while men are professional only if they do not, is the product of rank sexual stereotyping. *See id.* at 1114–16 (Pregerson, C.J., dissenting). The second dissent in the case even noted that the policy in this case, which the dissent would have found to be a violation of Title VII, was based not on "anatomical differences" but cultural norms about "what a 'real woman' looks like." *Id.* at 1118 (Kozinski, J., dissenting).

[78] *Lewis*, 591 F.3d at 1039–41.

[79] The decision whether to wear one's hair short or whether to wear makeup are not related to biology, anatomy, or genetics.

[80] Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 118–24 (2d Cir. 2004).

[81] *Id.* at 113.

[82] *Id.*

to the supposition that a woman is unqualified for a position because she does *not* conform to a gender stereotype."[83] That the court of appeals allowed the plaintiff's claim to avoid summary judgment makes clear that the court found sex discrimination in treating men and woman "differently simply because of presumptions about the respective roles they play in family life,"[84] characteristics that have nothing to do with genetic, anatomy, or other biological sexual differences.

B. Interpretation of "Sex" by Circuit Courts in Sexual Orientation and Gender Identity Cases

It is true that some circuit courts interpreting Title VII in the context of claims of sexual orientation and gender identity discrimination had defined "sex" narrowly to mean biological sex. In *Holloway v. Arthur Andersen & Co.*,[85] the transgender female plaintiff argued that the term "sex" under Title VII was synonymous with "gender," which would include gender identity, while the employer argued that the term "sex" "should be given the traditional definition based on anatomical characteristics."[86] The Ninth Circuit held that "Congress ha[d] only the traditional notions of 'sex' in mind,"[87] presumably

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[83] *Id.* at 119.

[84] *Id.* at 130; *see also* Chadwick v. WellPoint, Inc., 561 F.3d 38, 44 (1st Cir. 2009) (indicating in context of Title VII claim that "several circuits, including this one, have had occasion to confirm that the assumption that a woman will perform her job less well due to her presumed family obligations is a form of sex-stereotyping and that adverse job actions on that basis constitute sex discrimination").

[85] Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977). The Ninth Circuit later, in 2000, recognized that the approach taken by the court of appeals in *Holloway* had been overruled by the Supreme Court in the *Price Waterhouse* case. *See* Schwenk v. Hartford, 204 F.3d. 1187, 1201 (9th Cir. 2000).

[86] *Holloway*, 561 F.3d at 662.

[87] *Id.* Interestingly, the Seventh Circuit in *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572, 580 (7th Cir. 1997), indicated that "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination," and therefore Title VII did not reach sexual orientation and gender identity discrimination, but that court also concluded the heterosexual male teenager stated a claim of sex discrimination because he was harassed "because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his coworkers' view of appropriate masculine behavior"; he was harassed because he wore an earring. Whatever the court meant by the "traditional" meaning of sex, the court clearly did not mean "biological" sex as defined by anatomy or genetics, but instead recognized that the prohibition of sex discrimination extended to discrimination on the basis of sexual stereotypes. As the *Doe* court indicated:

> A woman who is harassed in the workplace with the degree of severity or pervasiveness that our cases require because her personality, her figure, her clothing, her hairstyle, or her decision not to wear jewelry or cosmetics is perceived as unacceptably "masculine" is harassed "because of" her sex even if the harassment itself is not explicitly sexual. In the same way, a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his

adopting the employer's traditional definition of "sex" as based on anatomy, although the court of appeals did state that the "manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally,"[88] a purpose that does not seem to be served by a restriction of the understanding of sex to anatomy, given that much discrimination on the basis of sex seems to have nothing to do with anatomy.

Curiously, in other cases, circuit courts insisted that "sex" under Title VII be given its "plain meaning," without actually defining the term. For example, in *Sommers v. Budget Marketing, Inc.,*[89] the Eighth Circuit upheld the district court's grant of summary judgment against the transgender female plaintiff.[90] The employer claimed that she was terminated because she had "misrepresented herself as an anatomical female" and that other female employees threatened to quit if she was allowed to use the restroom assigned to female personnel.[91] The district court had rejected her claim, indicating that it did not believe that Congress "intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual."[92] Accordingly, while the district court seemed to be defining sex as a matter of anatomy, and the court of appeals indicated that it was in agreement with the district court "that for the purposes of Title VII the plain meaning must be ascribed to the term 'sex,'"[93] it is still odd for the court of appeals not to have stated that plain meaning. Indeed, the court of appeals' later assertion that the "major thrust of the 'sex' amendment was towards providing equal opportunities for women" [94] seems somewhat at odds with a definition of sex as being confined to anatomical characteristics.

These cases seem less consistent with an insistence that "sex" in Title VII means only biological sex, based on genetics or anatomy, and more with the insistence that whatever "sex" means, it does not provide protection based on gender identity or sexual orientation.

> masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.

Id. at 581 (footnotes and citations omitted). Although the decision in *Doe* was vacated by the Supreme Court in light of the decision in *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75 (1998), see *City of Belleville v. Doe*, 523 U.S. 1001 (1998), the Seventh Circuit has expressly recognized that that action did not "call into question this circuit's holding regarding gender stereotypes." Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 704 n.3 (7th Cir. 2016).

[88] *Holloway*, 561 F.3d at 663.

[89] Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982).

[90] *Id.* at 750.

[91] *Id.* at 748–49.

[92] *Id.* at 749.

[93] *Id.* at 750.

[94] *Id.*

Some circuit courts, while recognizing that "sex" under Title VII might mean more than biological sex, defined that term in such a way as to expressly exclude claims of gender identity and sexual orientation and that appears to be intentionally outcome determinative. In *Etsitty v. Utah Transit Authority*,[95] the Tenth Circuit indicated its belief that the "plain meaning of 'sex' encompasses [nothing] more than male and female" and therefore "transsexuals" were outside of this "traditional binary conception of sex."[96] Of course, if one defines "sex" as binary, anyone who is non-binary necessarily will be excluded from this definition. Curiously, the court reached this conclusion in spite of its recognition of the complexity of "biological sexuality," that "sexual identity may be biological," and that "[s]cientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female."[97] It is hard to see this case as the product of serious legal analysis, rather than based on the conclusion that the law was not yet ready to recognize a broader definition of "sex" when the interests of gender identity and sexual orientation were at stake.[98]

A similar example in the context of a sexual orientation claim is the Second Circuit decision in *Simonton v. Runyon*.[99] In rejecting the gay male plaintiff's Title VII claim involving pervasive harassment, the court of appeals noted that "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation."[100] Curiously, although the court indicated that the term "sex" in Title VII included "gender" but excluded "sexual affiliation," the court did not define either of those terms.[101] It was apparently enough for the court to assert that

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[95] Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).

[96] *Id.* at 1222.

[97] *Id.*

[98] *Id.* While this case did not involve sexual orientation, the court cited to an earlier case indicating that Title VII did not extend to discrimination based on sexual orientation. *Id.* (citing Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1135 (10th Cir. 2005)). The court noted that "[a]lthough there is certainly a distinction between a class delineated by sexual orientation and a class delineated by sexual identity," that earlier case "demonstrates this court's reluctance to expand the traditional definition of sex in the Title VII context." *Id.*

[99] Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000).

[100] *Id.* at 36.

[101] Two statements in the court's opinion might be viewed as giving meaning to the term "gender." First, the court, without deciding the issue, notes that "[o]ther courts have suggested that gender discrimination—discrimination based on a failure to conform to gender norms—might be cognizable under Title VII." *Id.* at 37. Second, the court cited to another case, *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000), that distinguished between "sex," meaning biological sex, and "gender." *Id.* (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000)). Accordingly, to the extent that the court is giving a definition to gender, that definition did not appear to be limited to biological sex.

whatever the meaning of "gender," it did not include issues of sexual orientation.

Another pre-2016 case, while purporting to adopt a "traditional" definition of "sex," raised substantial questions about not only the meaning of that definition but also the appropriateness of that definition, or at least the way in which that definition shaped the application of Title VII to claims of sexual orientation discrimination. In the Seventh Circuit's first consideration of the case of *Hively v. Ivy Tech Community College*,[102] the court of appeals held that the lesbian plaintiff had failed to make out a claim under Title VII because her claim was one of sexual orientation, not sex discrimination.[103] In reaching that conclusion, the court cited to prior circuit precedent indicating that the ordinary and plain meaning of "sex" in Title VII "'implies that it is unlawful to discriminate against women because they are women and against men because they are men.'"[104] This is, of course, not so much a definition as it is a conclusion, and not even a very helpful one at that. What does it mean to discriminate against women because they are women? Based only on their genitalia or chromosomes or based on other characteristics? Employers, after all, rarely have access to information about their employees' genitalia or chromosomes. And how does one define or identify a woman? Again, employers generally rely on an employee's self-identification to determine an employee's gender.[105]

But the *Hively* court's analysis raises further doubts about the appropriateness of the "traditional" definition of "sex." The court made clear its understanding that the prohibition against sex discrimination reached discrimination based on gender stereotypes and also the incoherence of trying to distinguish between failure to conform with gender norms and sexual orientation discrimination. The court noted that "almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity."[106] But the

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[102] Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698 (7th Cir. 2016), *rev'd en banc*, 853 F.3d 339 (7th Cir. 2017).

[103] *Id.* at 699.

[104] *Id.* at 700 (quoting Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)).

[105] It is true, of course, that employers may seek identification from employees in connection with hiring decisions, including driver's licenses, state identification cards, social security cards, birth certificates, and passports. But depending on the laws and policies of the state or federal jurisdiction issuing those forms of identification, those forms of identification may tell the employer little about the employee's genitalia, chromosomes, or other gender characteristics. Those forms of identification may instead provide the employer information about the employee's self-identified gender.

[106] *See id.* at 704. The court of appeals indicated:

> It may be that the rationale appellate courts, including this one, have used to distinguish between gender non-conformity discrimination claims and sexual orientation discrimination claims will not hold up under future

court found against the lesbian plaintiff, concluding that her claim was one solely of sexual orientation discrimination while suggesting that it was time for the Supreme Court to address the "boundaries of gender discrimination under the 'sex' prong of Title VII,"[107] an invitation that the Court accepted in the *Bostock* case.[108]

The assertion that all circuit courts prior to 2017 defined "sex" in Title VII to mean only biological sex, even when gender identity and sexual orientation claims were at issue, is untrue. One clear example of the contrary is the decision of the Sixth Circuit in *Smith v. City of Salem*.[109] The case involved a claim by a transgender female firefighter of discrimination on the basis of sex in violation of Title VII.[110] The court of appeals reversed the district court's dismissal of the claim, rejecting the prior authority relied on by the district court as inconsistent with intervening Supreme Court authority—in particular, the Court's *Price Waterhouse* decision.[111] The *Smith* court noted that the "Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform

> rigorous analysis. It seems illogical to entertain gender non-conformity claims under Title VII where the non-conformity involves style of dress or manner of speaking, but not when the gender non-conformity involves the sine qua non of gender stereotypes—with whom a person engages in sexual relationships. And we can see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms.

Id. at 718.

[107] *Id.* at 715.

[108] *See* Bostock v. Clayton Cnty., 590 U.S. 644, 682–83 (2020). Even before the Supreme Court accepted the invitation in the *Bostock* case, the Seventh Circuit itself overruled it prior precedent in its en banc consideration of the *Hively* case. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 329, 350–51 (7th Cir. 2017). In that opinion, the majority noted the unhelpfulness of what it terms the "truism" of the "it is unlawful to discriminate against women because they are women and against men because they are men," saying "as if this resolved matters." *Id.* at 341 (quoting Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)). The court indicated that in cases of sexual orientation discrimination, as in cases of other forms of sex discrimination, employers are "policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man)." *Id.* at 346. The court of appeals ultimately concluded that sexual orientation was a form of sex discrimination because "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." *Id.* at 351. The dissent would have interpreted the term "sex" in Title VII to mean "biologically male or female" seemingly suggesting that that was a helpful definition. *Id.* at 362 (Sykes, J., dissenting),

[109] Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

[110] *Id.* at 567–68.

[111] *Id.* at 572–73.

to stereotypical gender norms."[112] At least two other circuits, prior to 2017, reached the same conclusion as to the scope of Title VII's prohibition against sex discrimination.[113]

Several circuit courts, also before 2017, recognized that the prohibitions of discrimination based on sex under other federal statutes and under the Constitution reached aspects of sex other than biological sex, as limited to issues of genetics or anatomy. The Eleventh Circuit in *Glenn v. Brumby*[114] recognized that the Equal Protection Clause's prohibition of discrimination based on sex extended beyond biological sex and also prohibited discrimination based on gender non-conformity, allowing the transgender plaintiff's claim that her employment had been terminated because she intended to transition in the workplace to proceed.[115] The court of appeals noted that "[e]ver since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes."[116]

The Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board*[117] considered a claim of sex discrimination under Title IX of the Education Amendments of 1972, challenging the school board's refusal to allow a high

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[112] *Id.* at 573. The *Smith* court did not go as far as to find gender identity discrimination to be a form of sex discrimination, but did conclude that the plaintiff's status as transgender did not prevent a claim of sex discrimination from being made: "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." *Id.* at 575; *see also* Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) ("A claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes.'").

[113] *See* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Thus, under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (indicating in the context of gender identity claim, that the Court's decision in *Price Waterhouse* made clear that Title VII "barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender"); *see also* Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that while "transsexuals" are not a protected class under Title VII, the court did read *Price Waterhouse* as establishing that "Title VII's reference to 'sex' encompasses both the biological differences between men and women and gender discriminations, i.e., discrimination based on a failure to conform to stereotypical gender norms").

[114] Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

[115] *Id.* at 1317–21.

[116] *Id.* at 1319.

[117] G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 580 U.S. 1168 (2017) (vacating lower decision in light of new guidance issued by Department of Education and Department of Justice on February 22, 2017), *later proceeding*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (upholding summary judgment for plaintiff on both his equal protection and Title IX claims).

school student to use the restroom consistent with his gender identity.[118] In determining the meaning of "sex" under that statute, the court of appeals noted that what the district court called "biological sex,"[119] based on reproductive organs, was not the only meaning of that term.[120] Referencing the then-effective Department of Education interpretation of Title IX as requiring transgender students to be allowed to use the restroom consistent with their gender identity, the court of appeals indicated that the term "sex" could also be understood to mean "the varying physical, psychological, and social aspects—or, in the words of an older dictionary, 'the morphological, physiological, and behavioral peculiarities'—included in the term 'sex.'"[121] The court of appeals rejected "a hard-and-fast binary division on the basis of reproductive organs" as the only way that the term "sex" was understood in the 1970s when the statute was enacted.[122]

The study of lower court decisions reveals that the courts have traditionally defined the term "sex" in federal statutes and under the Constitution as much broader than "biological sex" and have certainly provided protection for sex- and gender-linked characteristics beyond those associated with anatomy and genetics. This broader notion of the meaning of sex is not of recent origin; it can be found in some of the earliest sex discrimination cases decided by the courts.

IV. WHAT BIOLOGY SAYS ABOUT SEX

The comments set forth at the beginning of this Article, even those by now-Justice Ketanji Brown Jackson of the United States Supreme Court, suggest that the answer to the question of how to define "woman" is easily resolvable by resorting to science, in particular to biology.[123] In reality, however, the definition and determination of sex is much more complex.

Even the insistence by social conservatives that they have science on their side[124] may have the purpose, as well as the effect, of decreasing support for transgender individuals. It has been suggested that this intense and disproportionate focus on transgender individuals—who make up a very

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[118] *Id.* at 714–15.

[119] *Id.* at 715. The *Grimm* court referred to "so-called 'biological sex" as "birth-assigned sex." *Id.*

[120] *Id.* at 720–21.

[121] *Id.* at 721–22.

[122] *Id.* at 721.

[123] "Biology" is generally defined as the study of life and living organisms. *Biology*, BRITANNICA, https://www.britannica.com/science/biology [https://perma.cc/C7KV-24KP].

[124] *See, e.g.*, Jared Eckert, *Don't Be Fooled: Gender Identity Policies Don't Follow the Science*, HERITAGE FOUND. (June 16, 2021), https://www.heritage.org/gender/commentary/dont-be-fooled-gender-identity-policies-dont-follow-the-science [https://perma.cc/8BSW-TWH6].

small portion of the population[125]—is motivated by politics[126] rather than any real concern for the protection of women and children, which is said to be the motivation for many of the state statutes restricting transgender rights.[127] And this focus on transgender individuals by social conservatives appears to have had the effect of decreasing support for transgender rights, particularly among white evangelicals and Republicans.[128]

It seems possible, perhaps likely, that this decrease in support for transgender rights may well be tied to beliefs and understandings about the relationship between sex assigned at birth and gender identity and the role that science plays in determining sex and gender identity. Individuals who believe that sex is determined at birth or before and is unchanging are less likely to support transgender rights than individuals who believe that gender can change over the course of life and that it manifests differently in different people.[129] And the percentage of adults who believe that whether one is a

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[125] A recent survey has indicated that 1.6% of adults in the United States are transgender or non-binary, with a variance among different age groups. Anna Brown, *About 5% of Young Adults in the U.S. Say Their Gender Is Different from Their Sex Assigned at Birth*, PEW RSCH. CTR. (June 7, 2022), https://www.pewresearch.org/short-reads/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth [https://perma.cc/JWW7-LN3F]. While 0.3% of those over age 50 identify as transgender or non-binary, 1.6 of those ages 30 to 49 identify as such, and 5.1% of those ages 18 to 29 identify as transgender or non-binary. *Id.* Of those between the ages of 18 and 29, 2% identify as transgender and 3% identify as non-binary. *See id.*

[126] *See* Dan Cassino, *Why Are Republicans So Focused on Restricting Trans Lives?*, WASH. POST (Mar. 21, 2022, 12:51 PM), https://www.washingtonpost.com/politics/2022/03/21/republican-trans-sports-texas-idaho-lgbtq [https://perma.cc/J3HY-YG8Q] (noting that cisgender men are more likely to identify as Republican when they consider issues of gender identity and that Republicans may be emphasizing rhetoric targeting transgender individuals "to reinforce wavering Republicans and even bring in some men who otherwise might not support Republican candidates"). That Article describes the results of research that indicates that asking about gender in terms of masculinity and femininity increased the likelihood that men—but not women—would identify as strong Republicans and that men were more likely to identify as Republican when they were first asked a question about non-binary gender. *Id.*

[127] See Part V.A., for a discussion of recent state legislation restricting the rights of transgender individuals with respect to identification documents, use of public spaces, health care access, and participation in sports.

[128] *See* Kelsy Burke & Emily Kazyak, *Americans' Support for Transgender Rights Has Declined. Here's Why.*, WASH. POST (Nov. 8, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/11/08/transgender-republican-evangelical-bathrooms [https://perma.cc/F3LE-BJWX] (noting that in 2016, only 41% of While evangelicals and 44% of Republicans supported the requirement that transgender individuals be required to use bathrooms that were aligned with their sex assigned at birth, while in 2022, 86% of white evangelicals and 87% of Republicans supported such a requirement. For Democrats, the numbers were 27% in 2016 and 31% in 2022. For non-religious respondents, the numbers were 21% in 2016 and 34% in 2022).

[129] *See id.* (citing the Public Religion Research Institute's American Values Survey, issued in October 2022, indicating that 59% of adult Americans surveyed view gender as static, with 88% of Republicans, 66% of independents, and 36% of Democrats believing that there are only two genders, men and women).

man or a woman is determined by sex assigned at birth has been increasing over the last several years.[130]

Research indicates that an individual's beliefs about the biological origin of a person's transgender status influences their support for transgender rights. Persons who believe that transgender status or gender identity has a biological basis are more likely to support a variety of transgender rights, including the right to be free from employment and housing discrimination, the right to health care access, and the right to use public spaces consistent with gender identity.[131] This research suggests that support for transgender rights may increase based on scientific evidence that sex is not binary and that gender identity has a biological basis.[132] But the connection between biological attribution and support for transgender rights may also mean that claims that science actually supports a binary classification of sex may act to decrease support for transgender rights.

While those on the conservative side of the culture wars concerning sex and gender identity claim that they have science on their side—that science supports sex as binary—, real scientists recognize the complexity of the science of sex:

> Sex is just as complicated as humans are. What seems a rather straightforward concept—with an unequivocal answer to the proverbial delivery room question, "Is it a boy or a girl?"—is in reality full of nuances and complexities, just like any human trait. From a biological standpoint, the appearance of the external genitalia is only one parameter among many, including chromosomal constitution, the sequence of sex-

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[130] Kim Parker et al., *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues [https://perma.cc/3SVL-EHMT] (finding that 54% of respondents in 2017, 56% of respondents in 2021, and 60% of respondents in 2022 indicated that whether one is a man or a woman is determined by sex assigned at birth, while 44% of respondents in 2017, 41% of the respondents in 2021, and 38% of the respondents in 2022 indicated that whether one is a man or a woman can be different from sex assigned at birth; among those who believe that gender is determined by sex assigned at birth, 46% indicate that what they have learned from science has influenced their views, while among those who believe that gender can be different from sex assigned at birth, 44% say that what they learned from science has influenced their views).

[131] *See* Melanie M. Bowers & Cameron T. Whitley, *What Drives Support for Transgender Rights? Assessing the Effects of Biological Attribution on U.S. Public Opinion of Transgender Rights*, 83 SEX ROLES 399, 404–06 (2020) (to measure biological attribution, survey respondents were asked: "Do you believe there is a biological reason people are transgender (born one sex, but identify as another)?").

[132] *Id.* at 409.

> determining genes, gonadal structure, the profile of gonadal hormones, and the internal reproductive structures.[133]

Stated more simply, a prominent endocrinologist and researcher of sexual development has indicated that "there's much greater diversity within male or female, and there is certainly an area of overlap where some people can't easily define themselves within the binary structure."[134]

Discussed below are some of the relationships between sex and genetics, including chromosomes associated with sex, and reproductive anatomy, as well as the biological basis of gender identity.

A. Genetics and Sex

Some argue that the most obvious way to define "woman" is through their genetic make-up. Then-Representative Madison Cawthorn asserted that the way to define "woman" was genetically, in that a woman has two X chromosomes;[135] he would presumably define "man" by noting that a man has one X and one Y chromosome. But, as it turns out, a study of the genetics of sex does not reveal the binary XX/XY that is often asserted to exist with respect to humans and their sexual classification. Instead of there being a clear binary with respect to chromosomes, there is considerable variation among individuals with respect to their chromosomes.[136]

One such variation is Turner Syndrome, when one of a woman's X chromosomes is missing or partially missing.[137] Individuals with this

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[133] Eric Vilain et al., *We Used to Call Them Hermaphrodites*, 9 GENETICS MED. 65, 65 (2007).

[134] The quotation is from John Achermann of the University College London's Institute of Child Health. *See* Claire Ainsworth, *Sex Redefined: The Idea of 2 Sexes is Overly Simplistic*: *Biologists now think there is a larger spectrum than just binary female and male*, SCI. AM. (Oct. 22, 2018), https://www.scientificamerican.com/article/sex-redefined-the-idea-of-2-sexes-is-overly-simplistic1. [https://perma.cc/JC3C-5EW7].

[135] Then-Representative Cawthorn's other criteria for defining "woman"—no "tallywacker"—was considerably less scientifically precise, although was presumably intended to refer to a man's genitals. As it turns out, he was also wrong on that score, as explained below.

[136] In humans, each cell nucleus generally contains 23 pairs of chromosomes, for a total of 46. *Chromosomes Fact Sheet*, NAT'L HUM. GENOME RSCH. INSTITUTE, https://www.genome.gov/about-genomics/fact-sheets/Chromosomes-Fact-Sheet [https://perma.cc/L5XS-5HYD]. The 23rd pair of chromosomes are called allosomes and consist of two X chromosomes in most females and an X and a Y chromosome in most males. *See id.* Accordingly, typical females will generally be referred to as 46XX and typical males referred to as 46XY, as a matter of chromosomes. Persons with variation from these typical patterns are often referred to as intersex or as having differentiation or disorders of sex development. *Id.*

[137] Individuals with Turner Syndrome are referred to as 45X, or 46XX if one X chromosome is only partially missing, as a matter of chromosomes. Amanda Montañez, *Beyond XX and XY*, 317 SCI. AM. (SPECIAL ISSUE) 50, 50 (2017). A graphic illustration of the complexity of the factors that affect the determination of sex is found in this article. The text accompanying this

condition tend to have fewer ovarian follicles, resulting in less estrogen secretion, often causing delayed puberty, amenorrhea (absence of menstruation), and lack of secondary sex characteristics.[138] The missing X chromosome that results in Turner's Syndrome occurs in approximately 1 in 2000 female newborns.[139]

Another variation is Klinefelter Syndrome, when males have an extra X chromosome.[140] Some males with this syndrome have abnormally small testes and penises and may suffer fertility problems; other symptoms of this syndrome are breast development and less facial and body hair.[141] The prevalence of Klinefelter Syndrome is approximately one in 500 to 1000 males, but this syndrome is underdiagnosed in the general population.[142]

These variations in chromosomes challenge the common understanding that sex can be determined simply by a study of chromosomes; these physical conditions that contradict the common-sense, but erroneous, notion that women always have two XX chromosomes and that men always have one X chromosome and one Y chromosome occur too frequently to be discounted. While some might view this variability in chromosomes as aberrant deviations from the accepted normal, it seems more appropriate to consider this simply as variability in the genetic bases of sex.

B. Reproductive Anatomy and Sex

Although genetics are often pointed to as being determinative of biological sex, most individuals are not assigned a sex at birth based on genetic information, but instead based on the appearance of their external

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graphic also notes the complexity of factors that influence the determination of biological sex and gender:

> Humans are socially conditioned to view sex and gender as binary attributes. From the moment we are born—or even before—we are definitively labeled "boy" or "girl." Yet science points to a much more ambiguous reality. Determination of biological sex is staggeringly complex, involving not only anatomy but an intricate choreography of genetic and chemical factors that unfolds over time. . . . The more we learn about sex and gender, the more these attributes appear to exist on a spectrum.

Id.

[138] VALERIE ARBOLEDA & ERIC VILAIN, *Disorders of Sex Development, in* GENETIC DIAGNOSIS OF ENDOCRINE DISORDERS, 259, 267 (2016).

[139] *Id.*

[140] *Id.*

[141] *Id.* at 267–68.

[142] Montañez, *supra* note 137, at 51. Individuals with Klinefelter Syndrome are referred to as 47XXY, as a matter of chromosomes. *Id.*; ARBOLEDA & VILAIN, *supra* note 138, at 269; *see also How Many People are Affected by or at Risk for Klinefelter Syndrome?*, U.S. DEP'T HEALTH HUM. SERV. (Jan. 9, 2024), https://www.nichd.nih.gov/health/topics/klinefelter/conditioninfo/risk [https://perma.cc/P4DG-3FJW].

genitals when they are born. But not all individuals are born with unambiguous external genitals.[143] When the external genitals of newborns are ambiguous, doctors and parents may be in the situation of deciding, rather than identifying, the sex of those babies.[144] And the role of doctors and parents in deciding the sex of those babies, and sometimes performing surgery on those children to confirm the choice of sex that they have made,[145] places in serious doubt the notion that sex can be definitely determined by the appearance of one's external genitals.

One condition that results in ambiguous genitals is 5-alpha reductase deficiency, a condition that affects individuals with an X and a Y chromosome.[146] This condition results in the underproduction of a hormone called dihydrotestosterone and often produces external genitalia that appear to be female or are ambiguous.[147] As a result, babies with this condition are often raised as girls, but at puberty experience a surge of testosterone that results in more male characteristics; these children may identify as male even though raised as female.[148] Another condition that affects individuals with one X and one Y chromosome is androgen insensitivity syndrome, in which the individual is resistant to male hormones and may have external genitals that appear female, although they do not have female reproductive organs.[149] This diagnosis is sometimes not made until puberty, when the individuals who were designated as female at birth do not begin to menstruate.[150]

Individuals with two X chromosomes may have congenital adrenal hyperplasia, which can result in enlarged clitoris or external genitalia that appear masculine, as well as excess body hair, irregular menstrual cycles, and infertility.[151]

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[143] Ambiguous genitalia occur in about 1 out of 4500 live births. Gopi Kumar & Joshuan J. Barboza-Meca, *5-Alpha-Reductase Deficiency,* NAT'L LIBR. MED. (Oct. 17, 2022), https://www.ncbi.nlm.nih.gov/books/NBK539904 [https://perma.cc/ASP8-LTLV].

[144] See, for example, the discussion concerning 16 genetic males born with absent or inadequate penises, 14 of which were raised as female by their parents and 2 of which were raised as male. William G. Reiner & John P. Gearhart, *Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned to Female Sex at Birth*, 350 NEW ENG. J. MED. 333, 333 (2004).

[145] See Kevin G. Behrens, *A Principled Ethical Approach to Intersex Paediatric Surgeries*, 21 BMC MED. ETHICS, Oct. 2020, at 1, for a discussion about the past and present practices of performing genital "normalizing" surgery on children, as well as the ethical issues raised by such practices.

[146] ARBOLEDA & VILAIN, *supra* note 138, at 269.

[147] *Id.*

[148] Montañez, *supra* note 137, at 51; ARBOLEDA & VILAIN, *supra* note 138, at 269.

[149] ARBOLEDA & VILAIN, *supra* note 138, at 270.

[150] *Id.*

[151] *Id.* at 259.

Some individuals may have unambiguous external genitals but internal reproductive organs atypical for their assigned sex. For example, individuals with two X chromosomes may have testicular tissue, while others have both ovarian and testicular tissue.[152] These conditions are sometimes discovered only through unrelated medical procedures. For example, middle-aged men who had typical external genitals and had fathered children have been found to have female reproductive organs when they were operated on for hernias;[153] these conditions are presumably the result of persistent Müllerian duct syndrome, a condition in which mullerian ducts, which are critical to the development of female reproductive organs, are not suppressed in otherwise typical males.[154]

These and other variations with respect to internal reproductive organs and external genitalia suggest that anatomy alone cannot be relied upon to determine sex. The simplistic assertion that only men have testes and penises and only women have ovaries and vaginas is not consistent with the science of biology.

C. The Biology of Gender Identity

When all of the different aspects of sex correlate with each other, the determination of sex is an easy task—this is presumably the situation that social conservatives have in mind when they confidentially assert that there are only two sexes and that science should be followed. But when sex cannot be easily determined by resorting to aspects of biology—when the different biological aspects of sex do not correlate to each other—which aspect of sex should be controlling in assigning an individual to one sexual category or the other, assuming that categorization by sex is required?[155] One scientist has suggested that gender identity should be the controlling factor: "[m]y feeling is that since there is not one biological parameter that takes over every other parameter, at the end of the day, gender identity seems to be the most reasonable parameter."[156] This position has much to recommend it from

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[152] *Id.* at 260.

[153] Afak Yusuf Sherwani et al., *Hysterectomy in a Male? A Rare Case Report*, 5 INT'L J. SURGERY CASE REPS. 1285, 1285–87 (2014) (70-year-old man who had fathered four children found to have uterus, fallopian tubes, and atrophied testis, but no ovaries, during operation for a hernia.); Halit Maloku et al., *A Rare Case Report - Ovary Attached to Testicle Inside Hernia Sac*, 38 UROLOGY CASE REPS. 1, 1 (2021) (67-year-old man who had fathered three children found to have uterus, fallopian tubes, ovary, and testis during hernia operation.).

[154] ARBOLEDA & VILAIN, *supra* note 138, at 273.

[155] I do not take as a given that categorization by sex is necessary in all cases, or perhaps even in any cases. But our society is still built around the male-female binary model, and it will take some time for that model to be abandoned, if it is indeed possible. Until such a time that society recognizes non-binary individuals, there will be occasions in which society finds it necessary to determine whether an individual is a boy or a girl, a man or a woman.

[156] Ainsworth, *supra* note 134 (quoting Eric Vilain, then-Director of the Center for Gender-Based Biology at the University of California, Los Angeles).

strictly a matter of personal respect for individuals. After all, the identification of one's sex and gender would appear to be an intensively personal issue, and respect for self-identification seems consistent with respect to individual liberties, particularly when the consequences for such self-identification are, for the most part, borne by the individual rather than society in general.[157]

But for those who claim that it is necessary to "follow the science" in order to determine sex and gender identity, and who think of gender identity as a purely subjective "choice" of how different individuals identify as male or female or as non-binary,[158] it may be important to realize that biology has something to say about gender identity, just as biology has something to say about sex, even though biology does not appear to be determinative of either sex or gender identity.

A review of the relevant research suggests that the determination of gender identity for both those whose gender identity is consistent with their sex assigned at birth—referred to as "cisgender"—and for those whose gender identity is inconsistent with their sex assigned at birth—referred to as "transgender"—indicates that gender identity has both heritable aspects, determined by genetic factors, and environmental factors.[159] Scientists now believe that gender identity is influenced by both genetic factors and exposure of the brain to hormones *in utero*;[160] just as exposure to hormones is responsible for the sexualization of the reproductive organs before birth, exposure to hormones *in utero* may be responsible for the sexualization of the brain.

As the prior discussion reflects, the use of the term "biological sex"—at least if that term is used as a designation of individuals to a binary

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[157] Determination of sex was once thought necessary in order to enforce laws concerning marriage, but the approval of same-sex marriage by the United States Supreme Court in *Obergefell v. Hodges* makes determination of sex for that reason irrelevant. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015). A more recent claim is that determination of sex is necessary in order to ensure fairness in sports, particularly for cisgender women, who, the argument goes, should not have to compete with transgender women, because of biological advantages of transgender women over cisgender women. A complete discussion of the issues involved in the participation of transgender individuals in sports is beyond the scope of this Article, but as the litigated cases suggest, considerations of fairness likely depend on the age of the participants, the nature of the sport involved, and a determination of whether particular individuals actually have advantages based on their sex assigned at birth as compared to individuals who share their gender identity.

[158] A judge considering a challenge to a state statute restricting gender-affirming care for transgender minors described the "choice" argument this way: "there are those who believe that cisgender individuals properly adhere to their natal sex and that transgender individuals have inappropriately *chosen* a contrary gender identity, male or female, just as one might choose whether to read Shakespeare or Grisham." Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *2 (N.D. Fla. June 6, 2023).

[159] *See generally* Tinca J. C. Polderman et al., *The Biological Contributions to Gender Identity and Gender Diversity: Bringing Data to the Table*, 48 BEHAV. GENETICS 95 (2018).

[160] *See* Alessandra Daphne Fisher & Carlotta Cocchetti, *Biological Basis of Gender Identity*, *in* THE PLASTICITY OF SEX 90–91, 97–101 (Marianne J. Legato ed. 2020).

classification of male or female based on biological characteristics—is likely a misnomer. Instead, there are a number of different aspects of biological sex relevant to determining whether one is male or female, a man or a woman. In general, when a reference is made to one's "biological sex," what that reference really means is the sex to which the individual was assigned at birth, generally as a result of an inspection of the baby's external genitals.[161]

V. WHY IT MATTERS WHO GETS TO DEFINE "WOMAN"

A. The Effect of a Narrow Definition of "Sex" on Transgender Individuals

The consequences of holding that "sex" means exclusively the sex to which one is assigned at birth are profound. One of the most profound consequences is the inability of transgender individuals to obtain legal recognition of their sex consistent with their gender identity, including on birth certificates and other forms of legal identification, even when they have otherwise transitioned from their sex assigned at birth. The consequences of this refusal—and likely the intent of prohibitions on legal recognition of their sex consistent with their gender identity—is to "out" these individuals as transgender and deny them the dignity to determine their own sex. This purpose seems much more likely than the professed motive behind bans on changes to legal identification—to ensure the accuracy of legal records—particularly given the fact that these bans have generally been adopted recently in jurisdictions that previously allowed the designation of sex to be changed on birth certificates.[162]

In a number of recent cases, courts have upheld state bans on changes to birth certificates from the sex assigned at birth to the sex consistent with

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[161] When each of the author's three children were born, the attending physicians and other health care personnel in the delivery room seemed to spend only a few seconds viewing the baby before declaring, the first two times, "It's a girl," and the last time, "It's a boy." While casting no aspersions on the quality of the health care received and noting that there has never been any reason to question the accuracy of the determinations made at that time, I do question whether the health care personnel were engaged at that time in determining the babies' biological sex. Instead, it seems more accurate to say that they were determining "sex assigned at birth."

[162] For example, the change in Oklahoma occurred by executive order, after a settlement agreement in which an individual obtained a non-binary, gender-neutral designation on their birth certificate. The Oklahoma governor's response to that settlement was as follows:

> I believe that people are created by God to be male or female. Period. . . . There is no such thing as non-binary sex, and I wholeheartedly condemn the OSDH court settlement that was entered into by rogue activists who acted without receiving proper approval or oversight. I will be taking whatever action necessary to protect Oklahoma values.

Fowler v. Stitt, No. 22-cv-115-JWB-SH, 2023 WL 4010694, at *2 (N.D. Okla. June 8, 2023) (quoting Oklahoma Governor Kevin Stitt, statement of October 21, 2021). This statement certainly suggests that the motive behind the change was ideology; it would be farcical to suggest that the "values" referred to are those pertaining to the accuracy of records rather than the asserted biblical belief in the binary nature of sex.

an individual's gender identity. In *Fowler v. Stitt*,[163] the United States District Court for the Northern District of Oklahoma upheld the new state ban on allowing transgender individuals to change the sex on their birth certificates under rational basis review.[164] The court rejected the claim that fundamental rights were involved because of the lack of historical protection[165] and found that heightened scrutiny was not appropriate because transgender individuals did not constitute a suspect or quasi-suspect class.[166] The court found the asserted purpose of the ban—to maintain the accuracy of records—to be a legitimate state interest.[167] The court went on to speculate about another possible legitimate state interest that might support the ban: to protect women from competition in sports from transgender women. The court said that state legislatures "might readily conclude that birth certificates provide a ready, reliable, non-invasive means of verifying the biological sex of participants in women's athletics should they choose to enact statutes that restrict participation by biological men."[168]

A similar result was reached by the United States District Court for the Middle District of Tennessee in *Gore v. Lee*,[169] although based on a slightly different analysis. Finding that the term "sex" on Tennessee birth certificates meant only sex assigned at birth based on external genitalia, the district court indicated that the classification and its limit to only two categories of "male" and "female" could not plausibly be unconstitutional.[170] Based on this conclusion, the court rejected the plaintiffs' claim for a change to birth certificates as being "incorrect," because the court indicated that later information about the plaintiffs' gender identity did not show that the original determination of sex based on external genitalia was incorrect.[171] The court used its own narrow definition of sex—it disclaimed that the state had

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[163] *Id.*

[164] *Id.*

[165] *Id.* at *8–17.

[166] *Id.* at *17–21. Although the district court recognized that classifications based on sex were to be subjected to intermediate scrutiny, the court expressed concern about "compressing transgender people into classifications based on sex." *Id.* at *20. This seems odd, given that the Supreme Court of the United States has expressly declared that discrimination based on gender identity is a form of sex discrimination. *See generally* Bostock v. Clayton Cty., 590 U.S. 644 (2020). The district court gave no indication that it was aware of the Supreme Court's holding in *Bostock*. On the other hand, the district court was apparently quite aware of dissenting opinions to the Court's decisions, opinions that it seemed to give more authority than the majority opinions of the Supreme Court. *See Gore*, 2023 WL 441665, at *17–21.

[167] *Id.* at *22–23.

[168] *Id.* at *23.

[169] *Id.* at *1. Gore v. Lee, No. 3:19-cv-0328, 2023 WL 4141665, at *1 (M.D. Tenn. June 22, 2023).

[170] *Id.* at *10.

[171] *Id.* at *10–12.

defined the term "sex" in this context[172]—to preclude the plaintiffs from being able to assert their claim of unequal treatment of transgender individuals. The court also held that the plaintiffs had not plausibly alleged that the ban on changes to sex on the birth certificate was based on animus against transgender individuals, indicating that the ban would apply even to a non-transgender person who obtained a sex change after birth.[173] In addressing the plaintiffs' due process claims, the district court held that the plaintiffs had not provided sufficient evidence that they would be subject to harm if personal information about their transgender status were disclosed by having to show their birth certificates.[174] And while the district court did recognize that the right to express their gender identity was within the scope of protected liberty interests, the court held that the ban on changing sex on birth certificates did not implicate that liberty interest because the designation of sex on birth certificates said nothing about "true sex" or gender identity.[175] The court also rejected the notion that transgender individuals would be required to disclose their transgender status by showing their birth certificates; the court said that gender identity was an internal belief that would not be disclosed by how one dressed or by other activities in which the individuals engaged, so that their gender identity would remain secret unless they chose to disclose that information.[176]

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[172] Gore v. Lee, No. 3:19-cv-0328, 2023 WL 4141665, at *19 (M.D. Tenn. June 22, 2023) ("The State does not, via the Birth Certificate Policy, *define* sex to mean (or *define* sex in terms of) only external genitalia at birth.").

[173] *Id.* at *13–23. The district court's refusal, on a motion to dismiss, to entertain the possibility, as the plaintiffs alleged, that the ban was based on discriminatory animus against transgender persons smacks of willful blindness. But perhaps this is not surprising, when the court also emphasizes that criminals engage in sex-change operations for nefarious reasons; the court's seeming willingness to equate a desire to change one's sex with criminal intent is hardly subtle.

[174] *Id.* at *24–26.

[175] *Id.* at *27–28. The court held that:

> [I]t is not plausible that Tennessee birth certificates or the Birth Certificate Policy stand in the way of transgender persons expressing either their gender identity or their 'true sex' as they perceive it, let alone stand in the way of transgender persons "defining" (which carries connotations of something more internal than "expressing") themselves in terms of either of these characteristics.

Id. at *28. The court's conclusion, again, on a motion to dismiss, that a ban on changing one's sex on a birth certificate has no effect on the ability of transgender individuals to define their sex in terms of their gender identity reflects a woeful failure of the court to understand, or even try to understand, the discomfort that transgender individuals suffer based on society's refusal to recognize their right to define their own sex. For example, in another case addressing the issue of bans on birth certificates, one of the plaintiffs provided evidence that "living with a birth certificate declaring she is male is a permanent and painful reminder that Idaho does not recognize her as she is—as a woman." *See* F.V. v. Barron, 286 F. Supp. 3d 1131, 1138–39 (D. Idaho. 2018).

[176] *Gore*, 2023 WL 4141665, at *28–30. The court noted that it was "indisputable that at least for many decades, there have been numerous persons of both sexes (based on birth

There is, however, contrary authority, in that a number of cases have held that bans on changing sex on birth certificates are unlawful. In *Ray v. McCloud*,[177] the United States District Court for the Southern District of Ohio invalidated a state policy not to allow transgender persons to change their sex designation on their birth certificates, after previously following a practice of allowing such changes.[178] With respect to the plaintiffs' due process claim, the district court held that the state's policy forced the disclosure of highly personal information about the plaintiffs' transgender status and exposed them to a risk of bodily harm, mandating strict scrutiny and requiring the state to provide a narrowly tailored, compelling state interest to support the policy.[179] With respect to the plaintiffs' equal protection claims, the district court found disparate treatment of transgender individuals because other changes were allowed to birth certificates, such as name changes and changes to parental information in the event of adoption.[180] The court found that transgender persons met the requirements of a quasi-suspect class, mandating intermediate scrutiny.[181] The court went on to find that the state's asserted interest in maintaining the historical accuracy of birth certificate records or in preventing fraud did not meet either level of scrutiny. The court noted that the state allowed other changes to birth certificates that would seem to interfere with their historical accuracy and, until the change in the policy, the state had allowed changes to the "sex" marker on birth certificates; the state had not explained why historical accuracy had only recently become important.[182] The court also noted that the state had not shown how the risk of fraud would be affected by allowing a change to the sex designation on

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appearance) and both gender identities who play ice hockey, wear pants, wear earrings, have hair short, have long hair, hold public office, are chief executive officers of companies, are clerics, are combat veterans, are stay-at-home parents, drink straight bourbon, play fantasy football, have husky voices, play guitar, cry in public, visit therapists, do yoga, are six feet tall or taller, are muscular, and use profanity." *Id.* at *29. Again, the willful blindness of the district judge is breathtaking (as is his willingness to stereotype based on gender, while professing that he is not doing so). If it were true that the gender identity of transgender individuals could never be determined unless those individuals themselves disclosed their gender identity, there would be no reason for the rampant discrimination against transgender individuals that exists in today's society.

[177] Ray v. McCloud, 507 F. Supp. 3d 925, 925 (S.D. Ohio 2020).

[178] *Id.* at 929.

[179] *Id.* at 931–32. The district court recounted the plaintiffs' evidence of risk of harm, including the fact that some of them had been harassed and even received death threats after prior disclosure of their transgender status by having to show their birth certificates, as well as the evidence that transgender individuals generally suffer harassment, discrimination, and violence because of their status. *Id.* at 932–34. The court also rejected the defendants' contention that the plaintiffs could not state a claim for violation of their right to informational privacy based on the fact that they had disclosed their transgender status in other contexts. *Id.* at 934.

[180] *Id.* at 935–36.

[181] *Id.* at 936–38.

[182] *Id.* at 938.

birth certificates.[183] The court suggested that the defendants' justifications for the policy were "nothing more than thinly veiled post-hoc rationales to deflect from the discriminatory impact of the Policy" and would not be sufficient even under rational basis review.[184]

Similarly, the United States District Court for the District of Idaho in *F.V. v. Barron*[185] invalidated on equal protection grounds an Idaho state policy of prohibiting individuals from changing their sex designation on their birth certificates.[186] The district court noted that transgender individuals were treated differently by being denied the ability to make changes to the sex designation on their birth certificates, while others were allowed to make changes to their birth certificates.[187] The court held that intermediate scrutiny applied to the policy both because discrimination on the basis of gender identity was a form of sex discrimination[188] and because transgender individuals constitute a quasi-suspect class.[189] Because the defendants had conceded that there was no rational basis for the policy, the court permanently enjoined the defendants from "automatically rejecting applications from transgender people to change the sex listed on their birth certificates."[190] The district court later held that the permanent injunction against the state policy applied to a subsequently enacted statute allowing the sex designation on a birth certificate to be changed only with a court order, because state law did not allow a transgender person to obtain a court order for change of the designation of sex on a birth certificate.[191]

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[183] *Id.* at 938–39.

[184] *Id.* at 939.

[185] F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Idaho 2018).

[186] The court declined to decide the plaintiffs' due process and free speech claims. *Id.* at 1134–35.

[187] *Id.* at 1140–41.

[188] *See id.* The court noted that "to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning." *Id.* at 1144.

[189] *Id.* at 1144–45.

[190] *Id.* at 1146. The court noted that the defendants had admitted "that they are aware of no rational basis justifying a prohibition against changing the sex designation on the birth certificate of a transgender person who has undergone clinically appropriate treatment to permanently change his or her sex" and "that no rational basis justifies treating transgender persons like Plaintiffs differently than other persons." *Id.* at 1138 n.9, 1141.

[191] F.V. v. Jeppesen, 477 F. Supp. 3d 1144, 1149–51 (D. Idaho 2020). The state statute defined "sex" as "the immutable biological and physiological characteristics, specifically the chromosomes and internal and external reproductive anatomy, genetically determined at conception and generally recognizable at birth, that define an individual as male or female." IDAHO CODE § 39-245A(3) (2020). The district court noted that the plain language of the state statute "forecloses any avenue for a transgender individual to successfully challenge the sex listed on their Idaho birth certificate to reflect their gender identity." *Jeppesen*, 477 F. Supp. 3d at 1150.

A determination that transgender individuals are a member of the sex to which they were assigned at birth, regardless of the sex in which they are presenting or the condition of their genitals, implicates their ability to use public spaces, such as gender-specific restrooms and dressing rooms. For example, Florida recently enacted a statute, known as the "Safety in Private Spaces Act," which applies to restrooms and other facilities, such as dressing rooms, fitting rooms, locker rooms, or changing rooms, in public buildings and other facilities.[192] That statute makes it an act of trespass for a person to enter a restroom or other facility designed for the opposite sex and to refuse to depart when requested to do so.[193] "Sex" is defined to mean "the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth."[194] The statute contains exceptions for certain individuals who are intersex or who have been diagnosed with disorders of sexual development but seeks to criminalize the actions of persons with discordant gender identity, thereby prioritizing certain biological determinants of sex and gender identity over others.[195]

The legal threats posed by these types of restrictions on the use of restrooms and other sex-segregated public spaces add significantly to the burdens already faced by transgender individuals in using those types of

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[192] Safety in Private Spaces Act, 2023 Fla. Sess. Law Serv. Ch. 2023-106 (West) (codified as amended at FLA. STAT. § 553.865).

[193] *Id.*

[194] FLA. STAT. § 553.865(3)(*l*) (2020). "Female" is defined in the statute as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing eggs." *Id.* § 553.865(3)(f). "Male" is defined as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing sperm." *Id.* § 553.865(3)(h).

[195] The statute by its terms does not apply to an individual "who is or has been under treatment by a physician who, in his or her good faith clinical judgment, performs procedures upon or provides therapies to a minor born with a medically verifiable genetic disorder of sexual development, including any of the following: (a) [e]xternal biological sex characteristics that are unresolvably ambiguous. (b) [a] disorder of sexual development in which the physician has determined through genetic or biochemical testing that the patient does not have a normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action for a male or female, as applicable." *Id.* § 553.865(15)(a), (b). The statute, by excusing from the crime of trespass certain individuals with intersex conditions or disorders of sexual development, but not individuals with discordant gender identity, prioritizes certain biological aspects of sex and gender identity over others, but apparently only when those individuals are or have been under the treatment of a physician who performs medical procedures or therapies on minors. This is curious, given the general view of conservative legislators about the appropriateness of gender-affirming care on minors. The statute appears to give approval to medical care given to minors in order to "confirm" their sex assigned at birth, but not medical care given to minors or adults to "affirm" their sex consistent with their gender identity. This exception seems to confirm that the objection of the legislators is not actually to surgery or other medical procedures performed on minors, but to the notion of gender identity that is inconsistent with sex assigned at birth.

public spaces.[196] That transgender individuals are restricted from using the restrooms and other sex-segregated public spaces that conform to their gender identity generally means that they will find it difficult to use public restrooms and other public spaces at all, given the reception that they are likely to receive in restrooms and other public spaces that do not align with their gender presentation. That is, a transgender man who presents as a man is likely to be challenged when he uses a women's restroom, while a transgender woman who presents as a woman may face both hostility and the risk of sexual assault when she uses a men's restroom.

Courts have reached disparate results concerning whether prohibitions on bathroom use consistent with the gender identity of transgender individuals are lawful. In *Grimm v. Gloucester County School Board*,[197] the United States Court of Appeals for the Fourth Circuit found that a school district's policy requiring students to use bathrooms based on their sex assigned at birth violated both the Equal Protection Clause and Title IX of the Education Amendments of 1972.[198] With respect to Grimm's equal protection claim, the court of appeals found that intermediate scrutiny was appropriate because the bathroom policy was a sex-based classification and because transgender individuals constitute at least a quasi-suspect class.[199] Applying intermediate scrutiny, the court found that the district's policy was not substantially related to its asserted interest in student privacy, given that Grimm had used the boy's bathroom without incident for seven weeks and because school districts throughout the country had been able to successfully adopt policies allowing transgender students to use the bathrooms consistent with their

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[196] In a survey conducted in 2015 of the experiences of transgender individuals, almost a quarter of respondents indicated that someone had questioned or challenged their presence in a restroom in the past year, while 12% of respondents reported being verbally harassed, physically attacked, or sexually assaulted while accessing a restroom in the past year; more than half of the respondents indicated that they had avoided using a public restroom in the past year because of fear of encountering problems; eight percent of persons who avoided using public restrooms reported experiencing urinary track infections or kidney-related medical issues as a result. *See* NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/3TXP-3J7F]. It seems likely that these problems have intensified in the intervening years, with more states moving to restrict the rights of transgender individuals and more hostility generally directed at transgender individuals, at least in conservative states.

[197] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020).

[198] *Id.* at 593, 619–20.

[199] *Id.* at 606–13. In reaching these conclusions, the court of appeals rejected the school district's suggestions that Grimm's gender identity was a "choice." *Id.* at 610. The court noted that the school district was "privileg[ing] sex-assigned-at-birth over Grimm's medically confirmed, persistent and consistent gender identity." *Id.* The court went on to note "that gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice. Rather, it is as natural and immutable as being cisgender." *Id.* at 612–13.

gender identity.[200] With respect to his Title IX claim, the court of appeals relied on the Supreme Court's decision in *Bostock* to establish that the district's bathroom policy was based on sex.[201] The court also concluded that Grimm was harmed by the district's policy, because having to use the gender-neutral bathrooms caused him to be late for class and because of the stigma of being required to use a separate bathroom.[202]

The United States Court of Appeals for the Eleventh Circuit in *Adams v. School Board of St. Johns County,*[203] on the other hand, held that the school board's policy prohibiting transgender students from using the bathroom consistent with their gender identity did not violate either the Equal Protection Clause or Title IX.[204] In addressing the transgender plaintiff's equal protection claim, the court framed the issue as whether it was permissible to segregate the school bathrooms by sex, not whether it was permissible to ban the plaintiff from using the boys' bathroom, the one consistent with his gender identity; framed that way, the court held that the policy survived intermediate scrutiny.[205] Next, the court found that the policy did not discriminate against transgender individuals; the court said that the policy made a distinction based on "biological sex" and that a policy "can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status."[206] The court held that this policy did not discriminate based on transgender status because the policy divided students into two groups, both of which include transgender students.[207] The court also indicated that the school board did not single out transgender students for unfavorable treatment; instead, the court said that the board sought to accommodate those students by providing gender-neutral bathrooms for their use.[208] The court of appeals held that the school board's policy did not violate Title IX because "sex" meant only "biological sex," which the court seemed to equate to reproductive function; the court

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[200] *Id.* at 613–15.

[201] *Id.* at 616–17.

[202] *Id.* at 617–19. The court noted that the school district's action constituted an effort "to protect cisgender boys from Gavin's mere presence—a special kind of discrimination against a child that he will no doubt carry with him for life." *Id.* at 620.

[203] Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (en banc). On initial hearing of the case, the court of appeals had upheld the district court's decision in favor of the student and against the school board. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1309–10 (11th Cir. 2020) .

[204] *Adams*, 57 F.4th at 796.

[205] *Id.* at 800–08.

[206] *Id.* at 808–09.

[207] *Id.* at 809. The court relied on the Supreme Court's largely discredited reasoning in *Geduldig v. Aiello*, 417 U.S. 484, 495-96 (1974), that discrimination on the basis of pregnancy is not discrimination on the basis of sex.

[208] *Adams*, 57 F.4th at 810–11.

rejected the idea that "sex" in Title IX could include gender identity.[209] One of the dissenting judges, however, criticized the majority opinion for its "medically and scientifically flawed" "presumption that biological sex is accurately determinable at birth and that it is a static or permanent biological determination."[210] Another dissenting opinion faulted the majority for disregarding the record evidence that "demonstrates that gender identity is an immutable, biological component of a person's sex."[211]

The restriction on the term "sex" to mean the sex to which one was assigned at birth can also place restrictions on the ability of individuals to access needed health care. An example is found in an Arkansas statute restricting gender-affirming care, defined in the statute as "gender transition procedures."[212] The statute generally prohibits the performance of "gender transition procedures" on minors; that term is defined to include the provision of hormones or puberty blockers as well as surgical procedures, if those therapies are intended to address anatomical features that are "typical for the individual's biological sex."[213] Excluded from the definition of "gender transition procedures" are procedures performed on those with a "medically verifiable disorder of sex development."[214] This statute therefore seems to allow the performance of medical procedures, including surgery, to confirm the sex assigned to a minor at birth, but not any type of medical therapy to affirm the sex consistent with an individual's gender identity.

"Biological sex" is defined in the statute to mean "the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, chosen, or subjective

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[209] *Id.* at 811–15. The author of the majority opinion also wrote a special concurring opinion in which she cautioned that expanding the definition of "sex" in Title IX beyond what she referred to as biological sex would have a negative effect on "girls' and women's rights and sports." *Id.* at 817 (Lagoa, C.J., specially concurring).

[210] *Id.* at 821–22 (Wilson, C.J., dissenting).

[211] *Id.* at 832 (Pryor, C.J., dissenting). The dissenting opinion also criticized the majority for its reframing of the issue in the case, from one about the rights of transgender individuals to use the bathrooms that correspond to their gender identity to one about whether schools can segregate bathrooms by sex. *Id.* The dissenting judge noted that the majority's approach was "but smoke and mirrors." *Id.* at 842–43.

[212] 2021 Ark. Laws Act 626 (became law on April 6, 2021 on override of Governor's veto) (codified at ARK. CODE ANN. §§ 20-9-1501 to 20-9-1504 (2021)).

[213] ARK. CODE ANN. § 20-9-1501(6)(B) (2021). The statute also prohibits the use of public funds for gender transition procedures with respect to individuals under age 18, ARK. CODE ANN. § 20-9-1503 (2021), and prohibits health care plans from providing coverage for gender transition procedures for minors, ARK. CODE ANN. § 23-79-164 (2021).

[214] ARK. CODE ANN. § 20-9-1501(6)(B) (2021).

experience of gender."[215] This statute prioritizes some aspects of biology to define the term "biological sex," while ignoring other aspects of biology that determine or influence an individual's sex.

This prioritizing of some aspects of biology in defining biological sex, while ignoring other aspects of biology, such as gender identity—at least in order to restrict access to gender-affirming care for transgender minors—has been found to be unconstitutional. The United States District Court for the Eastern District of Arkansas in *Brandt v. Rutledge*[216] held that the Arkansas statute violated the Equal Protection Clause and the Due Process Clause and permanently enjoined the enforcement of the statute.[217] The statute was found to violate the Equal Protection Clause as discriminatory on the basis of sex, without being supported by an exceedingly persuasive justification.[218] The court noted that while the state was purportedly motivated by claims that the procedures that it was banning were risky and not generally beneficial, the statute banned the procedures only when they were used by transgender youth for gender transition; the very same procedures were allowed for minors if the purpose was to confirm sex assigned at birth, but banned if inconsistent with the sex assigned at birth.[219] The court found that the statute violated the Due Process Clause because it deprived parents of the liberty interest in making medical decisions in the best interests of their children; that deprivation was unlawful unless supported by a compelling state interest, which the state had not established.[220] The court rejected the state's claim that it was protecting the physical and psychological well-being of children with gender dysphoria because the court said that the evidence supported the conclusion that forbidding gender-affirming care to transgender youth was

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[215] ARK. CODE ANN. § 20-9-1501(1) (2021). The statute defines "gender" to mean "the psychological, behavioral, social, and cultural aspects of being male or female." ARK. CODE ANN. § 20-9-1501(3) (2021).

[216] Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727, at *1 (E.D. Ark. June 20, 2023). The district court noted that the Arkansas statute had been titled Arkansas Save Adolescents from Experimentation (SAFE) Act, but the court declined to call the statute by that title because the title was "misleading." *Id.* at * 1 n.2. Before the district court granted the permanent injunction against enforcement of the statute, the court had granted a preliminary injunction against the statute, *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021), and the granting of a preliminary injunction had been upheld by the United States Court of Appeals for the Eighth Circuit. Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

[217] The district court also found that the statute violated the First Amendment rights of healthcare professionals in Arkansas by barring them from referring their patients to other healthcare providers for gender transition treatment; the court held that the state had failed to prove that its asserted interests were "compelling, genuine, or even rational." *Brandt*, 2023 WL 4073727, at *37–38.

[218] *Id.* at *31–35.

[219] *Id.* at *31–35. The district court noted that, under Supreme Court precedent, discrimination on the basis of gender identity was a form of sex discrimination. *Id.* The court also held that transgender people met all of the requirements of a suspect class, making appropriate heightened scrutiny of the classification made by the statute. *Id.* at *31–32.

[220] *Id.* at *36.

more likely to cause them harm.[221]

A similar conclusion was reached with respect to statutory provisions adopted in Florida restricting or prohibiting gender-affirming care for minors and prohibiting the use of Medicaid funds for gender-affirming care for both transgender minors and adults. The Florida statute prohibits the use of "state funds" for "sex-reassignment prescriptions or procedures";[222] the prohibited procedures are defined as the prescription of puberty blockers or hormones or any medical procedure, but only if the purpose of those procedures or prescriptions is "to affirm a person's perception of his or her sex if that perception is inconsistent with the person's sex" as defined by the statute.[223] The very same types of treatment are not prohibited if provided to a minor with a "medically verifiable genetic disorder of sexual development."[224] That is, procedures and prescriptions are apparently allowed to "confirm" one sex's assigned at birth, but not to "affirm" one's sex consistent with gender identity. "Sex" is defined in the statute as "the classification of a person as either male or female based on the organization of the human body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth."[225]

In *Doe v. Ladapo*,[226] the United States District Court for the Northern District of Florida granted a preliminary injunction against enforcement of the provisions of the statute prohibiting transgender minors from receiving puberty blockers and hormone treatment.[227] In reaching this conclusion, the court first addressed what it called the "elephant in the room": that "[g]ender identity is real."[228] Addressing the plaintiffs' equal protection arguments, the district court made clear that intermediate scrutiny should apply to the classifications made by the statute because they were classifications based on sex; the court also noted that intermediate scrutiny was appropriate for classifications based on gender non-conformity, so that

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[221] *Id.* at *36–37. The court noted that the statute "would take away these parents' fundamental right to provide healthcare for their children and give that right to the Arkansas Legislature." Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727, at *36 (E.D. Ark. June 20, 2023).

[222] 2023 Fla. Sess. Law Serv. Ch. 2023-90 (codified at FLA. STAT. § 286.31 (2023)). The statute also prohibits or restricts what are defined as "sex-reassignment prescriptions and procedures" with respect to patients under the age of 18 and provides authority for emergency jurisdiction over a child present in the state if a child "has been subjected to or is threatened with being subjected to sex-reassignment prescriptions or procedures." FLA. STAT. § 61.517 (2023).

[223] FLA. STAT. § 456.001(9)(a) (2023).

[224] FLA. STAT. § 456.001(9)(b) (2023).

[225] FLA. STAT. § 456.001(8) (2023).

[226] Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *1 (N.D. Fla. June 6, 2023).

[227] *Id.* at *1.

[228] *Id.* at *1–2.

treating the plaintiffs differently based on their transgender status merited intermediate scrutiny because of their status as at least a quasi-suspect class.[229] The district court held that the plaintiffs were likely to succeed on their equal protection claim because the statute would survive neither rational basis nor intermediate scrutiny.[230] The court noted that the statute was not supported by a legitimate state interest because "[d]issuading a person from conforming to the person's gender identity rather than to the person's natal sex is not a legitimate state interest" and that the enactment of the statute was substantially motivated by disapproval of transgender status.[231] That the statute was in part motivated by purposeful discrimination against transgender individuals violated the Equal Protection Clause.[232] The district court also found that the parental plaintiffs were likely to prevail on their due process claim because they were being denied the right to control their child's medical treatment.[233] The court indicated that the state's claimed justifications for outlawing gender-affirming care—the claimed low quality of evidence supporting gender-affirming care, the risks of such care, and the supposed political bias of medical groups supporting gender-affirming care—were generally pretextual and did not support the statute in any event.[234] The district court held that a preliminary injunction was appropriate because the plaintiffs would suffer irreparable harm and because "[a]dherence to the Constitution is always in the public interest."[235]

In a later decision in a related proceeding, *Dekker v. Weida*,[236] the same district court judge, after a trial on the merits, held the Florida statute unconstitutional with respect to its prohibition on Medicaid payment for gender-affirming care for minors and adults.[237] The district court rejected the state's conclusion that gender-affirming care was "experimental" and

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[229] *Id.* at *8–10. Other courts have also concluded that classifications based on gender identity are subject to intermediate scrutiny under equal protection analysis because classifications based on gender identity are based on sex and because transgender individuals constitute a quasi-suspect class. *See* M.H. v. Jeppesen, No. 1:22-cv-00409-REP, 2023 WL 4080542, at *8 (D. Idaho June 20, 2023).

[230] *Doe*, 2023 WL 3833848, at *10.

[231] *Id.* at *10. The court noted that the Florida Department of Health took the position that even social transitioning, which requires no medical intervention, should not be available to transgender children. The court reasoned that "[n]othing could have motivated this remarkable intrusion into parental prerogatives other than opposition to transgender status itself." *Id.*

[232] Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *10–11 (N.D. Fla. June 6, 2023).

[233] *Id.* at *11.

[234] *Id.* at *11–16

[235] *Id.* at *16.

[236] Dekker v. Weida, No. 4:22cv325-RH-MAF, 2023 WL 4102243 (N.D. Fla. June 21, 2023).

[237] *Id.*

therefore not covered by Medicaid.[238] The court noted that the overwhelming weight of medical authority—and that of reputable medical associations—supports the use of gender-affirming care.[239] The court held that the denial of Medicaid coverage for gender-affirming care for transgender individuals violated the Equal Protection Clause, violated the Affordable Care Act's prohibition of discrimination based on sex, and violated the requirements of the Medicaid Act.[240]

Another district court, the United States District Court for the Middle District of Tennessee in *L.W. v. Skrmetti*,[241] also granted a preliminary injunction against a state statute restricting the ability of minors to receive gender-affirming care,[242] but that preliminary injunction was vacated by the United States Court of Appeals for the Sixth Circuit.[243] The court of appeals disagreed with the district court's determination that the plaintiffs were likely to succeed on the merits of their claims.[244] The court of appeals suggested that because the "original fixed meaning" of the Due Process and Equal Protection clauses did not cover those claims, it was not clear that "the people of this country ever agreed to remove debates of this sort—over the use of innovative, and potentially irreversible, medical treatments for children—from the conventional place for dealing with new norms, new drugs, and new public health concerns: the democratic process."[245] The court also suggested that because the plaintiff's sought "to extend the constitutional guarantees to new territory," the requirement of likely success on the merits could not be met.[246] The court went on to cast doubt on whether the right of parents to direct the medical care of their children was a right protected by substantive

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[238] *Id.* at *6–8.

[239] *Id.*

[240] *Id.* at *10–20.

[241] L.W. v. Skrmetti, No. 3:23-CV-00376, 2023 WL 4232308 (M.D. Tenn. June 28, 2023).

[242] *Id.* at *20.

[243] L.W. v. Shrmetti, 83 F.4th 460 (6th Cir. 2023). The court of appeals consolidated the case with another case out of Kentucky, *Doe 1 v. Thornbury*, No. 3:23-CV-230-DJH, 2023 WL 4230481 (W.D. Ky. June 28, 2023) (granting preliminary injunction against Kentucky law restricting gender-affirming care for minors), *later proceeding*, Doe 1 v. Thornbury, 75 F.4th 655 (6th Cir. 2023) (declining to lift stay by district court). See Marc Spindelman, *Trans Sex Equality Rights After* Dobbs, 172 U. PA. L. REV. ONLINE 1 (2023), for a critical analysis of the court of appeals' initial decision staying the preliminary injunction.

[244] *Skrmetti*, 83 F.4th at 479.

[245] *Id.* at 471. In referring to "new drugs" and "new public health concerns," it is not clear whether the court of appeals meant "new" since the adoption of the Due Process and Equal Protection clauses or "new" in a more modern sense. *See id.* But to the extent that the court of appeals meant to suggest that gender-affirming care is "new" in the experimental sense, the court of appeals was willfully blind to the fact that gender-affirming care has been shown to be generally safe and effective for minors, as found by the district court. *Skrmetti*, 2023 WL 4232308, at 20–28.

[246] *Skrmetti*, 83 F.4th at 471.

due process, when that medical care involved treatment banned by state law.[247] With respect to the equal protection claim, the court of appeals rejected the conclusion that the state's actions were discrimination based on sex and therefore judged by heightened scrutiny.[248] The court of appeals concluded that the state would suffer irreparable harm if the injunction was not vacated.[249] The dissent to the court of appeals decision makes clear that the majority's decision is poorly reasoned and inconsistent with circuit precedent.[250]

Assignment of a narrow definition to the term "sex"—essentially defining sex to mean biological sex only as determined by external genitalia at birth—will also affect the ability of transgender individuals to participate in sex-segregated activities such as sports. Statutory and other types of restrictions generally phrase the restrictions in terms of requiring transgender individuals to compete only as a member of the sex to which they were assigned at birth. These restrictions are, in fact, likely to preclude transgender individuals from reaping the benefits of participating in sports altogether, because they are unlikely to participate on sports teams inconsistent with their gender identity.[251]

Proponents of restrictions on the participation of transgender girls and women on sports teams limited to girls and women have tried to justify these

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[247] *Id.* at 479–89.

[248] *Id.* at 479. The court of appeals did note that classifications based on gender were subject to heightened scrutiny but found that a classification based on gender identity did not implicate sex or gender, concluding that the Supreme Court's conclusion in *Bostock* that discrimination on the basis of gender identity was a form of sex discrimination applied only under Title VII. *Id.* at 484–85.

[249] *Id.* at 471–72. The court of appeals found that if the injunction was allowed to stand, the states of Tennessee and Kentucky would suffer irreparable harm, including with respect to their interests in "avoid[ing] health risks to their children." *Id.* at 491. Although the court of appeals gave lip service to the potential harm that would be suffered by the plaintiffs and other children denied access to health care that has been generally available before social conservatives began their culture wars on transgender individuals, the court clearly seemed to care more about the ability of the state to enforce its hostility toward transgender individuals than the real concerns, identified by the district court, about the effect of the injunction on the health of the children that the state was purported to be concerned about. *See Skrmetti*, 2023 WL 4232308, at 32–33.

[250] *See Skrmetti*, 83 F.4th at 491–513 (White, C.J., dissenting). The dissent also recognizes the significant interests of the children who are being denied necessary medical care, noting that their injuries are truly irreparable "because progressing through adolescence untreated leads to daily anguish and makes adult treatment more complicated." *Id.* at 512. The recognition of this harm, and the real harm that its decision is causing, is absent from the majority's decision.

[251] *See generally* Barrera et al., *The Medical Implications of Banning Transgender Youth from Sport Participation*, 176 JAMA PEDIATRICS 223 (2022) (noting that restricting transgender youth from participating in sex-segregated sports activities consistent with their gender identity is likely to result in avoidance of those activities, with loss of the medical and social benefits that all youth obtain from those activities, including medical benefits in terms of cardiovascular health and bone density and positive effects on academic performance, attention, planning, problem-solving, working memory, and inhibitory control).

restrictions as a matter of fairness to women, on the grounds that "biological men" will unfairly take opportunities away from cisgender women. While this might, or might not, be a reasonable fear at some levels of competitive sports, this concern needs to be balanced against the real harm that will be done to transgender athletes when they are effectively precluded from participating in sports at all. Transgender individuals, including transgender children, already suffer from depression, anxiety, self-harm, and suicide at higher rates than their cisgender peers; exclusion from sports activities because of transgender status is likely to exacerbate their mental health concerns.[252]

A number of states have recently enacted bans on transgender individuals, particularly transgender women, participating in sports consistent with their gender identity.[253] The United States Department of Education, however, has released a notice of proposed rulemaking that would interpret Title IX to prohibit categorical bans on transgender students participating in sports teams consistent with their gender identity and would apply to public primary and secondary schools, as well as colleges, universities, and other institutions that receive federal funding.[254] There would appear to be a

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[252] *See generally* WASELEWSKI et al., PERSPECTIVES OF US YOUTHS ON PARTICIPATION OF TRANSGENDER INDIVIDUALS IN COMPETITIVE SPORTS, A QUALITATIVE STUDY 1, 6 (2023). The results of the survey reported in this article indicated that a plurality of respondents (47%) thought that transgender athletes should be able to participate in sports based on their gender identity, while another ten percent of respondents thought that whether transgender athletes should participate in sports based on their sex assigned at birth, in a separate league, or based on their gender identity should depend on factors such as their stage of transition, hormone levels, level of competition, and type of sport. *Id.*

[253] *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-120.02 (West 2023) (prohibiting students of the "male sex" from participating on athletic teams designated for "females," "women," or "girls"; the statute references "biological sex" but does not define that term); IDAHO CODE § 33-6201 to 33-6206 (2023) (prohibiting students of the "male sex" from participating on athletic teams designated for "females, women, or girls" and providing resolution of a dispute regarding a student's sex "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" based on "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels"); IND. CODE § 20-33-13-4 (2023) (prohibiting a male, "based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology," from participating on an athletic team or sport designed as being "a female, women's, or girls' athletic team or sport"); W. VA. CODE § 18-2-25d (2023) (prohibiting students of the "male sex" from participating on teams or sports designed for "[f]emales, women, or girls" and defining "biological sex" to mean "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth").

[254] *Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams*, U.S. DEPT. EDUC. (Apr. 6, 2023) https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams [https://perma.cc/ZEN2-M67U]. The proposed regulations would require schools to consider the sport involved, the level of competition, and the grade or education level to which its criteria apply and would have to attempt to minimize the harm to students whose opportunity to participate on teams consistent with their gender identity is limited or denied. *Id.* The proposed regulations suggest that elementary school

compelling argument that Title IX as so interpreted would preempt state laws providing to the contrary.

Challenges to state bans on transgender students participating in sports on teams consistent with their gender identity have received a mixed reception by the courts considering those challenges. In *B.P.J. v. West Virginia State Board of Education*,[255] the United States District Court for the Southern District of West Virginia upheld a West Virginia statute prohibiting transgender girls from participating on a girls sports team, finding no violation of the Equal Protection Clause or of Title IX,[256] although the same district court judge had initially granted the then-11-year-old middle school girl a preliminary injunction against enforcement of the statute on the grounds that she was likely to succeed on the merits of both claims.[257] With respect to the equal protection claim, in its consideration of the claim on the merits, the district court found that intermediate scrutiny was appropriate because the statute made distinctions based on sex and transgender status, both quasi-suspect classifications.[258] The court went on to conclude that the plaintiff was not challenging sex segregation in sports generally, but only the statute's decision to define transgender girls like her as not "girls."[259] Concluding that the state had an important interest in providing equal athletic opportunities for female students, the district court held that defining sex in terms of biological sex as determined by reproductive anatomy and genetics at birth was substantially related to that interest because of the athletic advantages that males have over females.[260] With respect to the Title IX claim, the district court found that Title IX "used 'sex' in the biological sense

students would generally be able to participate on teams consistent with their gender identity, while some limitations on transgender students might be allowed in high school and college sports. *Id.*

[255] B.P.J. v. W. Virginia State Bd. of Educ., 649 F. Supp. 3d 220 (S.D.W. Va. 2023), *later proceeding*, 2023 WL 1805883 (S.D.W. Va. 2023) (denying the plaintiff's motion for a stay pending appeal), 2023 WL 28003113 (4th Cir. 2023) (granting plaintiff's motion for a stay pending appeal).

[256] *Id.*

[257] B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347 (S.D.W. Va. 2021). The district court judge began his opinion granting the preliminary injunction by noting: "[a] fear of the unknown and discomfort with the unfamiliar have motivated many of the most malignant harms committed by our country's governments on their own citizens. . . . At this point, I have been provided with scant evidence that this law addresses any problem at all, let alone an important problem." *Id.* at 350.

[258] *B.P.J.*, 649 F. Supp. 3d, at 228–29.

[259] *Id.* at 229–30.

[260] *Id.* at 230–32. In concluding that the legislature's definition of a "girl" as being based on "biological sex" was constitutionally permissible, the district court inaccurately failed to recognize that gender identity also has a biological basis. The district court did note, however, that "being transgender is natural and is not a choice." *Id.* at 231.

because its purpose was to promote sex equality" and that the state statute therefore "furthers, not violates, Title IX."[261]

The United States District Court for the District of Idaho in *Hecox v. Little*[262] granted a preliminary injunction against an Idaho state statute prohibiting transgender women and girls from participating on sports teams consistent with their gender identity.[263] In granting the preliminary injunction, the district court considered only the plaintiffs' equal protection claims.[264] Applying heightened scrutiny because the statute drew distinctions based on both transgender status and sex, the court held that the plaintiffs were likely to succeed on the merits of their claim.[265] The court noted that while the defendants argued that the statute was supported by the important governmental interests of promoting sex equality and providing opportunities for female athletes, the court indicated that the statute did not appear to be substantially related to those interests.[266] The small number of transgender individuals in society, the court said, made it unlikely that transgender women could displace cisgender women in sports; with respect to even the few transgender female athletes identified as participating in athletic competitions, those women had sometimes prevailed, and sometimes lost, to cisgender women.[267] Accordingly, the defendants had not provided

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[261] *Id.* at 233. The district court's insistence that "[t]here is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex," *B.P.J.*, 649 F. Supp. 3d at 223, contrasts with the court's recognition in its opinion on the preliminary injunction that "sex" in Title IX had a broader meaning, citing to the Supreme Court's opinion in *Bostock*, and that the plaintiff had been subjected to sex discrimination in violation of Title IX because she "will be treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity." *B.P.J.*, 550 F. Supp. 3d at 357. Similarly, the judge in the case on the merits declared that the plaintiff will not be excluded from sports entirely because she can try out of the boys' team. *B.P.J.*, 649 F. Supp. 3d at 233, while in his initial opinion, he noted that "[f]orcing a girl to compete on the boys' team when there is a girls' team available would cause her unnecessary distress and stigma." *B.P.J.*, 550 F. Supp. 3d at 357.

The district judge's assertion in *B.P.J.* that there is not "serious debate" about the meaning of "sex" in Title IX is startling, in light of the fact that there has been quite serious debate about the meaning of "sex" in Title IX, even in the context of participation in sex-segregated sports by transgender individuals. *B.P.J.*, 649 F.Supp.3d at 233. For example, in *A.M. v. Indianapolis Public Schools*, 617 F. Supp. 3d 950 (S.D. Ind. 2022), the district court found that the question of whether Title IX prohibits discrimination on the basis of gender identity in determining participation in sex-segregated sports teams to be "not even a close call" because discrimination on the basis of gender identity "violates the clear language of Title IX." 617 F. Supp. 3d at 964–66.

[262] Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020), *later proceeding*, 2023 WL 1097255 (9th Cir. 2023) (plaintiff's claim is not moot).

[263] *Id.*

[264] *Id.* at 944.

[265] *Id.* at 974–76.

[266] *See id.* at 979.

[267] *Id.*

empirical evidence that the categorical ban on transgender women in women's sports was related to the interests claimed.[268] The court went on to find that the statute's actual purpose did not appear to be to promote women's opportunities in sports, but to exclude transgender women and girls from participating in sports, as they could under preexisting rules that focused on circulating testosterone if they had been taking medication to depress their testosterone levels.[269]

B. Other Consequences of a Narrow Definition of "Sex"

As explained above, restrictions on the meaning of "sex" to sex assigned at birth will have devasting consequences for transgender individuals, who are at risk of being defined out of existence by the prioritization of sex assigned at birth over other biological components of sex, such as gender identity. But the consequences of restricting "sex" to mean issues of chromosomes and anatomy, rather than including other aspects of sex, are likely to go far beyond the restriction of transgender rights. Indeed, defining "sex" narrowly will also affect the rights of persons who are cisgender, particularly but not exclusively cisgender women. This is ironic, given that proponents of restricting the rights of transgender individuals are claiming an intent to "protect" women as a justification for their actions.[270]

There are a number of reasons to be concerned about the claims that restrictions on transgender rights are intended to protect the rights of women. This apparent newfound desire to protect women is suspect, particularly given the fact that these individuals and entities seeking to protect women by limiting the rights of transgender individuals have not been known as advocates for women's rights. It is not an accident that the states that are moving to restrict the rights of transgender individuals—principally "red" states controlled by Republicans—are also the states that have been the least

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[268] *Id.* at 977–82. The court noted that because there was not a sufficient showing that allowing participation by transgender athletes threatened women's equality in sports, the statute's asserted justifications "do not appear to overcome the inequality it inflicts on transgender women athletes." Hecox v. Little, 479 F. Supp. 3d 930, 982 (D. Idaho 2020).

[269] *Id.* at 983–84. The court also noted the circumstances under which the statute was enacted, after the declaration of COVID-19 as a pandemic, such that the government stayed in session in order to pass laws to limit the rights of transgender individuals when the national shutdown would have seemed to make the "rush to the [sic] pass the law unnecessary," the court suggested that these circumstances suggest the statute "was motivated by a desire for transgender exclusion, rather than equality for women athletes." *Id.* at 984.

[270] For example, the state of Oklahoma, in seeking to justify its ban on allowing transgender individuals to change their designated sex on their birth certificates from their sex assigned at birth to a sex consistent with their gender identity, claimed that one of the justifications for the ban was to use the classifications of sex "to protect the interests of women." *See* Fowler v. Stitt, No. 22-CV-115-JWB-SH, 2023 WL 4010694, at *22 (N.D. Okla. June 8, 2023). Similarly, the Kansas legislature enacted a statute restricting the rights of transgender individuals, characterizing the statute as "a women's bill of rights to provide a meaning of biological sex for purposes of statutory construction." S.B. 180, 2023 Kan. State Leg. (Kan. 2023); Attorney General Opinion No. 2023-2, State of Kansas, Office of the Attorney General (June 26, 2023).

protective of women's rights generally, while states that are moving to protect the rights of transgender individuals—principally "blue" states controlled by Democrats—are also states that have been the most protective of women's rights generally.[271]

Another reason to be suspicious of these expressed concerns for the interests of women is that this appears to be a way to undermine the natural commonality of interests of groups fighting for their civil rights, by pitting their interests against each other rather than recognizing the commonality of their interests. In general, women have been more supportive of the rights of transgender individuals than men.[272] Attempting to create a conflict between the rights of transgender individuals and women generally may be an effort to decrease that support.

One way in which the rights of cisgender girls and women and boys and men, as well as transgender girls and women and boys and men, are likely to be impacted by a narrow definition of "sex" to mean sex assigned at birth based on external genitalia is that individuals may be called up to "prove" their sex, resulting in invasion of privacy interests. For example, the Idaho statute prohibiting transgender girls and women from playing on sports teams designed for females provides for a procedure to resolve "disputes" over a student's sex, requiring a health care provider to "verify the student's biological sex," based on "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels"; the state board of education is supposed to promulgate rules to be used for the resolution of those disputes.[273] As the district court considering a challenge to the Idaho statute indicated, the statute allows an "undefined class of individuals to challenge a student's sex," requiring the student to undergo "a potentially invasive sex verification process."[274] The court noted that the plaintiffs in that case, one

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[271] One obvious example is that the same states that are enacting statutes to restrict the rights of transgender individuals are also enacting statutes to restrict the rights of women to make decisions about their own healthcare, including their reproductive health. *See* Geoff Mulvihill, *Conflict over Transgender Rights Simmers Across the US*, PORTLAND PRESS HERALD (Apr. 28, 2023, 6:45 PM), https://www.pressherald.com/2023/04/28/conflict-over-transgender-rights-simmers-across-the-u-s [https://perma.cc/4XM7-H5YA] (noting that Republican-controlled states are enacting legislation to restrict transgender rights, while Democrat-controlled states are moving to protect those rights); Ctr. for Reproductive Rts., *After Roe Fell: Abortion Laws By State*, https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/P9V6-WSXV] (maps showing that Republican-led states have moved to make abortion illegal, while Democratic-led states have moved to preserve or expand abortion rights).

[272] *See* Melanie M. Bowers & Cameron T. Whitley, *What Drives Support for Transgender Rights? Assessing the Effects of Biological Attribution on U.S. Public Opinion of Transgender Rights*, 83 SEX ROLES 339, 400 (2020); *see generally* Brian F. Harrison & Melissa R. Michelson, *Gender, Masculinity Threat, and Support for Transgender Rights: An Experimental Study*, 80 SEX ROLES 63 (2019).

[273] IDAHO CODE §33-6203(3) (2020).

[274] Hecox v. Little, 479 F. Supp. 3d 930, 944 (D. Idaho 2020). The court noted that the criteria set forth for the verification process were not part of any standard physical sports examination

of whom was transgender and one of whom was cisgender, faced a real risk of the embarrassment of having their sex challenged and the invasiveness of having to submit to the verification process.[275] The court went on to suggest that the sex verification process could be used "to bully girls perceived as less feminine or unpopular and prevent them from participating in sports."[276]

That girls and women who are perceived as less feminine might be called upon to "prove" their sex is not a theoretical threat. In June 2023, a 67-year-old man stopped an elementary school track-and-field event in British Columbia, Canada, insisting that a nine-year-old girl was either a boy or transgender, and that she produce her birth certificate, indicating that the event was for "real girls."[277] The nine-year-old, who had a short pixie haircut, was about to compete in the shot-put event when her sex was challenged.[278]

Women who are particularly successful in their sport may also face challenges to their sex. A female swimmer, Kathleen Genevieve Ledecky, who has won multiple Olympic gold medals, recently tied a record with swimming legend Michael Phelps for the most individual world swimming titles.[279] On the same day as the announcement of her achievements, there was a story inquiring about whether she was transgender and stating that she had "recently came out as a trans woman, as per several reports."[280]

There are other potential negative consequences for women in general from a narrow definition of "sex," particularly if that definition is

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and that for children, verification of their reproductive anatomy might require a pelvic examination or even a transvaginal ultrasound, procedures that can be quite traumatic for children, reveal sensitive information in additional to sex, require insurance preauthorization, and be very expensive. *Id.* at 985–87.

[275] *Id.* at 963–66. Although the defendants argued in front of the court that the verification process could merely consist of a letter from a physician indicating that the plaintiffs were female, the court noted that that argument was inconsistent with the terms of the statute. *See id.* The court also noted that when plaintiffs' counsel stated that they "would be happy to consider entering into a consent decree if Defendants were willing to agree that this interpretation of the statute was authoritative and binding in Idaho," the defendants failed to respond to that suggestion. *Id.* at 964 n. 19.

[276] *Id.*at 985.

[277] Jonathan Edwards, *A 9-Year-Old Girl Competed at a Track Meet. A Man Questioned Her Gender*, WASH. POST (June 16, 2023, 5:12 AM), https://www.washingtonpost.com/nation/2023/06/16/9-year-old-track-transgender [https://perma.cc/92QC-FH58].

[278] *Id.*

[279] *See* Stephen Wade, *Katie Ledecky Wins Gold in 1,500 at the Swimming Worlds to Tie Mark Set by Michael Phelps*, WASH. TIMES (July 25, 2023), https://www.washingtontimes.com/news/2023/jul/25/katie-ledecky-wins-gold-in-1500-at-swimming-worlds [https://perma.cc/NY4M-KFRF].

[280] *See* Srinija Grandhi, *Is Katie Ledecky Transgender? Swimmer Ties Michael Phelps' Record for Most Individual Titles at World Championships*, https://www.msn.com/en-us/sports/other/is-katie-when%20did%20ledecky%20transitionedecky-transgender-swimmer-ties-michael-phelps-record-for-most-individual-titles-at-world-championships/ar-AA1en29s [https://perma.cc/GQ43-3N66].

incorporated into federal and state anti-discrimination laws, either expressly by amending the statutes or implicitly by interpretation of those anti-discrimination statutes. As discussed above, the term "sex" in the anti-discrimination laws, including Title VII and Title IX, has traditionally been defined quite broadly to include not only protection from discrimination based on what is generally referred to as "biological sex"—and which really means sex assigned at birth—but also a wide array of sex-linked traits, including gender expression and compliance with gender-based stereotypes and gender-based roles.[281]

If "sex" in Title VII were to be strictly construed to refer only to sex assigned at birth, one could easily imagine the Supreme Court's decision in *Price Waterhouse v. Hopkins*[282] coming out quite differently than it did.[283] The allegations of Anne Hopkins, in that case, were not just that she was discriminated against for being a woman—a "biological woman" as proponents of a narrow definition of "sex" in Title VII would have it—but because she did not comply with stereotypical notions of how a woman should act.[284] If "sex" in Title VII were interpreted to refer only to genitals and chromosomes, then her evidence that she was excluded from partnership with the firm because she was viewed as "macho," aggressive, and insufficiently feminine would presumably not be evidence of sex discrimination, which the plurality clearly found it to be.[285] The plurality in the case relied on the notion of sexual stereotyping as a violation of the prohibition against sex discrimination,[286] but it is not clear at all that sexual stereotyping would be prohibited under a definition of "sex" that was limited to the sex that one was assigned at birth. After all, Justice Alito in his *Bostock* dissent insisted both that "sex" in Title VII meant only "biological sex" and that Title VII did not prohibit discrimination based on sexual stereotypes.[287] If Justice Alito were right that Title VII's prohibition of sex discrimination "meant discrimination because of the genetic and anatomical characteristics

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[281] *See* Parts II and III.

[282] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[283] The *Price Waterhouse* case might have still come out the same under a narrow definition of "sex" in Title VII because there was circumstantial and even direct evidence of discrimination against women generally, including the fact that only a tiny percentages of the partners at the firm were women and that a partner had remarked, when another woman was being considered for partnership, that women were not capable of functioning as partners or senior managers and the firm took no action to discourage his comments. *See id.* at 233, 236.

[284] *See supra* text accompanying notes 12–19.

[285] *See supra* text accompanying notes 12–19.

[286] *See Price Waterhouse*, 490 U.S. at 250–51 (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .").

[287] *See* discussion of Justice Alito's dissent in text accompanying notes 42–51.

that men and women have at the time of birth,"[288] one's compliance or non-compliance with sexual stereotypes is clearly not such a characteristic. Whether one is masculine or feminine or whether one complies with traditional societal gender roles is not a genetic or anatomical characteristic and certainly is not identifiable at birth.

And it is not just the *Price Waterhouse* case that might come out quite differently under a narrow definition of "sex" that means sex assigned at birth and therefore excludes discrimination based on sexual stereotyping. Other Supreme Court sex discrimination cases, including *Phillips v. Martin Marietta Corp.*,[289] found a violation of Title VII based on an employer's reliance on sexual stereotyping and assumptions about traditional gender roles, not genetic and anatomical characteristics present at birth. And assuming that a narrow definition of "sex" would also apply under the Constitution, other cases in which the Court found unlawful discrimination based on sexual stereotyping, including *Frontiero v. Richardson,*[290] *Craig v. Boren*,[291] *Stanton v. Stanton*,[292] and *Califano v. Westcott*,[293] might come out differently under such a definition. Again, in none of those cases did the government impose different rules with respect to men and women because of genetic or anatomical differences between the sexes; in each of those cases, the government imposed different rules because of sexual stereotypes about differences between the sexes.[294] If the prohibition on discrimination because of "sex" were to be interpreted narrowly to include only anatomical or chromosomal differences between the sexes, it is not clear that rules based on sexual stereotyping would be found to be unlawful sex discrimination under such a definition.

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[288] Bostock v. Clayton Cnty., 590 U.S. 644, 686 (2020) (Alito, J., dissenting).

[289] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). Discrimination against women with pre-school aged children, but not women without such children and not men with such children, was not based on biological characteristics but stereotypes about the potential for conflict between work and family responsibilities.

[290] Frontiero v. Richardson, 411 U.S. 677 (1973). Discrimination between male service members and female service members concerning proof of spousal dependency to obtain benefits was not based on biological characteristics but stereotypes about the role of men and women as the source of family support.

[291] Craig v. Boren, 429 U.S. 190 (1976). Discrimination between men and women with respect to access of alcohol based on age was not based on biological characteristics—which would have supported a contrary rule—but stereotypes about the tendency of men to drink and drive.

[292] Stanton v. Stanton, 421 U.S. 7 (1975). Discrimination between men and women with respect to age at which child support could terminate was not based on biological characteristics but stereotypes about the relative need for men and women to attend higher education.

[293]Califano v. Westcott, 443 U.S. 76 (1979). Discrimination between men and women with respect to access to government assistance because of unemployment of parent was not based on biological characteristics but stereotypes about the role of men and women in providing family support.

[294] *See supra* Part II.A.

There are already indications that a narrow definition of "sex" based on what is generally termed "biological sex" is having a negative effect on sex discrimination claims. In *Bear Creek Bible Church v. Equal Employment Opportunity Commission*,[295] in the context of a declaratory judgment action challenging the EEOC guidelines on the meaning of *Bostock*, the United States District Court for the Northern District of Texas first misread the Supreme Court's decision in *Bostock* to mean that employees are protected only "from being treated differently based on their biological sex,"[296] a term that the court did not define but seemed to interpret as sex assigned at birth. The court went on to find that the employer's sex-specific dress codes did not violate Title VII because they applied equally to men and women. The court reasoned:

> Men are forbidden to wear earrings, but women may. Men who have customer contact must wear a tie; women are not permitted to wear ties. Women can wear skirts, blouses, shoes with heels, and fingernail polish, while men are forbidden to wear any of these items. . . .Since the policy requires men to wear slacks, a male employee who wears jeans and a male-to-female transgender employee who wears dresses are equally in violation of the rule. Because the dress code is enforced evenhandedly, . . . [the] dress code policy does not violate Title VII.[297]

What the court failed to grasp was that the equivalence that it attempted to draw was a false one. If both male and female employees were prohibited from wearing jeans, then there might well be equal treatment on the basis of sex. But a policy that explicitly requires women and men to comply with traditional sex stereotypes in their dress and gender expression constitutes sex discrimination in violation of Title VII, as confirmed by the Supreme Court in *Bostock*. The district court's focus on what it terms "biological sex" seemed to blind it to the *Bostock* Court's explicit reference to the unlawfulness

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[295] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571 (N.D. Tex. 2021), *aff'd in part, rev'd and remanded in part*, 70 F.4th 914 (5th Cir. 2023).

[296] *Bear Creek Bible Church*, 571 F. Supp. 3d at 623. The district court noted that "biological sex" is "an immutable characteristic distinct from sexual conduct itself." *Id.* Even though the district court quoted the *Bostock* language making clear that discrimination based on failure of individuals to comply with traditional sex stereotypes violates Title VII, the court was either ignorant of, or willfully disregarded, the implications of that binding authority. *See id.* at 620; Bostock v. Clayton Cnty., 590 U.S. 644, 672–73 (2020).

[297] *Bear Creek Bible Church*, 571 F. Supp. 3d at 624. It is important to note that the district court did not attempt to justify its decision based on the special rules that courts have traditionally applied to dress codes, instead concluding that the explicitly different treatment of men and women was not sex discrimination at all. *See id.*

of sex stereotyping,[298] even when the district court set forth that language in its opinion.

On appeal, the United States Court of Appeals for the Fifth Circuit did not decide whether the district court was correct about the meaning of Title VII, declining to address what it called "the scope-of-Title-VII claims post-*Bostock*" because it found that the plaintiffs were entitled to an exemption from Title VII under the Religious Freedom Restoration Act.[299] Although the court of appeals vacated the portion of the district court's order interpreting the scope of the prohibition on sex discrimination, this may not stop other courts from adopting the district court's analysis, particularly courts that have shown an inclination to narrowly define the term "sex" in the anti-discrimination laws.

There are other types of cases in which a narrow definition of "sex" to mean biological sex might well result in a finding that challenged actions, either by employers, educational institutions, or governmental actors, are not in violation of the anti-discrimination laws. At least since the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*,[300] in which the Court emphasized the requirement that harassment meet the requirement of being "because of . . . sex"[301] to be unlawful, the courts have focused much more on that issue. A number of courts have concluded that sexual harassment is unlawful sex discrimination when it is based on sexual stereotyping.[302] A narrow definition of "sex" that excludes sexual stereotyping as a prohibited basis under the anti-discrimination laws could well result in findings that a broad range of harassment does not violate those laws. For example, a man who is harassed for being considered not sufficiently masculine or a woman harassed because she was considered not sufficiently feminine might well be found not to be protected by Title VII. That is, masculinity or femininity might be considered not based on anatomy

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[298] As the *Bostock* Court made clear: "So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same." *Bostock*, 590 U.S. 662.

[299] Braidwood Management, Inc. v. EEOC, 70 F.4th 914, 940 (5th Cir. 2023).

[300] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 75 (1998).

[301] The Court in *Oncale* emphasized that all harassment had to meet the "because of . . . sex" requirement to be unlawful, by noting that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discrimination* . . . because of . . . sex.'" *Id.* at 80 (omissions in original).

[302] *See, e.g.*, Grabowski v. Arizona Bd. of Regents, 69 F.4th 1110, 1117 (9th Cir. 2023) (concluding that both Title VII and Title IX prohibit harassment on the grounds of non-conformance with "traditional gender norms" or "failure to conform to a particular masculine or feminine sex stereotype"); Roberts v. Glenn Indus. Grp., Inc., 998 F.3d 111, 120 (4th Cir. 2021) (concluding that Title VII prohibits harassment based on a plaintiff's "failure to conform to sex stereotypes").

or genetics and therefore not sufficiently tied to "biological sex" to be within the protections of Title VII under a narrow definition of that term.

VI. CONCLUSION

This Article has demonstrated that defining "woman" is not a simple and straightforward task, easily resolvable by resorting to the science of biology. Instead, the biology of sex defies a binary classification of all individuals into neat categories of "men" and "women." Similarly, the legal meaning of the term "sex," as contained in prohibitions against sex discrimination—either as a matter of statutory or constitutional law—has not traditionally meant "biological sex," or, more accurately, sex assigned at birth. Instead, the prohibitions against sex discrimination have long been understood to prohibit discrimination not only based on biological differences between the sexes, but also based on a range of other sex-related and gender-related traits, including gender expression, gender conformity or non-conformity, and compliance with society's gender roles and expectations.

This Article has also demonstrated the dangers of imposing a narrow definition of "sex"—one focused on issues of anatomy and chromosomes present at birth—under the anti-discrimination laws and other federal and state statutes. While the most obvious dangers posed by those narrow definitions are the restrictions of the rights of transgender individuals and other sexual minorities, those dangers extend beyond effects on those groups. Indeed, adoption of a narrow definition of "sex," whether by legislative action or judicial interpretation, threatens the rights of all individuals to be free from sex-based and gender-based limitations on their rights, including those based on societal expectations about the proper role of the sexes. Accordingly, cisgender individuals, particularly but not exclusively cisgender women, need to be attuned to the dangers posed by recent efforts on the part of social conservatives to limit the rights of transgender individuals under the guise of "protecting women." Those efforts should not be seen as a way to protect the rights of women but instead as what they are—an effort to impose a narrow and limiting definition of "sex" in order to restrict protections for the sex-based and gender-based characteristics of all individuals and to impose their own notion of what it means to be "a woman."